DISTINCT WORDS, DISCRETE MEANINGS: THE INTERNET & ILLICIT INTERSTATE COMMERCE

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Abstract

Despite the innumerable benefits generated by the proliferation of the Internet over the last two decades, one unfortunate consequence has been the advent of a simple, fast, and inexpensive means of distributing illicit materials across state lines. While the Internet preserves the elemental appearance of

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anonymity crucial to those engaging in criminal activity, its development has forced courts to grapple with the application of previously unambiguous statutes regulating illegal interstate commerce. This tension was recently placed into stark relief in the context of criminal prosecutions for child pornography. In view of the policy interests involved, most circuits—with Congress's subsequent blessing—incorrectly marginalized the common techniques of statutory construction, interpreting the governing jurisdictional element to require mere use of the Internet to implicate the "in interstate or foreign commerce" nexus requirement. The sole circuit in opposition, however, applied a "plain language" reading of the statute, and demanded evidence of actual dissemination "in commerce" across state lines.

This article uses the tension created by this split to argue that well-intentioned but basically atextual statutory interpretation by the courts may better align with Congress's ultimate objectives, yet creates perverse consequences for the federal system. First, by reference to a wide variety of analogous and distinguishable bodies of legislation and legislative history, the article explains that, in construing narrow statutory language to broadly encompass any use of the Internet, the prevailing view essentially rewrote the legislation to lower the burden on the government. Next, the article demonstrates that by re-interpreting common statutory language on the fly to suit policy imperatives particular to a specific case, the majority circuits failed to incentivize Congress to monitor and bring staid statutory jurisdictional standards up to date with evolving technology. In fact, subsequent congressional action smugly validated a misguided judicial policy judgment, undermining the force of the existing statutory text and reducing the predictability of jurisdictional language. At bottom, the article concludes that judicial absolution of Congress's legislative duty poses a genuine threat to the separation of powers.

I. INTRODUCTION

"[The Internet] is a series of tubes," former Senator Ted Stevens obtusely observed while the new technology was still in its commercial infancy.[1] As the technology proliferated and the proverbial tubes transcended state lines, Congress quickly undertook to regulate behavior occurring across these boundaries pursuant to its broad Article I authority to regulate interstate activity under the Commerce Clause.[2] In this context, Congress has endeavored to regulate behavior that it considers obscene or harmful, particularly where such activities negatively impact minors and society as a normative whole.[3] Even prior to the advent of the Internet, as part of an effort

1. Dan Mitchell, *Tail is Wagging the Internet Dog*, N.Y. TIMES, July 8, 2006, http://www.nytimes.com/2006/07/08/business/08online.html.

2. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995) (setting the standard for when Congress may exercise its Article I authority).

3. Roth v. United States, 354 U.S. 476, 486 (1957) (holding that Congress may regulate obscenity because it does not fall "within the area of constitutionally protected speech or press" (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). *See* Richard A. Epstein, *The Proper Scope of the Commerce*

to curb the exploitation of children and minors, Congress enacted the first statute to address the interstate distribution and possession of child pornography in 1977,[4] attempting to eradicate such exploitation by prohibiting the possession, transportation, receipt and distribution of child pornography and related materials ". . . in interstate or foreign commerce."[5] Yet, despite the government's efforts, the propagation of the Internet over the last fifteen years greatly increased the availability of child pornography to a wide cross-section of United States residents.[6]

Concurrently, from a jurisprudential standpoint, the availability and popularity of the Internet forced courts to grapple with the application of previously unambiguous statutes regulating interstate commerce when confronted with Internet use, particularly in the instance of criminal conduct.[7] This tension was recently placed into stark relief in the context of criminal prosecutions for child pornography. The Internet provides a simple, fast, and inexpensive means of distributing illicit materials across state lines, while preserving the elemental appearance of anonymity crucial to participants in criminal enterprises. Considering the interstate architecture and operation of the Internet, the federal courts traditionally do not question Congress's power under the Commerce Clause to regulate the distribution of child pornography through the Internet, "as it does other instrumentalities and channels of interstate commerce, and to prohibit [the Internet's] use for harmful or immoral purposes . . . ."[8] As a result, the real dispute arose in determining the appropriate evidentiary standard for demonstrating sufficient jurisdictional nexus between actual use of the Internet and the "in-commerce" transmission of child pornography across state lines previously required by numerous statutes.[9]

Prior to the rise of the "new federalism" movement at the end of the Twentieth Century, Congress, in exercising its authority, could assert "its full Commerce Clause power so as to cover all activity substantially affecting

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Power, 73 VA. L. REV. 1387 (1987) (providing an extensive discussion of the scope and evolution of the commerce power from pre-New Deal through the present time).

4. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (current version at 18 U.S.C. §§ 2252(a)(2) & (a)(4)(B) (Supp. 2008)).

5. *Id.* For purposes of this article, §§ 2252 and 2252A are used to refer to text in the statutory sections prior to the 2008 amendments, unless otherwise specified.

6. *See* Lesli C. Esposito, Note, *Regulating the Internet: The New Battle Against Child Pornography*, 30 CASE. W. RES. J. INT'L. L. 541, 542 (1998) (discussing the growth of online child pornography); Brian M. Werst, Comment, *A Survey of The First Amendment 'Indecency' Legal Doctrine and its Inapplicability to Internet Regulation: A Guide for Protecting Children from Internet Indecency After* Reno v. ACLU, 33 GONZ. L. REV. 207, 208–9 (1998) (stating that Internet pornography accounts for third largest source of sales in cyberspace).

7. *See, e.g.*, United States v. Farraj, 142 F. Supp. 2d 484, 490 (S.D.N.Y. 2001) (applying National Stolen Property Act, 18 U.S.C. § 2314, to e-mail transmission of stolen data); United States v. LaMacchia, 871 F. Supp. 535, 543 (D. Mass. 1994) (refusing to find copying of copyrighted software via a computer bulletin board to constitute "physical taking" under the NSPA).

8. *See* United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004) (stating that "[t]he Internet is an instrumentality of interstate commerce . . . Congress clearly has the power to regulate the Internet . . .") (citing Heart of Atlanta Motel, Inc v. United States, 379 U.S. 241, 256 (1964)).

9. *See, e.g.*, 18 U.S.C. § 1343 (2006); 18 U.S.C. § 2252(a) (2006) (illustrating the use of "in commerce").

interstate commerce," or could lessen the scope of legislation to activities specifically involving movement "in commerce."[10] Fearing that this permissively broad construction of the commerce clause had gradually eviscerated state autonomy and empowered the federal government with unlimited authority, the Supreme Court endeavored to reign in legislation that failed to evince a discernible tie to "economic activity."[11] In the instance of the statutory scheme in dispute here, the courts all agreed that Congress possessed the *power* to regulate Internet transactions in general as economic activity.[12] They diverged, however, as to whether Congress actually intended to exercise the full scope of its commerce power in enacting 18 U.S.C. § 2252 and its jurisdictionally identical sibling, 18 U.S.C. § 2252A. The majority of circuits to address the matter "creatively" interpreted the relevant statutes to mean that any activity performed on the Internet inevitably involved the transportation or shipment of materials across state lines because the Internet is an "instrumentality" or "facility" of interstate commerce.[13] Therefore, these circuits asserted, the government did not need to establish actual interstate movement "in commerce" so long as it demonstrated concrete use of the Internet.[14] The Tenth Circuit, in contrast, read the relevant statute differently, holding that the statute only applied when illicit materials were disseminated "in commerce" across state lines.[15] This solitary circuit demanded that the government advance actual evidence of interstate movement of pornography—rather than mere evidence of Internet use alone—to satisfy the statutes' "transports or ships in interstate or foreign commerce" jurisdictional language.[16]

Finding the Tenth Circuit's interpretation inconsistent with its public policy priorities, Congress moved quickly, ridiculing the minority view and quickly amending the governing statutes to broaden its applicability.[17] Yet, while rebuking the Tenth Circuit's holding, Congress's affirmation of the majority interpretation through a complete re-wording of the statutory text

10. Scarborough v. United States, 431 U.S. 563, 571 (1977) ("Congress is aware of the 'distinction between legislation limited to activities 'in commerce' and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.'" (internal citations omitted)).

11. *See, e.g.*, John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2023–24 (2009) (describing the Supreme Court's modern approach to the Commerce Clause).

12. *See, e.g.*, *Hornaday*, 392 F.3d at 1311 (11th Cir. 2004) (stating that Congress has the power to regulate the Internet).

13. *See* United States v. MacEwan, 445 F.3d 237 (3d Cir. 2006) (finding government's evidence of downloading from the Internet sufficient for jurisdictional purposes); United States v. Machtley, 163 Fed. App'x. 837 (11th Cir. 2006) (finding defendant's admission to downloading images from the Internet sufficient to establish that the images traveled in interstate commerce); United States v. Runyan, 290 F.3d 223 (5th Cir. 2002) (holding that a download of pornography from the Internet satisfies § 2252A's jurisdictional nexus requirement); United States v. Hilton, 257 F.3d 50 (1st Cir. 2001) (holding that evidence of Internet downloading of child pornography satisfies the jurisdictional requirements).

14. *MacEwan*, 445 F.3d at 244.

15. United States v. Schaefer, 501 F.3d 1197, 1202 (10th Cir 2007).

16. *Id.* at 1202.

17. *See* Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (amending the governing statute to provide for more effective prosecution of cases involving child pornography).

merely changed the rules of the game; the subsequent legislation did not suggest that the interpretations rendered as to the previously-existing language were correct. In fact, congressional action perversely validated a misguided judicial policy judgment, undermining the literal command of the relevant statute. This development presented a profound, but previously overlooked, instance of philosophical inconsistency biased by policy considerations, warranting closer inspection of the underlying motivations.

This article utilizes the factual background of the instant split to argue that well-intentioned but basically atextual statutory interpretation by the courts may better align with Congress's ultimate decision, yet creates perverse consequences for the federal system. By illuminating the methodology ignored by the prevailing view, the article will show that judicial reliance on policy judgments marginalizes accepted techniques of statutory interpretation and poses a genuine threat to the separation of powers. More narrowly, the article explains how such deference to policy failed to correctly resolve the salient question of statutory interpretation involving the Internet's role as an instrumentality of interstate commerce. In contrast, the article proposes that the statutory text could only be correctly interpreted by requiring the government to aver sufficient detail to demonstrate actual interstate movement "in commerce."

Part II of this Article outlines the statutory framework underlying the jurisprudential split, discussing the historical origins and evolution of Congressional legislation regulating the interstate exploitation of minors. Part III addresses the circuit courts' conflicting approaches to the jurisdictional nexus question, highlighting and explaining the divergent linguistic and policy justifications offered by the circuits for their separate approaches. The article then analyzes both analogous and distinguishable bodies of legislation to argue that Congress and the majority circuits failed to apply the statutory language correctly, deducing from the jurisprudence and extensive legislative history that Congress's reasoned decision to fluctuate between broad and narrow statutory language in various laws cannot be ignored solely for policy reasons.[18] Without preferencing an ideological theory of statutory interpretation, the article concludes that the relevant statutes reflect congressional intent to require the government to present tangible evidence of interstate transmissions of child pornography to satisfy the jurisdictional nexus. Finally, the article demonstrates that by absolving Congress of its legislative responsibility, the prevailing view is inconsistent with a reasoned and predictable method of statutory interpretation, increasing the danger of ambiguous legislative drafting and judicial legislation.

II. STATUTORY FRAMEWORK & TEXTUAL SALIENCE

Within the federalist system of government in the United States,

18. *See* 18 U.S.C. § 1343 (2006); 18 U.S.C. § 875(c) (2006); 18 U.S.C. § 1958(a) (2006); 18 U.S.C. § 1952 (2006); 18 U.S.C. § 2422(b) (2006); 18 U.S.C. § 1470 (2008) (evidencing Congress's fluctuation between broad and narrow statutory language).

Congress's commerce power originally served to protect the flow of interstate commerce between the states and to insulate commerce against local restraints in matters of national concern.[19] In due course, however, the Supreme Court's expansive characterization of the Commerce Clause encouraged Congress to regularly enact regulatory and criminal laws bearing only a vague and undefined relation to commerce among the states; at times, the conduct governed was "neither interstate nor commerce."[20] As evidenced by the Supreme Court's recent federalism-driven jurisprudence, despite the incongruity in scope, the commerce power is intended to be an enumerated restraint on the federal government's ability to regulate purely intrastate activities, even if the meaning of a purely intrastate activity defies clarity.[21] In response to the rapid development of an interdependent national economy during the last century, the Supreme Court cultivated several categories through which Congress could regulate interstate commerce. Namely, Congress may (1) regulate "the channels of interstate commerce"; (2) it may "regulate and protect the instrumentalities of interstate commerce" or "persons or things in commerce"; and finally, (3) Congress may regulate those activities significantly "affecting commerce."[22] Under this guise, the courts permit—and sometimes encourage—Congress to regulate countless matters of both local and national interest so long as "the regulated activity burdens, obstructs, or affects interstate commerce, no matter how indirectly."[23]

While Congress's authority to regulate the channels or instrumentalities of interstate commerce is unquestioned, one salient limitation upon the exercise thereof arises in situations involving the regulation of intrastate activities. Where an intrastate activity only "substantially affect[s]" interstate commerce, rather than involves actual interstate commerce or use of an instrumentality of interstate commerce, the economic nature of a regulated activity plays a central role in the Supreme Court's Commerce Clause analysis, particularly of late.[24] Recently, the Court has indicated that even in this

19. 15 C.J.S. *Commerce* § 5 (2010); 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).

20. Paul Boudreaux, *A Case for Recognizing Unenumerated Powers of Congress*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 551, 569–71 (2005); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 9 (2001).

21. *Compare* United States v. Lopez, 514 U.S. 549, 561–62 (1995) (providing that the Commerce Clause does not afford Congress the power to regulate purely intrastate, local acts), *with* Perez v. United States, 402 U.S. 146, 155–57 (1971) (permitting federal regulation of loan shark transactions despite their purely intrastate nature). *See generally* Michael W. McConnell, *Federalism: Evaluating* The Founders' Design, 54 U. CHI. L. REV. 1484 (1987) (criticizing Raoul Berger's book, THE FOUNDERS' DESIGN); Herbert Hovenkamp & John A. MacKerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 726 (1985) ("On the federal side . . . authority under the commerce clause permitted them to reach interstate restraints on trade but not purely intrastate restraints.").

22. *Perez*, 402 U.S. at 150.

23. *See generally* Epstein, *supra* note 3, at 1387 (discussing the proper scope of the commerce clause).

24. *See* United States v. Morrison, 529 U.S. 598, 618 (2000) ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States"); s*ee also* Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1222 (2003) (discussing the effect of *Lopez* and *Morrison* on Commerce Clause jurisprudence).

context, non-economic intrastate activity comprising a part of a larger commercial activity may nonetheless be regulated by Congress.[25] Importantly for this article, this non-economic limitation is inapplicable to congressional regulations implicating the channels, instrumentalities, or persons or things moving in interstate commerce.[26] In the latter contexts, courts are to afford great deference to Congress's rational belief that a regulated activity involves interstate commerce.[27]

The Protection of Children Against Sexual Exploitation Act of 1977 represented Congress's first attempt to regulate the possession, receipt, and distribution of visual depictions of child pornography in interstate commerce.[28] In passing this legislation, Congress expressed its concern that the production and sale of child pornography was a nationwide, "highly organized, multimillion dollar industr[y]," which operated in interstate commerce with considerable detrimental effects upon minors and society.[29] Congress decided to prohibit the distribution of child pornography based on two public-policy considerations: First, each image of child pornography represented evidence of illegal sexual abuse and exploitation of children.[30] Second, Congress determined that pedophiles often used child pornography to lure other children into performing further illicit acts.[31] Congress expressed its concern that the child pornography industry had become a serious nationwide problem, "carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce."[32] Finding that existing laws addressing prostitution and pornography did not adequately "protect against the abuse of children" in the creation and dissemination of child pornography, Congress enacted additional legislation to remedy the situation.[33]

The original 1977 statute regulated any "visual or print medium involv[ing] the use of a minor engaging in sexually explicit conduct," and prohibited the possession and distribution of "obscene" child pornography only if such activities were done for "commercial purposes."[34] Subsequently, in 1984, the Supreme Court asserted its support for Congress's regulation in the field, stating that "the prevention of sexual exploitation and abuse of children

25. Gonzales v. Raich, 545 U.S. 1, 26–27 (2004) (upholding application of federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, to intrastate growers and users of marijuana).

26. *Lopez*, 514 U.S. at 558 (showing that Congress may undoubtedly regulate the channels of interstate commerce). *See* Norman R. Williams, *The Commerce Clause and The Myth of Dual Federalism*, 54 UCLA L. Rev. 1847, 1923–24 (2007) (analyzing the effect of *Lopez*, *Morrison*, and *Raich* upon Congress's commerce power).

27. Williams, *supra* note 26, at 1923–24.

28. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified at 18 U.S.C. § 2252 (2006)).

29. S. REP. NO. 95-438, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 42.

30. *Id*. *See also* Jason Hitt, Note, *Child Pornography And Technology: The Troubling Analysis of* United States v. Mohrbacher, 34 U.C. DAVIS L. REV. 1129, 1134–40 (2001) (discussing some of the legislative history behind § 2252).

31. Hitt, *supra* note 30, at 1157 n.195.

32. S. REP. NO. 95-438, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 42.

33. *Id*.

34. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2252, 92 Stat. 7, 7 (1978).

constitutes a government objective of surpassing importance."[35] The Court emphasized that a state's concern for protecting children outweighed the need to protect child pornography under the First Amendment.[36] Congress responded to the decision by amending § 2252 to remove the obscenity and "commercial purpose" language, thereby lowering the evidentiary burden threshold placed upon the government.[37]

In addition, the jurisdictional language in the original statute only prohibited the knowing transport or shipment of any visual depictions in "interstate or foreign commerce" by any means.[38] The inclusion of this jurisdictional statement comports with the Supreme Court's observation that existence of a jurisdictional element suggests that "the federal cause of action is in pursuance of Congress's power to regulate interstate commerce."[39]

Significantly, the development of computers and computer networks during this time period created an enforcement problem because the statute covered tangible movement of illicit material, but did not statutorily apply to computer- and network-based intangible modes of indirect transport and propagation.[40] In response, Congress again amended the statute through the Child Protection and Obscenity Enforcement Act of 1988, which addressed the computer loophole by increasing the statute's scope to cover transport and shipment of child pornography "in interstate or foreign commerce by any means *including by computer*."[41] Subsequent to these initial actions, Congress again drafted further legislation tackling other methods of sexual exploitation of children, including, among others, the coercion of minors into sexual activity or prostitution, the trafficking—i.e., selling and buying—of children for purposes of sexual conduct, and the production of child pornography for non-distribution purposes.[42]

As part of its ongoing efforts to restrict the distribution and possession of child pornography and to prosecute all potential predators, Congress enacted in 1996 Title 18, Section 2252A, a complementary statute virtually identical to

35. *See* New York v. Ferber, 458 U.S. 747, 757–58 (1982) (finding a state statute prohibiting the promotion of sexual performances by minors consistent with the First Amendment).

36. *Id.*

37. Child Protection Act of 1984, Pub. L. 98-292, § 4, 98 Stat. 204, 204–05 (1984).

38. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7, 7 (1978) (codified as amended at 18 U.S.C. § 2252 (2006)).

39. United States v. Morrison, 529 U.S. 598, 613 (2000) (finding that Congress lacked authority to enact civil remedy provision as part of regulation not substantially affecting interstate commerce).

40. Hitt, *supra* note 30, at 1138–39 (referencing Senate hearings, Attorney General's report, and Presidential statements encouraging Congress to amend § 2252 to cover computer distribution and possession of child pornography).

41. Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, § 7511, 102 Stat. 4181, 4485 (1988) (emphasis added).

42. *See, e.g.*, 18 U.S.C. § 2251(a) (2006) ("Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, . . . with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished. . . ."); 18 U.S.C. § 2422(a) (2006) ("Whoever . . . knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, . . . to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, . . . shall be fined. . . .").

Section 2252;[43] these two sections formed the basis for the instant incongruity and this article. The new section—§ 2252A—increased penalties for perpetrators, focused on child exploitation enterprises, and provided for civil remedies lacking in § 2252.[44] At the same time, until Congress's recent action, the two sections were materially identical in their jurisdictional elements.[45] Both sections required the knowing transport or receipt of prohibited materials "in interstate or foreign commerce by any means including by computer."[46] The primary distinction in scope between §§ 2252 and 2252A is that while the former section addresses only "visual depictions" of "minors engaging in sexually explicit conduct,"[47] the latter section is broader, encompassing "any child pornography."[48] Traditionally, courts will give statutes with indistinguishable language matching interpretations.[49] Therefore, the identical jurisdictional language in the instant statutes was treated as posing a single question of statutory construction.

III. THE JURISDICTIONAL NEXUS VARIANCE

Despite the arguably clear statutory language, the circuits split over the correct textual interpretation of Congress's prior jurisdictional nexus language, disagreeing as to the necessary evidentiary standard for demonstrating sufficient movement "in interstate or foreign commerce."[50] The majority of circuits to address the issue held that evidence of Internet use alone satisfied the jurisdictional requirement in the statute. Conflictingly, the Tenth Circuit decided that Internet use by itself did not meet the statutory threshold, requiring the government to demonstrate actual movement across state borders. This disagreement was particularly notable because of its ramifications for applying the established body of interstate commerce jurisprudence to novel contexts, such as in the case of crime over the Internet.

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43. *See* 18 U.S.C. § 2252A (2006) (prohibiting shipping, mailing, reproducing, receiving, distributing, or reproducing child pornography materials).

44. *Id*. Both § 2252 and 2252A now provide that a violator of the statutes shall be fined and subject to imprisonment for a term of not less than five years and not more than twenty years, except where a violator has previously been convicted of sexual abuse, abusive conduct involving a minor, or production possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children. Such repeat offenders shall be fined and imprisoned for not less than fifteen years and not more than forty years. *See* §§ 2252(b)(1), 2252A(b)(1).

45. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) (arguing that existence of a jurisdictional element in statutory language would "lend support to the argument" that a statute is "sufficiently tied to interstate commerce").

46. *Id.*; 18 U.S.C. § 2252(a)(1).

47. § 2252(a)(1)(A).

48. § 2252A(a)(1).

49. Woodford v. Ngo, 548 U.S. 81, 107 (2006) (Stevens, J., dissenting) (relying upon United States v. Wells, 519 U.S. 482, 495 (1997)):

> If we have already provided a definitive interpretation of the language in one statute, and Congress then uses nearly identical language in another statute, we will give the language in the latter statute an identical interpretation unless there is a clear indication in the text or legislative history that we should not do so.

50. For purposes of this article, the terms "in commerce," "in interstate commerce," and "in interstate or foreign commerce" will be used interchangeably and carry the same meaning.

A. Circuits Basing Jurisdiction on Internet Use Alone

In *United States v. MacEwan*,[51] the Third Circuit held that as long as the government could prove that a perpetrator downloaded child pornography from the Internet, such evidence satisfied the jurisdictional element of § 2252A, even without proof of actual interstate movement of the pornographic images.[52] In that case, the appellant, a repeat offender of various child-sexual-exploitation laws, asserted that the government "could not establish that, in compliance with the interstate commerce jurisdictional element of § 2252A(a)(2)(B), there was an interstate transmission of the pornographic images."[53] The perpetrator argued that no evidence was presented at trial showing that "the downloaded image files ever traveled outside of the state of Pennsylvania," and therefore, the statute did not cover his purely intrastate activities.[54]

The Third Circuit flatly rejected this contention, concluding that given the "interstate nature of the Internet," any connection to a website server or transmission of an image through a server constitutes interstate commerce and satisfies the jurisdictional requirement by itself.[55] The court reasoned that the appellant was incorrectly "conflating 'interstate commerce' with 'interstate transmission,'" seeing as the statute only required that pornographic images be "transported in interstate . . . commerce by any means, including by computer," rather than requiring that the images actually cross state lines.[56] Finding it "difficult to find an act more intertwined with the use of the channels and instrumentalities of interstate commerce than that of downloading an image from the Internet," the court determined that it did not matter whether the images actually traversed state lines.[57] Since "the Internet is an instrumentality and channel of interstate commerce,"[58] the court argued that the government carried its jurisdictional burden under § 2252A just by proving that a perpetrator engaged in the proscribed behavior while connected to the Internet, "a system that is inexorably intertwined with interstate commerce."[59]

The Third Circuit's position found support in the Eleventh, First, and Fifth Circuits, among others.[60] In *United States v. Machtley*,[61] the Eleventh Circuit held appellant's admission to downloading pornographic images from the Internet sufficient to establish that the images traveled in interstate commerce.[62] The court noted that "use of the [I]nternet to transmit or receive

51. United States v. MacEwan, 445 F.3d 237 (3d Cir. 2006).
52. *Id.* at 245–46.
53. *Id.* at 241.
54. *Id.* at 242.
55. *Id.* at 244 ("The Internet is an international network of interconnected computers." (citing Reno v. ACLU, 521 U.S. 844, 850–53 (1997))).
56. *Id.* at 243–44 (reiterating that courts give statutory terms their plain and ordinary meaning) (citing Okeke v. Gonzales, 407 F.3d 585, 593 (3d Cir. 2005)).
57. *Id.* at 245 (citing United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004)).
58. *Id.* at 245.
59. *Id.* at 245–46 (citing United States v. Lopez, 514 U.S. 549, 558 (1994)).
60. *See supra* note 13.
61. 163 Fed. App'x. 827 (11th Cir. 2006).
62. *Id.* at 838–39.

child pornography *is* interstate commerce," satisfying § 2252's jurisdictional requirement regardless of evidence that the illicit images actually moved interstate.[63]

Similarly, the First Circuit held that "proof of transmission of pornography over the Internet or over telephone lines satisfies the interstate commerce element of the offense," under § 2252A.[64] The *Hilton* court observed that evidence suggesting that images were "used in conjunction with Internet chat rooms" and that was "'indicative' of files that had been transmitted via modem" demonstrated interstate commerce under the statute.[65] The court did not inquire whether the pornographic images actually traveled "in interstate or foreign commerce," assuming that use of the Internet by itself demonstrated this fact.[66] Analogously, the Fifth Circuit applied an identical framework, concluding that use of the Internet to download pornography may be equated to actual movement in interstate commerce, as long as the government can draw "a specific connection between the images introduced at trial and the Internet."[67]

While only indirectly saying as much, the courts appeared to be influenced by policy considerations, namely the fact that the defendants in each case were "clearly involved in exactly the type of child-exploitive and abusive behavior that Congress sought to prohibit."[68] As a result, due to fear of defeating Congress's purpose in passing the relevant statutes, these courts were loath to exculpate a guilty predator based on a contested question of whether the government satisfied its burden of proving interstate movement.

B. Circuit Requiring Evidence of Actual Interstate Movement

The Tenth Circuit, in contrast, viewed the question differently, and split with the majority circuits. The court expressly indicated that it "respectfully disagree[d]" with the Third Circuit's stance in *MacEwan* as "run[ning] counter to the plain terms of § 2252(a)."[69] In *Schaefer*, the government charged appellant with receiving and possessing child pornography by using his computer and Internet to subscribe to websites containing illicit materials, in violation of §§ 2252(a)(2) and (a)(4)(B).[70] While not disputing Congress's power to regulate purely intrastate activity,[71] the appellant argued that the

63. *Id*. (emphasis added).

64. United States v. Hilton, 257 F.3d 50, 54 (1st Cir. 2001) ("Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce." (quoting United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997))).

65. *Id*. at 54–55.

66. *Id.*

67. United States v. Runyan, 290 F.3d 223, 242–43 (finding insufficient evidence linking pornographic images to appellant's use of the Internet (citing United States v. Henriques, 234 F.3d 263, 264–65 (5th Cir. 2000))).

68. United States v. Andrews, 383 F.3d 374, 378 (6th Cir. 2004). *See also* United States v. Morales-de Jesus, 372 F.3d 6, 20 (1st Cir. 2004) (finding defendant engaged in similar activity to previous case).

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

70. *Id.* at 1198.

71. The court in United States v. Fisher, 494 F.3d 5, 10 n.2 (1st Cir. 2007), succinctly distinguished an analogous situation falling under 18 U.S.C. § 1958 (2000): "The government's statement that intrastate phone

evidence failed to "establish that in committing the offense a visual image" was actually "mailed . . . shipped or transported in interstate or foreign commerce . . . by any means including by computer."[72] Therefore, the appellant contended, the government did not prove an essential element of a § 2252 violation: the existence of an interstate jurisdictional nexus.[73]

The Tenth Circuit accepted this reasoning, finding that proof of Internet use alone was insufficient to satisfy the interstate-commerce jurisdictional requirement of the existing statute.[74] Although acknowledging that most Internet use "will involve the movement of communications or materials between states,"[75] the court, nonetheless, declined to absolve the government of "the need for evidence of this interstate movement."[76] In interpreting the statute, the court applied a "plain language" reading, finding that the words "in interstate or foreign commerce" possess distinct meaning and require actual movement between states.[77] The court focused on the fact that the statute did not contain broader language, such as "affecting commerce" or a "facility of interstate commerce."[78] Instead, the court interpreted the statute's "in interstate commerce" phrasing to reflect Congress's purposeful decision "to limit federal jurisdiction and require actual movement between states to satisfy the interstate nexus."[79] Congress's choice "not to exercise its full Commerce Clause power in § 2252(a)"[80] requires the government to prove that "any Internet transmissions containing child pornography . . . crossed state lines" in order to satisfy its burden of proof.[81]

The court rejected the Third Circuit's arguments, observing that the *MacEwan* court "recast the jurisdictional requirement of the child pornography statute into one that could be satisfied by use of an 'interstate facility.'"[82] Noting that the term "'interstate facility' (or similar terms) is noticeably absent from §[§] 2252(a)" and 2252A, the Tenth Circuit concluded that Congress's decision to use the limiting "in interstate commerce" language did not

use is sufficient to sustain jurisdiction under the Commerce Clause misses the point. The question is not whether Congress could have based *jurisdiction* on intrastate use of the telephone, but rather whether it defined the *crime* so as to cover intrastate use of the telephone."

72. *Schaefer*, 501 F.3d at 1200.

73. *Id.* at 1198. *See also* United States v. Henriques, 234 F.3d 263, 266 (5th Cir. 2000) ("The transport of images through interstate commerce, as an element of the crime, must be proved beyond a reasonable doubt. Requiring the government to independently link each image to interstate commerce is therefore necessary and appropriate in order that the government satisfies its burden.").

74. *Schaefer*, 501 F.3d at 1200–01.

75. *Id.* at 1201 (citing Reno v. ACLU, 521 U.S. 844, 849 (1997)).

76. *Id.*

77. *Id*. (citing United States v. Hunt, 456 F.3d 1255, 1264–65 (10th Cir. 2006)).

78. *Id*.

79. *Id.* at 1201–02 (*comparing* Russell v. United States, 471 U.S. 858, 859 (1985) (which noted that term "affecting interstate or foreign commerce" indicates Congress's desire to exert full Commerce Clause power), *with* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115–16 (2001) (which observed that "in commerce" language is meant to limit Congress's reach)).

80. *Schaefer*, 501 F.3d at 1202 ("'Congress is aware of the distinction between legislation limited to activities 'in commerce' and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.'" (quoting Scarborough v. United States, 431 U.S. 563, 571 (1976))).

81. *Id.*

82. *Id.* at 1205 (quoting United States v. MacEwan, 457 F.3d 237, 245(3rd Cir. 2006)).

demonstrate "a more expansive exercise of its Commerce Clause powers."[83] In light of the plain terms of the statute, the court refused to accept the existence of an "internet exception" to § 2252's jurisdictional nexus requirement, ruling that Internet use alone does not "automatically equate[] with a movement across state lines."[84]

At bottom, the circuits split over the evidentiary standard for satisfying the jurisdictional nexus in the child-pornography statutes. The majority of circuits that considered the question found evidence of Internet use alone satisfied the government's burden of proof, even in the absence of proof of actual interstate movement. These circuits viewed the Internet as an instrumentality of interstate commerce, and, therefore, any use of this instrumentality demonstrated actual movement "in interstate commerce" under the statute. The Tenth Circuit did not dispute this characterization of the Internet as an instrumentality of interstate commerce; rather, the Tenth Circuit rejected the view that mere use of an instrumentality of interstate commerce *alone* satisfied the jurisdictional nexus of the statute. From its perspective, the statutory language precluded such an expansive reading of the law. As such, this circuit expected the government to advance evidence of actual interstate movement of child pornography depictions to obtain a conviction under the statute.

C. Congressional Reaction

Having grown accustomed to the judicial interpretation furnished by the majority circuits, Congress did not previously have occasion or incentive to consider whether its statutory drafting failed to account for advances in modern technology. In effect, the position advocated by the Third Circuit and its brethren resulted in outcomes consistent with the original policy objectives of the relevant statutes, namely, the protection of minors from sexual exploitation. Reflecting this reality, Congress did not waver in its reliance upon the "in commerce" language throughout its passage of §§ 2252 and 2252A and their amendments.[85]

The Tenth Circuit's ruling in *Schaefer* immediately altered this dynamic. Rather than continuing to defer to the judiciary to apply the statutory language in a manner that served the legislature's public-policy concerns, Congress could no longer trust that the courts would accede to the legislature's prerogative if not clearly annunciated in the statutory code.[86] In line with the statute's plain language, the *Schaefer* court demanded a higher standard of proof from the government prosecutors, and accordingly, failed to uphold a conviction that advanced Congress's policy interests.[87]

Somewhat surprisingly, however, in so ruling, the court drew the

83. *Id.*
84. *Id.*
85. *See* 18 U.S.C. §§ 2252 & 2252A (mentioning the word "commerce" frequently throughout the sections).
86. *Schaefer*, 501 F.3d at1207.
87. *Id.*

legislature's ire. Considering the highly salient subject matter, Congress moved quickly to condemn the Tenth Circuit's opinion, criticizing both the textual-interpretation methodology as well as the court's alleged misreading of legislative intent.[88] Representative Biggert, the co-chair of the House of Representatives' narrowly-focused Missing and Exploited Children's Caucus, noted that the *Schaefer* court's interpretation that "the use of the phrase 'in commerce' instead of 'affecting commerce' in the law signaled Congress's intent to limit Federal jurisdiction in the prosecution of child pornographers" could not have been "further from the truth."[89] Adding to the harsh rhetoric, Representative Conyers, another leader of the caucus, lambasted the *Schaefer* court's reversal of a conviction of a man who "was found to be in the possession of child pornography" on *trivial* textual grounds, and called it "a truly unfortunate and . . . wrongly decided decision by the 10th Circuit Court of Appeals . . . ."[90] Similarly, Representative Cannon derided the Tenth Circuit's allegedly outdated interpretation, observing that "[w]e live in a world of very quickly transforming technology. The courts sometimes have difficulty keeping up with that, and we have to act to create the legal environment for the courts to appropriately act."[91]

In response, Congress introduced the Effective Child Pornography Prosecution Act of 2007.[92] The new legislation reiterated Congress's concerns as expressed in the original 1977 bill, namely, that "[c]hild pornography is estimated to be a multibillion dollar industry of global proportions, facilitated by the growth of the Internet."[93] Yet, unlike the earlier legislation, this new bill demonstrated acute awareness of the significant multijurisdictional consequences resulting from the invention of the Internet, noting that "[c]hild pornography is readily available through virtually every Internet technology, including Web sites, e-mail, instant messaging, Internet Relay Chat, newsgroups, bulletin boards, and peer-to-peer."[94] The legislation also directly responded to the concerns raised by the Tenth Circuit's opinion. Specifically, Congress noted that "[t]he Internet is well recognized as a method of distributing goods and services across State lines," and explicitly directed that "[t]he transmission of child pornography using the Internet constitutes transportation in interstate commerce."[95] The last finding in particular directly rebuked the Tenth Circuit's holding that mere Internet use alone would not suffice to constitute transportation "in interstate commerce" in the absence of actual evidence demonstrating interstate movement.[96]

Acknowledging the existing division amongst the circuits in interpreting

88. *See generally* 153 CONG. REC. H13592 (daily ed. Nov. 13, 2007) (providing a hearing on the Effective Child Pornography Prosecution Act of 2007 which would clarify Congress's intent).

89. 153 CONG. REC. H13592 (statement of Rep. Biggert).

90. 153 CONG. REC. H13591 (daily ed. Nov. 13 2007) (statement of Rep. Conyers).

91. 154 CONG. REC. H9888 (daily ed. Sept. 25, 2008) (statement of Rep. Cannon).

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

93. Effective Child Pornography Prosecution Act of 2007 § 102(1), 122 Stat. 4001, 4001.

94. *Id.* § 102(4).

95. *Id.* §§ 102(6)–(7).

96. *Cf.* United States v. Schaefer, 501 F.3d 1197, 1201 (10th Cir. 2007) (stating the statutory analysis of "in commerce" rather than "affecting commerce").

§§ 2252 and 2252A's jurisdictional elements, the new bill intended to "close the loophole in current law by replacing the phrase 'in commerce' with the phrase 'affecting commerce' in the child pornography statute."[97] Adopting the Tenth Circuit's dicta, the change in statutory language was precipitated by Congress's intent to use a "phrase [ ] well understood [to] reflect[ ] Congress's intent to use the full reach of its constitutional commerce clause power."[98] The Act passed unanimously in both houses of Congress,[99] and amended both §§ 2252 and 2252A by striking any reference to movement "in interstate commerce."[100] Instead, the revised sections sanction anyone who knowingly transports or ships "*using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce"* by any means including by computer or by mail.[101] As such, little room remains for misconstruing the jurisdictional element when deciding whether an individual transmitted illicit materials within the auspices of §§ 2252 and 2252A.[102]

IV. INTERPRETIVE DISSONANCE

Congress's legislation resolved the circuit split, clarifying the appropriate jurisdictional standard to be applied when interpreting §§ 2252 and 2252A in the future. Yet, despite the derisive statements of legislators, the matter of whether the Tenth Circuit actually failed to properly apply the existing statutory language has received scant attention. The question remains whether the *Schaefer* court's statutory construction of "in commerce" in the Internet

97. 153 CONG. REC. H13592 (daily ed. Nov. 13, 2007) (statement of Rep. Biggert).

98. *Id.* (statement of Rep. Conyers).

99. *See* 154 CONG. REC. D1142 (daily ed. Sep. 23, 2008) (stating that the Senate passed the Act); 154 CONG. REC. D1189 (daily ed. Sep. 26, 2008) (stating that the House of Representatives passed the Act).

100. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 103, 122 Stat. 4002, 4003 (2008).

101. *Id.* (emphasis added).

102. Prior to the amendment, an argument could have been made that courts should take judicial notice of the fact that every Internet communication involves movement in interstate commerce, thereby resolving the circuit split on a factual level. Courts are entitled to take judicial notice of facts that are "not subject to reasonable dispute" because they are either "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). *See also* Green v. Warden, U. S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983) ("[F]ederal courts may also take notice of proceedings in other courts, both within and outside of the federal judicial system, if the proceedings have a direct relation to matters at issue."). Such judicial notice may be taken *sua sponte*, without the parties' request and even in a subject area "which is ordinarily not thought to be within [the court's] expertise." Norman v. Hous. Auth. of City of Montgomery, 836 F.2d 1292, 1304 (11th Cir. 1988). The majority of circuits to address the topic determined without hesitation that use of the Internet is factually tantamount to moving files across state lines. United States v. MacEwan, 445 F.3d 237, 245 (3rd Cir. 2006); United States v. Machtley, 163 Fed. App'x. 837, 839 (11th Cir. 2006); United States v. Runyan, 290 F.3d 223, 239 (5th Cir. 2002); United States v. Hilton, 257 F.3d 50, 54 (1st Cir. 2001). In fact, the Tenth Circuit itself agreed that "given the architecture of the Internet, it is vanishingly remote that an image did not cross state lines."102.United States v. Schaefer, 501 F.3d 1197, 1208 (10th Cir. 2007) (Tymkovich, J., concurring). This argument, however, ignores the true subject of the circuit split. Although the Tenth Circuit concurring opinion in *Schaefer* mentioned the possibility of resolving the issue simply by taking judicial notice, the above discussion shows that the courts were actually divided about whether use of an instrumentality or facility of interstate commerce equated to actual movement "in interstate commerce" under the statute. Even if each circuit explicitly took judicial notice of the Internet's interstate character, the question of whether the original §§ 2252 and 2252A required evidence of actual interstate movement, or just use of an instrumentality or channel of interstate commerce, would still have persisted.

context reflected the normatively better conclusion than that rendered by the majority circuits, both from a statutory-construction perspective as well as from a policy standpoint. Certainly, since the instant split has technically been resolved, we must query why the differing interpretations remain a relevant source of contention. That answer is both basic and fundamental: if courts are to be entrusted with giving meaning to uncertain laws in the future, they cannot invent statutory interpretations on the fly to suit policy imperatives particular to specific cases.

Though it is undeniably well established, it bears repeating that "it is emphatically the province and duty of the judicial department to say what the law is."[103] At the same time, judges act "as agents or servants of the legislature" in statutory construction[104]: "[i]n construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature . . . ."[105] Accordingly, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[106] As a result, "[t]he legitimacy of judicial power over statutory interpretation has long been thought to flow from [the] assumption that judges would implement Congress's decisions."[107] When, however, the federal judiciary is seen as "making" or creating law based on personal values,[108] its actions lack "the constitutional legitimacy of measures adopted pursuant to constitutionally prescribed lawmaking procedures,"[109] via the legislative branch.

Unfortunately, statutory language often fails to provide adequate guidance, rendering the latter view only part of the reality of statutory construction when the judiciary is confronted with textual ambiguity.[110] In

103. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

104. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (noting that in "the most prominent conception of the role of courts in statutory construction," judges must "discern and apply a judgment made by others, most notably the legislature."). *See also* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1680 (2001) ("The faithful agent theory far better reflects the broader structural premises of the U.S. Constitution and, at least since the Marshall Court, it is the theory that has withstood the test of time.").

105. Schooner Paulina's Cargo v. United States, 11 U.S. 52, 60 (1812) (Marshall, C.J.) ("[T]his intention is to be searched for in the words which the legislature has employed to convey it.").

106. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (2d Cir. 1992).

107. Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1251 (2002).

108. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 617 (1995) ("[D]emocratic theory reduces to a crude majoritarian imperative: it is always better to have an accountable actor make policy than a non-accountable one. A court, as grand enforcer of democratic norms, must surrender and reassign its own interpretive authority to a body perceived to have a better democratic pedigree."); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 556 (1988) ("[T]he fact that judges are protected in significant ways from the popular will does make it inappropriate for them to reach outcomes on the basis of their personal (and possibly idiosyncratic) values.").

109. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1403 (2001) ("By design, the Constitution insulates federal judges from the political process and assigns them no role in adopting 'the supreme Law of the Land.'").

110. *See, e.g.*, Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121, 127 (2000) ("Most cases of statutory interpretation, especially at the appellate levels, do not involve disputes over the applicability of clear language, but rather over the meaning of unclear language in the context of a particular case.").

such contexts, contrary to the Chief Justice's analogy, the judiciary's function in textual interpretation is significantly more complex than the role played by a baseball umpire, merely calling "balls and strikes."[111] While the problem of statutory construction of ambiguous language may always have been of concern,[112] particularly in the modern state, "[t]here is simply too much law today, governing too many subjects, for legislators to address every important policy question that might arise under their statutes."[113] In fact, as one jurist noted, "the overwhelming majority [of] cases which involve legislative . . . construction involve a matter which the legislators never thought of in the first place."[114] Not surprisingly under these circumstances, the judiciary must sometimes "giv[e] meaning when none is extractable from the text."[115] The inherent policy questions involved in giving meaning to such statutory ambiguity "often call[] for a choice between competing, plausible interpretations, because there are multiple readings that could each be regarded as the 'intended' or 'reasonable' or 'best' one."[116]

Considering the ongoing struggle between unclear—or sloppy—legislative drafting and policy-oriented judicial construction, "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[117] Instead, various proposed interpretive methods have proliferated, with several emerging as consensus favorites within the deluge of scholarly literature on the topic. Unfortunately for many readers, a discussion of these suppositions inevitably requires a rehashing of tried and true arguments.

Generally, when confronted with uncertain legislative commands, jurists and scholars approach judicial statutory interpretation through one of several canons of construction. Textual or language canons seek to initially derive meaning based on clues and inferences located within the "four corners of a statute," relying upon structure, grammar, and word placement in the text.[118]

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111. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to Be Chief Justice of the United States).

112. *See* Molot, *supra* note 107, at 1253–54, 1296 (discussing James Madison's observation in the Federalist that "[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal[,] until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." (quoting THE FEDERALIST NO. 37, at 245 (James Madison) (Isaac Kramnick ed., 1987))).

113. *Id*. at 1241.

114. Mikva, *supra* note 110, at 128 (quoting Judge Robert Cowan of the Third Circuit Court of Appeals).

115. *Id. See also* Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 365–66 (2007) ("When interpreting statutes, courts regularly apply substantive canons of statutory construction, which are policy-based directives about how statutory ambiguity should be resolved.").

116. Schacter, *supra* note 108, at 657.

117. Daniel O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 191 (2008) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), quoted in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14 (1997)).

118. Anita S. Krishnakumar, *The Hidden Legacy of* Holy Trinity Church*: The Unique National Institution Canon*, 51 WM. & MARY L. REV. 1053, 1097 (2009) (citing WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 640–42 (4th ed. 2007)).

Where imprecise phrasing fails to elucidate the proper result, however, the courts often resort to reference canons to divine statutory meaning.[119] In relying upon extrinsic sources, judges frequently approach statutory construction through one of two predominant interpretive theories: meaning-based textualism or intent-based intentionalism and purposivism.[120]

The latter approaches endeavor to ascertain the intent of the drafters in enacting statutory language, and "emphasize the realization of legislative intent as the aim of statutory interpretation."[121] In an effort to align judicial action with legislative will, traditional intentionalists utilize a variety of tools of construction in addition to the mere text of the statute; in particular, emphasis is placed on the legislative history underlying a statute, including legislative committee reports, congressional speeches and statements, contemporaneous circumstances of events occurring during and after enactment, and prior versions of the ultimate legislation.[122] Although both intentionalism and purposivism are cognizant of the difficulties posed by deciphering the often murky and conflicting intents of the drafters, intentionalism endeavors to resolve the case at bar in the manner originally contemplated by the enacting legislature.[123] Purposivists, in contrast, identify a statute's holistic purpose and then apply an interpretation to best effectuate that overriding objective.[124] Despite the differences, advocates of the latter approaches argue that intent-based interpretation promotes sound policy by matching judicial statutory application with legislative policy objectives.[125]

Unlike the intentionalists' concern with the legislature's subjective intent, meaning-based textualists consider the statutory language itself the best—and often only reliable—evidence of legislative intent.[126] Responding to the indeterminacy of intentionalist approaches, textualists look to the ordinary and objective meaning of the disputed statutory language, but examine the text in

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119. *Id.*

120. The focus on these principal theories of statutory construction is not intended to suggest that these are the only means by which courts construe statutes; indeed, myriad ways exist for accomplishing this precise purpose. One scholar highlighted the existence of approximately twelve differing theories or schools of statutory interpretation in addition to the ones discussed here, including liberal, legal process, coherence, and normativist theories, feminist republicanism, deconstruction, social construction, critical pragmatism, and legal realism. *See* J. Gordon Christy, *A Prolegomena to Federal Statutory Interpretation: Identifying the Sources of Interpretive Problems*, 76 MISS. L.J. 55, 57 n.6 (2006) (discussing WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (Harvard Univ. Press 1994)). Nevertheless, these approaches preponderate in the literature and case law, confirming their primacy.

121. Daniel K. Brough, *Breaking Down the Misprision Walls: Looking Back on the Federal Sentencing Guidelines after* Booker, *through a Bloomian Lens*, 82 N.D. L. REV. 413, 433 (2006); Jacob Scott, *Codified Cannons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 348 (2010).

122. Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 297 (2003).

123. *See, e.g.*, H. Miles Foy, III, *On Judicial Discretion in Statutory Interpretation*, 62 ADMIN. L. REV. 291, 293–94 (2010); Mary Pennisi, *A Herculean Leap for the Hard Case of Post-Acquisition Claims: Interpreting Fair Housing Act Section 3604(b) After* Modesto, 37 FORDHAM URB. L.J. 1083, 1106 (2010); Scott, *supra* note 121, at 348.

124. O'Gorman, *supra* note 117, at 194.

125. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 101 (2005) (noting that intentionalism "helps statutes match their means to their overall public policy objectives, a match that helps translate the popular will into sound policy.").

126. Scott, *supra* note 121, at 348.

context by considering other provisions of the same statute or similar provisions in analogous codified statutes.[127] Supporters of the latter framework contend that the extensive legislative history appertaining to modern statutes is often inconclusive and contradictory, affording judges undue discretion to interpret based on personal "objectives and desires."[128] Additionally, the textualists' rejection of legislative history and refusal to apply ambiguous wording may incentivize Congress to draft legislation with precision for fear of rendering statutory provisions impotent.[129]

Despite the noted distinctions, this article does not dwell upon which predominant theory of statutory construction is best or correct. Rather, the below discussion demonstrates that the majority interpretation erred under either framework.

Here, all of the circuits that considered the original statutory language determined—based on the statutory text alone—that their approach was the intended or best one. Yet, considering that the circuit split arose in the first place, it is ostensibly clear that two competing interpretations were both plausible and arguably reasonable. Indeed, the profound disagreement in this narrow area intimates that the statutory plain language provided insufficient guidance as to the proper resolution.

The limited literature to address this dispute has narrowly focused on the ramifications of Congress's resolution of the circuit split, while ignoring the basis for such action and the statutory construction exercise pertaining therein. One author, although mentioning the circuit disagreement, commented that Congress's swift reaction is primarily flawed for emasculating state authority to regulate child pornography violators.[130] By greatly expanding the use of its commerce clause authority for prosecuting purveyors of illicit material over the Internet, "Congress ensured that prosecution of all acts involving child pornography can take place at the federal level . . . ."[131] As such, even "purely local incidences of child pornography" will now be capable of prosecution under the federal statutes "simply because they involve the Internet," eclipsing state laws and prosecution capability.[132] Although this discussion is relevant for understanding the implications of the instant situation for federalism and state authority, this scholarship devoted almost no attention to examining the textual interpretation approaches underlying the circuit split and Congress's subsequent action. Student comments have similarly addressed the implications of the circuit split, without giving any attention to the statutory

127. *Id.* *See* Brough, *supra* note 121, at 431 (explaining "[e]ssentially, so long as it is statutory text, it is fair game for statutory interpretation.").

128. *See* SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17–18 (1997) ("The practical threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.").

129. Paul Killebrew, Note, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U. L. Rev. 1895, 1900 (2007).

130. David M. Frommell, *Pedophiles, Politics, and the Balance of Power: The Fallout from* United States v. Schaefer *and the Erosion of State Authority*, 86 DENV. U. L. REV. 1155, 1177 (2009).

131. *Id.* at 1167.

132. *Id.* at 1170.

construction questions presented in this article.[133]

A. Judicial Inconsistency in Statutory Application

While the majority rulings better aligned with Congress's public-policy objectives—as confirmed by the subsequent legislative history discussed above—these decisions nonetheless failed to properly interpret the statutory language in accordance with established canons of statutory construction and common sense. In fact, analysis of the reference canons favored by both textualists and intentionalists makes clear that these majority circuits placed individual policy considerations before a consistent approach to textual interpretation. Even more importantly, these decisions absolved Congress of its legislative responsibility to monitor and update the statutory jurisdictional standards in light of evolving technology, namely the statutes' failure to account for Internet transmissions. The fact that Congress did not amend the relevant sections to adjust for the Internet's propagation until the Tenth Circuit rendered its decision further evidences this abdication of accountability.

To the majority of circuits, the "interstate nature of the Internet" provided for immediate interstate movement as soon as "a user submit[ted] a connection request to a website server or an image [was] transmitted from the website server back to [the] user . . . ."[134] Such use of a "channel and instrumentality of interstate commerce" on its own purportedly proved "beyond doubt that the government . . . satisfied the jurisdictional element of § 2252A . . . ."[135] This perspective, however, wrongly conflated use of an "instrumentality," "channel," or "facility" of interstate commerce with the statutes' rhetorical requirements. As the Supreme Court has reiterated on numerous occasions, "in determining the scope of a statute, we look first to its language . . . giving the words used their ordinary meaning."[136] The relevant statutes required that child pornography be actually transported, shipped, received, distributed, or possessed "in interstate or foreign commerce," in order to meet the jurisdictional nexus.[137] In the absence of Congress's subsequent legislative history approving of the majority circuit view, courts lacked any jurisprudential justification for believing that Congress utilized—or intended to utilize—the terms "instrumentality," "channel," or "facility" of interstate commerce to denote actual interstate movement.[138] Statutes are to be construed such that "no clause, sentence, or word shall be superfluous, void, or

133. *See* Nathaniel H. Clark, Comment, *Tangled in a Web: The Difficulty of Regulating Intrastate Internet Transmissions Under the Interstate Commerce Clause*, 40 MCGEORGE L. REV. 947 (2009) (omitting discussion on statutory construction); Jane Adele Regina, Comment, *Access Denied: Imposing Statutory Penalties on Sex Offenders Who Violate Restricted Internet Access as a Condition of Probation*, 4 SETON HALL CIRCUIT REV. 187 (2007) (omitting discussion on statutory construction).

134. United States v. MacEwan, 445 F.3d 237, 244 (3d Cir. 2006).

135. *Id.* at 246.

136. Moskal v. United States, 498 U.S. 103, 108 (1990).

137. 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(4)(B) (2006); 18 U.S.C. §§ 2252A(a)(1), (a)(2), (a)(4)(B) (2006).

138. *Id.*

insignificant.[139] By reading differing language to carry identical meaning, the majority circuits ignored Congress's apparent decision to place a higher burden of proof upon the government to demonstrate actual interstate movement.

Even conceding that reasonable arbiters could have disagreed upon the plain meaning of the sections, scrutiny of distinguishable and comparable statutes, as well as of legislative history, confirms that the "in commerce" distinction is real. Moreover, a sophisticated reading of the text should have revealed Congress's apparent decision to limit the scope of the statutes to situations where the government carried its burden of showing actual interstate movement of child pornography. Fundamentally, the majority circuits misread the statute to provide for an expansive application in a context where the statute commanded a higher evidentiary standard, thereby compromising the authority of their decisions.

1. Analogous Statutory Language

As discussed, the jurisdictional language in the child-pornography statutes originally required movement ". . . in interstate or foreign commerce" for the activity to implicate federal jurisdiction.[140] To construe the meaning of unclear statutory language, courts commonly apply the Supreme Court's established *in pari materia* reference canon of statutory construction by considering analogous statutes that utilize identical phrasing.[141] Pursuant to this methodology, courts are to construe statutes with uniform language and similar subject matter uniformly.[142] "Where Congress uses terms that have accumulated settled meaning . . . a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of these terms."[143] Here, analogous statutes relating to interstate criminal activity demonstrate that the instant terminology is commonly interpreted to require evidence of *actual* interstate movement to support a conviction, rather than mere use of an instrumentality or facility of interstate commerce.[144]

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139. S*ee* TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (observing the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"); *see also* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 266 (2000).

140. 18 U.S.C.§§ 2252, 2252A (2006).

141. *See* Erlenbaugh v. United States, 409 U.S. 239, 243–44 (1972) ("The rule of *in pari materia*—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context."). *See also* Jamie Darin Prenkert, *Bizarros Statutory Stare Decisis*, 28 BERKELEY. J. EMP. & LAB. L. 217, 234 (2007) ("[A]n interpretation of one statute is usually treated as binding on the other when both involve the same language").

142. *See, e.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 13 (2005) ("Other frequently used language canons are the in pari material guideline, which presumes that similar statutes should be interpreted similarly and also that Congress uses the same term consistently in similar statutes.").

143. *See* Kungys v. United States, 485 U.S. 759, 770 (1988) (internal quotations marks omitted) (ascertaining the meaning of "material" by analogizing its interpretation in several comparable statutes in related field of law).

144. *See, e.g.*, Barrett v. United States, 423 U.S. 212, 216 (1976) (finding 18 U.S.C. § 922(h)'s "shipped or received in interstate or foreign commerce" language to lack ambiguity, and was "directed unrestrictedly at

The Wire Fraud Statute is a logical first place to begin in examining the common meaning of interstate commerce jurisdictional elements. In the context of prosecuting crimes committed over the Internet, "[a]lthough no specific Internet fraud statute currently exists, Internet fraud is largely prosecuted under . . . wire fraud statutes."[145] In the Wire Fraud Statute, Congress utilized the same "in interstate commerce" language previously implicated in the child-pornography statutes.[146] The fraud statute prohibits any fraudulent activities that occur "by means of wire, radio, or television communication in interstate or foreign commerce."[147] As in the case of crimes perpetrated over the Internet, wires, radio, and television are generally considered instrumentalities and channels of interstate commerce, and the use of these channels is similarly subject to congressional regulation.[148] In fact, use of the Internet may entail the utilization of interstate wires, directly subjecting any fraudulent activities to the provisions of § 1343.[149]

Yet, in spite of the apparent interstate connection from mere use of the wire facilities of commerce, courts *always* demand tangible evidence of actual interstate wire communication before convicting a defendant under the statute.[150] In this context, the "in commerce" jurisdictional nexus requirement limits the scope of statutory application to instances of demonstrated interstate wire transmission.[151] In the absence of countervailing evidence, such judicial interpretations of identical jurisdictional language suggest that Internet use in

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the felon's receipt of any firearm that 'has been' shipped in interstate commerce"); United States v. Purkey, 428 F.3d 738, 754 (8th Cir. 2005) (approving jury instruction that required finding of transport "across state lines" under 18 USC § 1201's "willfully transported in interstate or foreign commerce"); United States v. Wright, 363 F.3d 237, 244 (3d Cir. 2004) (stating that 18 U.S.C. § 2314's "transports . . . in interstate or foreign commerce" jurisdictional requirement is satisfied if fraudulent check travels interstate in the bank collection process); United States v. Sirois, 87 F.3d 34, 39 (2d Cir. 1996) (discussing 18 U.S.C. § 2251's "transports any minor in interstate or foreign commerce" is satisfied if child pornography actually crosses or will cross state lines).

145. Charlotte Decker, Note, *Cyber Crime 2.0: An Argument to Update the United States Criminal Code to Reflect the Changing Nature of Cyber Crime*, 81 S. CAL. L. REV. 959, 991 (2008) (discussing various crimes perpetrated through use of computers and networks).

146. 18 U.S.C. § 1343 (2006).

147. *Id.*

148. *See, e.g.*, United States v. Mehta, 594 F.3d 277, 279 (4th Cir. 2010) (upholding conviction where evidence showed interstate wire transmission from Maryland to North Carolina); United States v. Bryant, 766 F.2d 370, 375 (8th Cir. 1985) (finding guilt in interstate wire transmission under § 1343 regardless of defendant's inability to foresee the violation).

149. Susan W. Brenner, *Law in an Era of Pervasive Technology*, 15 WIDENER L.J. 667, 780–81 (2006) (noting that internet access via dial-up or wired cable modem "would travel in interstate commerce via 'wires' and could therefore be prosecuted as wire fraud under § 1343").

150. *See, e.g.*, United States v. Mills, 199 F.3d 184, 189–90 (5th Cir. 1999) (finding federal jurisdiction where defendant's interstate wire communications facilitated transfer of funds between Texas and Colorado). *See also* Lee Greenwood, *Mail and Wire Fraud*, 45 AM. CRIM. L. REV. 717, 720 (2008) (noting that the wire fraud statute requires "that the communication at issue cross state lines"); Carrie A. Tendler, Comment, *An Indictment of Bright Line Tests for Honest Services Mail Fraud*, 72 FORDHAM L. REV. 2729, 2730 n.5 (2004) ("[W]ire fraud requires use of an interstate telephone call or electronic communication.").

151. *See, e.g.*, United States v. Ratliff-White, 493 F.3d 812, 812 (7th Cir. 2007) (extensively discussing need to demonstrate an actual interstate wire transmission in fraud case); United States v. Robertson, 493 F.3d 1322, 1331 (11th Cir. 2007) (addressing need to show proof of interstate activity, which can be done through circumstantial evidence of interstate commerce); United States v. Veras de los Santos, 184 Fed. App'x. 245, 248–49 (3d Cir. 2006) (discussing various items of evidence used to support § 1343 conviction for interstate wire fraud).

the instant matter was no different than use of analogous interstate channels under the fraud statute. Yet, in contrast to the wire-fraud context where concrete evidence of actual interstate movement is obligatory, the majority circuits here rendered inapposite rulings in reviewing §§ 2252 and 2252A. As such, the majority of circuits in the instant matter either misunderstood or disregarded Congress's seeming intent—as encapsulated by the actual statutory language[152]—in drafting §§ 2252 and 2252A.

This outcome is confirmed by applying another statute pertaining to criminal conduct over the Internet. In enacting 18 U.S.C. § 875(c), Congress utilized identical "in commerce" language to prohibit threats to kidnap or injure another individual.[153] The statute operates to punish and deter perpetrators who transmit such communications "in interstate or foreign commerce."[154] To convict under this section, courts again require the government to prove intent to actually transmit an interstate communication containing a true threat, rather than finding sufficient the mere intent to use an instrumentality or facility of interstate commerce.[155] In this salient context of threats advanced over the Internet, courts likewise hold the statute's jurisdictional hook satisfied only when the government presents direct evidence of communications traveling across state lines.[156] While reiterating that the Internet is "an international network of interconnected computers,"[157] and therefore, constitutes "an instrumentality and channel of interstate commerce,"[158] courts nonetheless insist upon evidence of actual interstate communications to find the jurisdictional element satisfied.[159]

Under indistinguishable textual circumstances, the majority of circuits in the child-pornography context unconvincingly assumed that use of the Internet instrumentality proved interstate movement.[160] The aforementioned applications of §§ 1343 and 875(c)—among other comparable statutes—demonstrate that this assumption conflicted with traditional interpretations of the "in interstate commerce" requirement. Because each of the implicated

152. United States v. Turkette, 452 U.S. 576, 580 (1981) ("[I]n the absence of a clearly expressed legislative intent to the contrary, [statutory] language must ordinarily be regarded as conclusive.").

153. 18 U.S.C. § 875(c) (2006).

154. *Id*.

155. United States v. Nishnianidze, 342 F.3d 6, 14–15 (1st Cir. 2003. *See also* United States v. Oxendine, 531 F.2d 957, 959 (9th Cir. 1976) (requiring prosecutors to advance proof of an actual transmission in interstate commerce under § 875(c)).

156. *See, e.g.*, United States v. Voneida, 337 Fed. App'x. 246, 249 (3d Cir. 2009) (holding transmission of threatening communications over the Internet between Pennsylvania and California supported conviction); United States v. Sutcliffe, 505 F.3d 944, 953 (9th Cir. 2007) (finding evidence that website was uploaded to various servers in multiple states sufficient to constitute "interstate transfer of information by means of the Internet" to satisfy the jurisdictional hook of §875(c)); United States v. Kammersell, 196 F.3d 1137, 1139 (10th Cir. 1999) (concluding that evidence of threatening Internet communication which traveled across interstate telephone lines to out-of-state server fulfilled jurisdictional element of offense).

157. *Sutcliffe*, 505 F.3d at 952.

158. *Id*. at 953.

159. *See id*. (depending upon evidence that the defendant "electronically sent threats and social security numbers to internet servers located across state lines" in convicting defendant for making threats under the interstate statute). *See also Kammersell*, 196 F.3d at 1139 (holding evidence that instant message traveled between servers in Utah and Virginia to satisfy the jurisdictional element of the statute).

160. *See supra* notes 11–13 and accompanying text.

statutes plainly requires the government to prove that an accused transported or received illicit materials "in interstate or foreign commerce,"[161] insistence upon a demonstration of actual interstate movement was consistent with a plain-meaning reading of the statutes.[162] Pursuant to the statutory text, the jurisdictional nexus could not be satisfied by proving mere use of an interstate instrumentality or channel, as presumed by the majority circuits.[163] Regardless of Congress's subsequent statements suggesting that the statutes at issue should have been read to cover any transmissions over the Internet, courts "must presume that a legislature says in a statute what it means and means in a statute what it says."[164] Prior to Congress's most recent amendments, requiring the government to prove concrete interstate movement reflected proper deference to Congress's formulation of a specific jurisdictional nexus. The majority circuits disregarded their previous interpretations of identical text, failing to align judicial action with legislative will.

2. Distinguishing Statutory Language

In contrast to the above examples, Congress is fully aware of, and relies upon, purposefully broad jurisdictional language when it intends to fully exert its commerce power to encompass crimes perpetrated through use of instrumentalities or facilities of interstate commerce, rather than through actual movement in commerce.[165] Prior to Congress's recent amendments to §§ 2252 and 2252A, which signaled the intentional expansion of the jurisdictional scope of the statutes, this distinction was evident in statutes regulating diverse subject matters. Even more noteworthy, this distinction is employed in statutes directly addressing the exploitation of children, a primary policy objective considered by the divided circuits. This significant distinction demonstrates that Congress's original phrasing of §§ 2252 and 2252A should not have been interpreted to encompass general use of the Internet as an interstate instrumentality or facility in the absence of specific evidence of illicit material dissemination in interstate commerce.

a. Disjunctive Jurisdictional Elements in General Criminal Statutes

As further evidence of Congress's understanding that distinct language has discrete meanings, Congress, in crafting statutory language, occasionally utilizes two separate jurisdictional nexus elements within a single statute. Applying one of the most common canons of construction, the Supreme Court has noted that "terms connected by a disjunctive [should] be given separate meanings, unless the context dictates otherwise."[166] The inclusion of two

161. 18 U.S.C. §§ 875(c), 2252, 2252A (2006); 28 U.S.C. § 1343 (2006).
162. United States v. Schaefer, 501 F.3d 1197, 1202 (10th Cir. 2007).
163. *Id*.
164. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).
165. Scarborough v. United States, 431 U.S. 563, 571 (1976).
166. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). *See* Mizrahi v. Gonzales, 492 F.3d 156, 164 (2d Cir. 2007) ("It is a standard canon of statutory construction that words separated by the disjunctive are intended to convey different meanings unless the context indicates otherwise.").

distinct jurisdictional elements within a single statute intimates that unique jurisdictional phrases have distinct meaning, and should be interpreted as such by courts.[167] Accordingly, Congress's use of "in commerce" in the child pornography sections cannot be read uniformly with statutes that merely required a showing of use of a facility or instrumentality of interstate commerce.

Although there are many instances where Congress has mixed jurisdictional elements within a single statute, several are particularly relevant. In a murder-for-hire statute, for example, Congress specifically included expansive language to discipline anyone who either (1) traveled "in interstate or foreign commerce," *or* (2) used "the mail or *any facility* of interstate or foreign commerce, with intent that a murder be committed . . . ."[168] Since no portion of statutory text may be treated as surplusage, this section demonstrates that Congress recognized a distinction between transport "in interstate commerce," as compared to use of a "facility" of interstate commerce when perpetrating a crime.[169] As a result, in applying this statute's jurisdictional language, courts construe the text to direct that whenever a perpetrator uses a facility of interstate commerce, the jurisdictional element is satisfied, irrespective of the intrastate or interstate destination of his activities.[170] Moreover, as a common-sense matter, Congress's inclusion of two separate jurisdictional elements in the same statute increased the likelihood that a perpetrator could be prosecuted regardless of whether she used a facility of interstate commerce or traveled across state lines without utilizing a facility of interstate commerce.

Similarly, in a racketeering statute, Congress again illustrated the distinction in jurisdictional language, providing that a crime could be committed by either "travel[ing] in interstate or foreign commerce" *or* by "us[ing] the mail or any facility in interstate or foreign commerce."[171] Again, in this context, courts only require a showing of use of an interstate facility under this provision, rather than actual interstate movement.[172] If the distinct phrases were intended to entail the same activity, such language would be

167. *See, e.g.*, Karin P. Sheldon, *"It's Not My Job To Care": Understanding Justice Scalia's Method of Statutory Interpretation Through* Sweet Home *and* Chevron, 24 B.C. ENVTL. AFF. L. REV. 487, 526 (1997) (observing that portions of statutory text should not be "deprived of its independent meaning" and be rendered surplusage through uniform treatment).

168. 18 U.S.C. § 1958 (2006) (emphasis added).

169. *Id*.

170. *See, e.g.*, United States v. Drury, 396 F.3d 1303, 1311 (5th Cir. 2005) (stating that Congress made it "absolutely clear" that 18 U.S.C. § 1958 applies whenever a "facility of interstate commerce" is used, regardless of whether use is interstate or intrastate in nature"); United States v. Dorman, 108 Fed. App'x 228 (6th Cir. 2004) (requiring only evidence of defendant's use of facility in interstate commerce to satisfy 18 U.S.C. § 1958's jurisdictional element); United States v. Marek, 238 F.3d 310, 317 (5th Cir. 2001) (finding that use of U.S. Post Office, a facility of interstate commerce, qualified for jurisdictional purposes of 18 U.S.C. § 1958, regardless of intrastate destination of the items mailed); United States v. Coates, 949 F.2d 104, 105 (4th Cir. 1991) ("[T]o indict for violating § 1958, the government must show that the person charged used interstate telephone service or other commerce facilities with the requisite intent.").

171. 18 U.S.C. § 1952(a).

172. *See, e.g.*, United States v. Nader, 542 F.3d 713, 720 (9th Cir. 2008) ("[I]ntrastate telephone calls involved the use of a facility "in" interstate commerce."); United States v. Smith, 789 F.2d 196, 203 (3d Cir. 1986) (finding that government must only prove use of a facility of interstate commerce under § 1952).

redundant and superfluous each and every time that Congress decided to draft a statute in this manner.[173] The Supreme Court, however, has clearly affirmed that "every clause and word of a statute" is to be given full effect, and that courts should be "reluctant to treat statutory terms as surplusage."[174]

In reading the child-pornography statutes as if they utilized identical "facility" language as in §§ 1958 and 1952, the majority of circuits interpreted "in interstate commerce" as an insignificant expression of congressional intent.[175] Effectively, these courts erroneously read into the statute the phrase "facility of interstate commerce," upholding a conviction where the government only demonstrated use of an interstate facility without interstate movement. In contrast, the Tenth Circuit upheld the distinction, demanding evidence of actual interstate movement, and aptly observing that Congress could expand the jurisdictional language at its discretion.[176] If courts are to avoid the appearance of capriciousness in applying statutes—as they must to "promote[] the important considerations of consistency and predictability in judicial decisions"[177]—they may not conflate actual movement "in interstate commerce" with mere use of an "instrumentality" or "facility" of interstate commerce. The decision to do so in the child pornography statutes rendered the distinct terms superfluous,[178] and violated the Supreme Court's mandate that "it is not the function of the courts to amend statutes under the guise of 'statutory interpretation.'"[179]

b. Jurisdictional Elements Addressing the Exploitation of Children

One of the probable reasons why the majority circuits seemingly marginalized the jurisdictional dichotomy was the salience of the subject matter. Undoubtedly, "[t]he prevention of sexual exploitation and abuse of

173. *See* 18 U.S.C. § 1201 (2006) (providing, in federal kidnapping statute, jurisdictional nexus for situations involving either transportation "in interstate or foreign commerce," or for use of "any facility, or instrumentality of interstate or foreign commerce"); 18 U.S.C. § 922(g) (2006) (providing analogous use of varying jurisdictional terms within a single statute).

174. Duncan v. Walker, 533 U.S. 167, 174 (2001) (declining to treat pivotal statutory term as meaningless surplus, thereby giving it no operative effect) (citations omitted).

175. United States v. Schaefer, 501 F.3d 1197, 1204 (10th Cir. 2007) ; *see also* Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(7), 122 Stat. 4001, 4002 ("The transmission of child pornography using the Internet constitutes transportation in interstate commerce.").

176. *Schaefer*, 501 F.3d at 1207–1208 (Tymkovich, J., concurring).

177. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 627 (1974) (noting that where a court "errs in its construction of a statute, correction may always be accomplished by legislative action.").

178. Moreover, even outside the criminal context, where the burden of proof is considerably lower than in the instant criminal framework, the jurisdictional view endorsed by the majority circuits is similarly undermined by the Supreme Court's approach to the Federal Arbitration Act ("FAA"). *See* 9 U.S.C. § 2 (2006). The Court expressly noted that if the FAA "were restricted to transactions actually 'in commerce,'" then the evidence would need to show an actual "'interstate transaction' or that [] loans 'originated out-of-state' or . . . [were] inseparable from 'any out-of-state projects.'" Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003). Since the statute utilized broader "involving commerce" language, "the FAA encompass[ed] a wider range of transactions than those actually 'in commerce,'—that is, 'within the flow of interstate commerce.'" *Id.* (citing Allied-Bruce Terminix Cos, Inc. v. Dobson, 513 U.S. 265, 273 (1995)) (citations omitted). The Court's clear acknowledgement of the evidentiary difference between "in commerce" and broader jurisdictional language should have guided the majority circuits in rejecting their ultimate conclusion.

179. Fedorenko v. United States, 449 U.S. 490, 513 n.35 (1981).

children constitutes a government objective of surpassing importance."[180] Although the majority circuits seemingly derived their interpretations from the statutory text, more likely, because of the topic, these courts were receptive to advancing the public-policy objectives underlying the statutes by reading the jurisdictional-nexus language broadly to cover even mere use of the Internet facility.[181] Indeed, advocates of the intentionalism and purposivism school of statutory construction could cogently argue that the majority decisions complied with Congress's motivations in enacting §§ 2252 and 2252A. While colorable, this reading gives far too little credit to Congress and its ability to craft statutes that adequately advance its policy aims; in this case, Congress's interest in safeguarding children.

In reality, in the context of the sexual exploitation of children, Congress has repeatedly demonstrated its drafting acumen by crafting statutes with distinctly broad language, again distinguishable from the child-pornography acts. In one such child-prostitution statute,[182] Congress prohibited the use of "any facility or means of interstate or foreign commerce."[183] In this instance, Congress chose to use expansive language to regulate a different type of child sexual exploitation, as compared to the narrow language utilized to regulate child pornography in the original §§ 2252 and 2252A. The wording of § 2422 does not require evidence of actual interstate movement to implicate the jurisdictional provisions of the act. Rather, use of the Internet alone, as a facility of interstate commerce, would suffice to implicate the provisions of the section.[184] Although §§ 2422, 2252 and 2252A all concerned the sexual exploitation of children, the language in the former section clearly differed and was more expansive than the text in the latter sections. Even when Congress updated § 2422 to include subsection (b), Congress did not see fit to similarly update §§ 2252 and 2252A to include the "facility" or "instrumentality" language until the Tenth Circuit's decision. In spite of Congress's discernible intent to employ this clear distinction, the majority circuits treated the jurisdictional element of §§ 2252 and 2252A identically to § 2242(b), requiring

180. New York v. Ferber, 458 U.S. 747, 757 (1982) (upholding state, child-pornography law against First Amendment challenge). *See also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 263 (2002) ("The Court has long recognized that the Government has a compelling interest in protecting our Nation's children.").

181. *See, e.g.*, United States. v. MacEwan, 445 F.3d 237, 245–46 (3d Cir. 2006); United States. v. Runyan, 290 F.3d 223, 242–43 (5th Cir. 2002) (stating that the use of the Internet constitutes interstate commerce).

182. 18 U.S.C. § 2422(b) (2006) ("Whoever, using the mail or any facility or means of interstate or foreign commerce . . . knowingly persuades . . . any [minor]. . . to engage in prostitution . . . .").

183. The addition of current subsection (b) in 1998 amended the original statute that included only subsection (a). Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, Title I, § 102, 112 Stat. 2974, 2975–76 (1998). Notably, subsection (a) only punishes the persuasion, inducement, enticement, or coercion of any individual "to travel in interstate or foreign commerce," rather than including the "mail or any facility or means of interstate or foreign commerce" later added to subsection (b). *Id.* This distinction further highlights Congress's use of distinct jurisdictional elements as it sees fit.

184. *See, e.g.*, United States v. Tykarsky, 446 F.3d 458, 464 (3d Cir. 2006) (holding that Internet use, as a channel or instrumentality of interstate commerce, satisfied § 2422(b)'s "facility" requirement); United States v. Bolen, 136 F.App'x. 325, 329 (11th Cir. 2005) (concluding that defendant violated the law by using a facility or means of interstate commerce—"that is a computer connected to the Internet"); United States v. Fuller, 77 F.App'x. 371, 379 (6th Cir. 2003) (finding that use of "both the Internet and the telephone, facilities or means of interstate commerce" establishes interstate commerce under the statute).

mere use of "a channel and instrumentality of interstate commerce."[185]

This failure to correctly interpret and apply statutory language is further evidenced by examining 18 U.S.C. § 1470, another statute aimed at protecting children from exploitation.[186] This section similarly utilizes the "facility of interstate commerce" jurisdictional requirement, which may be satisfied without evidence of actual interstate movement so long as the Internet is used.[187] Under this rubric, courts consistently hold that any transfer of obscene materials over the Internet is sufficient, even in the absence of evidence demonstrating actual movement across state lines.[188]

On numerous other occasions, Congress has consistently recognized the distinction in scope between its use of "in commerce," "instrumentality of commerce," and "affecting commerce."[189] Where appropriate, Congress has purposefully expanded the jurisdictional language to broaden the applicability of a particular statute to encompass activities not previously covered.[190] In such instances, Congress's intent and purpose to place disparate burdens of proof upon the government in distinct situations is unambiguously conveyed through the enacted statutory language. The approach taken by the majority of circuits ignored this distinction, conflating use of an "instrumentality" or "facility," with actual interstate movement. The comparison statutes, enacted with language distinct from that of the child pornography acts, reflected a congressional preference for a different jurisdictional nexus in each context. This distinction supported the Tenth Circuit's conclusion that evidence of movement "in commerce" needed to be proven under §§ 2252 and 2252A, even if statutes utilizing looser jurisdictional language did not require similar proof. Assuming "two plausible interpretations of a federal criminal statute," the alternative that does not "impute an intention to Congress to use its full commerce power" should be followed.[191] Congress sufficiently demonstrated its ability to exert its commerce clause power differently in various statutes protecting children. As such, the policy interest in preventing the exploitation of children did not justify an interpretation of §§ 2252 and 2252A to proscribe activity absent from the text.

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185. *See, e.g.*, *MacEwan*, 445 F.3d at 246; *Machtley*, 163 F.App'x. at 839 (finding that use of the Internet is sufficient to constitute interstate commerce).

186. 18 U.S.C. § 1470 (2006) ("Whoever, using the mail or any facility or means of interstate or foreign commerce, knowingly transfers obscene matter to another individual who has not attained the age of 16 years. . . .").

187. *Id*.

188. *See, e.g.*, United States v. Spurlock, 495 F.3d 1011, 1013 (8th Cir. 2007) (finding transfer of obscene materials via the Internet sufficient by itself); United States v. Schnepper, 161 Fed. App'x. 678, 680 (9th Cir. 2006) (upholding jury's determination that defendant e-mailed obscene pictures, without evidence of actual interstate movement).

189. *See, e.g.*, H.R. Rep. 93-1107 at 9–11 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7702, 7711–13 (stating that purpose of amendment to 15 U.S.C. § 45, which changed the FTC's jurisdiction from activities "in commerce" to activities "in or affecting interstate commerce," was to broaden the FTC's jurisdiction to the maximum extent permitted by the Commerce Clause); H.R. Rep. 96-871, at 1–2 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 2732, 2732–33 (explaining that amendment to 15 U.S.C. § 18, which changed the Clayton Act's coverage from activities "engaged in" interstate commerce to those "affecting commerce," was intended to expand coverage to the maximum extent allowed under Congress's commerce power).

190. H.R. Rep. 93-1107 at 9–11; H.R. Rep. 96-871, at 1–2.

191. United States v. Lopez, 514 U.S. 549, 610 (1994) (Souter, J., dissenting).

B. The Weight of Legislative History

In addition to the textual and contextual support provided by the aforementioned statutes, the relevant legislative history further undermines the majority's statutory conclusions. While the final text of a statute should reflect the legislative purpose,[192] in situations where congressional intent is ambiguous and difficult to discern, courts often turn to the legislative history underpinning the enactment of a statute.[193] Such use of extrinsic evidence aligns with the intent-based theories of statutory construction, as it is intended to reveal what the legislature intended to accomplish and how it would resolve a judicial dilemma.[194] Because of the repeated criticisms leveled against judicial scrutiny of legislative history,[195] its role in statutory construction has diminished in favor of "enhanced reliance on textual cues."[196] Nevertheless, extrinsic evidence continues to play a role "to the extent [it] shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."[197] The circuits' inability to find common meaning in the text irrefutably suggests ambiguity in the statute, warranting resort to other reliable indicators.

Interestingly, Congress's resolution of the instant judicial dispute resulted in a drastic amendment to the jurisdictional text of §§ 2252 and 2252A. The amended sections integrated the majority circuits' policy concerns with the Tenth Circuit's suggestion that Congress expand its exertion of authority if it intended to curtail all transmissions of child pornography over the Internet. But since courts are neither capable nor inclined to amend statutes whenever they encounter difficult situations, the subsequent legislative action provides no guidance for how the original "in commerce" formulation should have been interpreted. This issue remains an open and salient question, as statutory construction of statutes regulating the Internet and interstate commerce will remain a common problem in the future.

In fact, a clear disparity emerges between the recent history[198] and that which was available to the courts when they decided the issue in question.

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192. *See* INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992) ("In construing statutes, we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.")

193. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (discussing the benefits of legislative history in helping a court understand the context and purpose of a statute); Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1972–74 (2007) (observing that use of legislative history reflects "a relatively minimalist approach to decision making, while textualism is a more 'maximalist' projection of Supreme Court power").

194. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 636–40 (1990) (discussing how the hierarchy of legislative sources is based upon the comparative reliability of each source).

195. *See generally* Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 568–69 (2005) ("Judicial investigation of legislative history has a tendency to become . . . an exercise in "'looking over a crowd and picking out your friends.'" (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983))).

196. John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1307 n.97 (2010); Foy, *supra* note 123, at 296 n.15; Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 386 (1999).

197. *Exxon*, 545 U.S. at 568 (Kennedy, J., concurring).

198. *See supra* Section III.C.

1. Legislative History for Sections 2252 and 2252A

In originally drafting §§ 2252 and 2252A and through multiple subsequent amendments, Congress attempted to provide courts with clear language from which to decipher congressional intent. Yet, finding ambiguity in the meaning of transports "in commerce," the courts could have considered the considerable legislative history to ascertain the proper construction of statutory language.[199] Reference to the legislative history would have been particularly useful where certain courts disregarded the common canons of textual interpretation and failed to abide by prior rulings upon identical jurisdictional phrasing. Neither the Tenth, Third, nor any other circuit considered the legislative history in making its decision; rather, each circuit assumed its reading of the statute was correct and resolved the individual cases accordingly.

In fact, the legislative history provides ample guidance in this situation. The Senate's Judiciary Committee, in drafting the original statute in 1977, clearly stipulated that it was Congress's intention for the government to have "the affirmative burden" of proving that the alleged perpetrator knew or should have known that illicit materials were to be "transported in interstate or foreign commerce."[200] The Committee considered this threshold "necessary to preserve the balance" between federal, state, and local authorities, despite the overwhelming policy interest of protecting minors.[201] The Committee's findings suggest that Congress was concerned with the interstate character of the illicit activity, and intentionally limited the statutory scope to require evidence of actual dissemination in interstate commerce.[202]

Further elucidating the lawmakers' original understanding of "in commerce" is the Department of Justice's response to Congress's request for comment, which played a central role in crafting and implementing the statute.[203] The Department recommended that the statute cover only conduct in which the prohibited pictures themselves were moved in interstate or foreign commerce.[204] Notably, the Department also insisted that any references to the expansive term "affect[ing] interstate commerce . . . be deleted from the bill," to avoid any confusion as to the scope of the law.[205] Seeing as Congress

199. *See Exxon*, 545 U.S. at 568 ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

200. S. REP. NO. 95-438, at 16 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 53–54.

201. *Id*.

202. *See generally* Potomac Elec. Power Co. v. Dir., Office of Workers' Comp. Programs, 449 U.S. 268, 275 (1980) ("The legislative history of the Act is entirely consistent with the conclusion that it was intended to mean what it says.").

203. *See generally* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 546 (1978) (stating that Justice Department's "contemporaneous interpretation" is entitled to "some deference" due to Department's role in drafting specific legislation); United Ass'n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Reno, 73 F.3d 1134, 1139 (D.C. Cir. 1996) ("[C]ontemporaneous interpretation by the agency of government responsible for administering the . . . laws deserves considerable respect, not only because of the Justice Department's responsibilities and expertise, but also because the reasons supporting its conclusion are compelling.").

204. S. REP. NO. 95-438, at 25–26 (1978), *reprinted in* 1978 U.S.C.C.A.N. 40, 60.

205. *Id*. at 26.

accordingly limited the statute to movement "in interstate commerce," it is reasonable to believe that the lawmakers agreed with the Department's views, and that evidence of actual movement in interstate commerce should have been required to meet the jurisdictional nexus.[206]

The legislative history of subsequent amendments to § 2252 demonstrates that Congress never contemplated eliminating the "affirmative burden" to prove actual interstate commerce.[207] When Congress amended § 2252 to include movement in interstate commerce "by any means including by computer," the legislative history shows that this addition aimed to broaden the potential means of actual interstate transport and shipment since only tangible means of movement had previously been contemplated.[208] Although the Third Circuit was correct in noting that "Congress's specific inclusion of the term 'including by computer' denotes its special concern for the transmission of child pornography by electronic means,"[209] there is no indication in either the statutory language or legislative history that Congress intended to eliminate the burden of proving interstate movement simply because a computer was used to transport the images across state lines.[210]

Moreover, in enacting § 2252A as recently as 1996, Congress again utilized the same narrow jurisdictional language that it had employed in § 2252.[211] The plain language again speaks of movement "in interstate commerce," rather than use of an "instrumentality" or "facility" of interstate commerce. Had Congress altered the jurisdictional language in a very similar statute to only entail use of an "instrumentality" or "facility" of interstate commerce, a stronger argument could be made that Congress had clarified the meaning of the original statute to require less than actual interstate movement.[212] But Congress's decision to again use the narrower wording in § 2252A should have suggested to the courts that Congress believed the original wording of § 2252 to be sufficiently clear.

2. Legislative Circumstances of Comparison Statutes

The legislative history of analogous statutes provides further support to

206. *Id*.

207. *See, e.g.*, Child Protection and Obscenity Enforcement Act of 1988; 134 CONG. REC. E3750-01 (1988) (statement of Rep. William Hughes) (noting amendments continuing the prohibition of distribution or receipt of illicit materials "in interstate or foreign commerce").

208. *Id.* (indicating the amendments "prohibit the transportation of shipment in interstate or foreign commerce by means of computer of visual depictions of child pornography").

209. United States v. MacEwan, 445 F.3d 237, 243 n.6 (3rd Cir. 2006).

210. Such a reading would render the language requiring movement "in commerce" effectively meaningless.

211. Child Pornography Prevention Act of 1996, Pub. L. 104–208, Stat. 3009 (1996), *invalidated by* Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002).

212. An argument could also be made that such a change would have indicated Congress's desire for two different standards in applying each statute. However, observing the almost identical substantive language in §§ 2252 and 2252A, it would have been difficult for courts and litigants to determine when each statute applied, creating great unpredictability in enforcement. Considering the identical language, it defies reason to conclude that Congress would have intended for the statutes to be applied in such a polar opposite manner.

the minority view espoused by the Tenth Circuit.[213] The legislative history to the previously discussed § 1958 further evidences Congress's intent for the "facility of interstate commerce" phrasing to mean that sheer use of a "means of transportation and communication . . . is sufficient to trigger federal jurisdiction."[214] Congress worded § 1958 broadly out of concern that local authorities could not deal with organized crime figures and lacked resources to investigate interstate crimes.[215] The use of "facility of interstate commerce" provided for a wider scope in application, and, was therefore, better suited to Congress's legislative goals in this instance.[216] As a result, courts construe this statute to apply to mere uses of a facility of interstate commerce, irrespective of the intrastate or interstate destination of illegal activities.[217] Such construction is consistent with both the plain meaning of the statutory language as well as the legislative history, and reflects the fact that Congress expressed a different intent in crafting this statute as compared to the child pornography sections.[218]

Furthermore, the legislative history to § 2422(b), a statute with distinctly broader language than the former child-pornography sections, suggests that the "facility" language was added specifically in response to the growing popularity and threat to minors posed by the Internet.[219] Congress intended the expansive language to "make[] it a federal crime to use the Internet to contact a minor for illegal sexual activities such as . . . child prostitution."[220] Neither the actual statute nor the legislative history suggests that evidence of actual interstate movement is necessary to implicate the jurisdictional provisions of this act.[221] Rather, use of the Internet alone, as a facility of interstate commerce, suffices to fall within the scope of § 2422(b).[222] Unlike the legislative history for the former §§ 2252 and 2252A, the history for § 2422(b) confirms its intended broad application, leaving little doubt about its applicability.

The majority circuits' failure to understand congressional intent is further evidenced by considering yet another statute aimed at protecting children from

213. *See* Patsy v. Bd. of Regents, 457 U.S. 496, 507–08 (1982) (relying on legislative history of statutes utilizing similar language to ascertain meaning of statute at issue); Lehman v. Nakshian, 453 U.S. 156, 167 n.16 (1981) (consulting the legislative history of statutes *in pari materia* to the statute at issue).

214. S. Rep. No. 98-225, at 305 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3484.

215. *Id.*

216. *See* 18 U.S.C. § 1028(c)(3) (2006) ("[P]roduction, transfer, possession, or use prohibited by this section is in or affects interstate or foreign commerce; including the transfer of a document by electronic means"). The statute demonstrates that Congress may exert its full commerce power by using term "affecting interstate or foreign commerce. Russell v. United States, 471 U.S. 858, 859 (1985).

217. Clark, *supra* note 133, at 950.

218. *See* Moskal v. United States, 498 U.S. 103, 108 (1990) (discussing when to resort to looking at legislative history to support statutory language).

219. *See* 144 CONG. REC. S12852-02 (daily ed. Oct. 21, 1998) (statement of Sen. Patrick Leahy).

220. 144 CONG. REC. E2136 (daily ed. Oct. 13, 1998) (statement of Rep. Robert Cramer) (titled the Child Protection and Sexual Predator Punishment Act of 1998).

221. H.R. REP. NO. 105557, at 10 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 679 (noting that the bill "targets pedophiles who stalk children on the Internet. It prohibits contacting a minor over the Internet for the purposes of engaging in illegal sexual activity . . . .").

222. *See supra* note 184 and accompanying text.

exploitation.[223] Section 1470 similarly utilizes the "facility of interstate commerce" jurisdictional requirement, which may be satisfied without evidence of actual interstate movement so long as the Internet is used.[224] Importantly, the legislative history to the statute explicitly drew a distinction between an actual shipment in interstate commerce and simple use of the Internet. When discussing the production of child pornography, Representative Gilman stated that 18 U.S.C. § 2251, a section with identical jurisdictional language to the original §§ 2252 and 2252A, applies "if the visual portrayal was produced with materials mailed, shipped or transported by interstate or foreign commerce—including via the Internet."[225] In contrast, when discussing the portion of the bill that became § 1470, the Congressman stated that "this bill also prohibits using the mail or Internet to knowingly transfer obscene matter to another individual known to be under the age of 16."[226] These comments reinforce that, while Congress intended to regulate any connection to a facility or instrumentality of commerce in the latter situation, it focused on actual transport "in interstate commerce" when utilizing the now familiar "in interstate commerce" language.[227]

Considering the aforementioned legislative history, analogous and distinct statutory language, and assuming "that the legislative purpose is expressed by the ordinary meaning of the words used,"[228] §§ 2252 and 2252A plainly required the government to show that the alleged child pornography actually moved "in interstate or foreign commerce."[229]

V. RAMIFICATIONS FOR JUDICIAL DEFERENCE

The ultimate effect of Congress's endorsement of the majority circuits'

223. *See* Child Protection and Sexual Predator Punishment Act of 1998, 144 CONG. REC. H10571 (daily ed. Oct. 12, 1998) (statement of Rep. Scott Hutchinson) (explaining that the Child Protection and Sexual Predator Punishment Act of 1998 "targets pedophiles who stalk children on the Internet. It prohibits knowingly transferring obscene materials to a minor or an assumed minor over the Internet").

224. 18 U.S.C. § 1470 (2006).

225. 144 CONG. REC. H10574 (daily ed. Oct. 12, 1998) (statement of Rep. Benjamin Gilman).

226. *Id. See also* H.R. REP. NO. 105-557, at 10 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 679.

227. One argument that could be advanced against the Tenth Circuit's approach is that Congress's immense interest in halting any sexual exploitation of children should imply a low threshold for meeting the jurisdictional requirement of "in interstate commerce"; suggesting that the jurisdictional requirement should be satisfied just by using an instrumentality of interstate commerce. This argument is fatally flawed in light of Congress's choice to use expansive "facility" language in §§ 1470 and 2422(b), in spite of an equally high interest in eliminating child prostitution, pornography, and exposure to obscenity. Courts should not read non-existent exceptions into statutes. Fedorenko v. United States, 449 U.S. 490, 513 n.53 (1981).

228. Richards v. United States, 369 U.S. 1, 9 (1962).

229. Importantly, Congress's intent to prosecute child pornographers would not have been undermined by requiring the government to advance evidence of actual interstate movement through the use of the Internet. The pervasive availability of proof that Internet transmissions involve the transport of images in interstate commerce allowed the government to easily advance evidence to meet its affirmative burden under the former statutes. *See* United States v. Schaefer, 501 F.3d 1197, 1208 (2007) (Tymkovich, J., concurring) (discussing availability of proof). Additionally, this judicial treatment would have imparted a clear incentive for the government to present clear and readily available evidence, instead of relying on unsubstantiated assumptions about the Internet and its relationship with interstate commerce. Since Congress certainly has a compelling interest in protecting children, it was at liberty to alter the evidentiary burden in the statutes to require mere use of an instrumentality or channel of interstate commerce, but did not do so until after the Tenth Circuit decision.

approach—and belittling of the Tenth Circuit view—is two-fold. Pursuant to this seemingly "winning" perspective, the judiciary is afforded substantial latitude in crafting policy regardless of statutory mandate and the legislature is absolved of its primary responsibility to update and adapt legislation to suit the evolving technological climate.

On the latter point, it is evident from the legislative history and timeline, that in the absence of the Tenth Circuit's decision, Congress would not have endeavored to transform the relevant statutory sections from their traditional "in commerce" jurisdictional rooting.[230] Because the Tenth Circuit's decision did not—in theory—adequately advance Congress's policy motives of strict criminal enforcement, the disposition created the impetus to spur Congress into action.[231] Interestingly, Congress is considered to be the branch of government most responsive to "popular will."[232] Precisely because it is more accountable—*i.e.* elected every two years—than its sister branches, it is similarly assumed that Congress is most responsive to the impact of technological development upon legal frameworks.[233] Reflecting this common conception, Congress similarly views itself as the branch best equipped to address legal questions implicating evolving technology.[234]

Yet despite such assumptions, Congress failed to act to update the relevant statutory language even though the courts had clearly been confronted with the instant dilemma. The circuits that previously considered the question ruled in favor of the government, regardless of evidence of actual interstate movement of illicit materials. Because the results aligned with Congress's policy imperatives, Congress ignored the statutory problem. Indeed, to some extent, this may be advanced as an argument supporting Congress's choice not to act until the circuit split arose.

Yet this view misses the point. Rather than focusing on Congress's failures, the onus must fall squarely on the courts. The checks and balances built into the Constitution only function properly if each branch of government actually demands that the other branches execute their constitutionally-mandated role. The judiciary can interpret existing laws,[235] but it must also

230. *See* statement by Rep. Conyers, *supra* note 90 (explaining how the bill is the product of the Tenth Circuit's decision in *Schaefer*).

231. *Id.*

232. *See, e.g.*, Indus. Union Dept., AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 685 (1980) ("Important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1308 (2008) ("[T]he body of Congress [was] designed to be most representative of the population (with membership based on population, not territory) and most responsive to popular control.").

233. Andrew R. Hull, Comment, *The Digital Dilemma: Requiring Private Carrier Assistance to Reach Out and Tap Someone in the Information Age – An Analysis of the Digital Telephony Act*, 37 SANTA CLARA L. REV. 117, 150 (1996) (stating that "Congress's continuing dedication to assure that Title III remained responsive to modern technological realities was further reflected in the comprehensive . . . ECPA amendment"). *See, e.g.*, Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 397 (2005) ("Congress decided to alter the structure of copyright law to make it more responsive to technological change.").

234. *See* Statement of Rep. Ben Cannon, *supra* note 91 (advocating the passage of the Effective Child Pornography Prosecution Act of 2007).

235. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

follow a singular interpretive regime, consistently applying identical statutory language regardless of the context.[236] Such consistency lowers the costs of statutory drafting,[237] and affords litigants and observers with a reliably predictable judicial operatus.[238] While the supporters of the majority view would likely contend that the majority circuits properly applied the law to the facts, as demonstrated above, the majority circuits did not interpret § 2252 and 2252A's jurisdictional language in conformity with their previously consistent interpretations of identical jurisdictional language in other statutes.

Congress's reaction to the Tenth Circuit's contrasting position confirms that Congress is undeniably aware of the meaning given to jurisdictional statements, and the reach of such language as it relates to interstate commerce.[239] Congress's subsequent re-drafting also reflects Congress's recognition that its policy objectives in the context of §§ 2252 and 2252A[240] would be better served through broader phrasing clearly encapsulating illicit transmissions over the Internet. In tailoring their interpretation to suit policy objectives, the majority circuits failed to hold Congress accountable for its legal drafting. Additionally, the prevailing approach did not appropriately incentivize Congress to update the relevant jurisdictional language to reflect modern technological reality. Overall, this approach absolved Congress of its legislative duty.

Relatedly, Congress's acceptance of the majority circuits' interpretation exposes acquiescence to a judicial model where policy questions can dictate the meaning of law. Although a discussion of the benefits and detriments of the use of policy judgments in judicial decision-making is outside the scope of this article, reliance on policy preferences serves to marginalize clear and precise notice of prohibited conduct and encourages arbitrary enforcement of a given statute.[241] In constructing the narrow statutory language to encompass the use of an instrumentality or facility, the majority circuits essentially rewrote the statute to be more expansive, and to place a lower burden upon the government. In so doing, these courts encouraged Congress to craft vague and ambiguous statutes, and to then depend on the courts to give imprecise language precise meaning.[242] Such decision-making comes at a cost: while

236. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994) ("An interpretive regime tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to statutes' scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities. Interpretive regimes serve both rule-of-law and coordination purposes.").

237. *Id.*

238. Note, *Central Bank and Intellectual Property*, 123 HARV. L. REV. 730, 737 (2010) ("Consistent rules of statutory interpretation—regardless of their content—enable litigants and Congress to predict more reliably how courts will construe statutes.").

239. *See supra* note 201 (discussing the "threshold for meeting the jurisdictional requirement of 'in interstate commerce'").

240. *See supra* notes 231.

241. *See, e.g.*, United States v. Gibson, 409 F.3d 325, 334 (6th Cir. 2005) (citation omitted) (discouraging reliance on policy preferences); *see also* Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 103 (2010) ("Policy judgments imply broad discretion; broad discretion precludes clear and precise notice.").

242. *See* Osborne v. Ohio, 495 U.S. 103, 121 (1990) ("[C]areless drafting cannot be considered to be cost free based on the power of the courts to eliminate overbreadth by statutory construction.").

litigants become uncertain as to which interpretation of a law the court will follow, the judiciary is forced to delve deeper into unclear elements of legislative history and to fashion appropriate judicial relief without clear guidance from the legislative body.[243] More directly in the criminal law context, the Supreme Court has previously observed that "a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language."[244]

As mentioned, the majority circuits did not interpret the jurisdictional language in §§ 2252 and 2252A in the same manner as in other instances, thereby neglecting "the inexorable command" of the actual statutory text.[245] Instead, some of the courts specifically noted the role policy considerations played in crafting their rulings, opining that the accused engaged in "the type of child-exploitive and abusive behavior that Congress sought to prohibit . . . ."[246] In addition, the majority circuits attempted to mold the jurisdictional language to suit a different policy objective: to make §§ 2252 and 2252A broadly applicable to illicit activity, even where evidence of actual interstate movement over the Internet was not advanced by the government.[247]

Aside from the regular concerns implicated by dependence on judicial policy preferences,[248] this last activity is particularly important in the context of evolving technology. As one senior jurist opined, "[w]hile discerning Congress's purpose in . . . legislation may require the exercise of some judgment, the court's function is not to assess the extent to which the congressional policy is responsive to current problems or to determine how well-tuned the statute is to subtle changes in people's behavior or market conditions."[249] This view has similarly found support on the Supreme Court, where Justice Breyer—ironically, one of the leading proponents of employing legislative history to inform statutory interpretation—recently chastised a United States Court of Appeals for "bringing [a] statute up to date" and for extending the statute's application "to keep up to date with the technology."[250] As Justice Breyer observed, such policy decisions are reserved for Congress.[251]

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243. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 458 (1989) ("Clear-statement principles force Congress expressly to deliberate on an issue and unambiguously set forth its will . . . .").

244. M. Kraus Bros. v. United States, 327 U.S. 614, 626 (1946).

245. *See supra* Sections IV.A-B.

246. United States v. Andrews, 383 F.3d 374, 378 (6th Cir. 2004) (suggesting that courts should examine whether an activity is for commercial or exploitive purposes in future cases to ensure that the jurisdictional reach of the statute is properly circumscribed). *See also* United States v. Morales-de Jesus, 372 F.3d 6, 20–21 (1st Cir. 2004) (discussing the issues that should be considered in deciding whether a conduct falls within the class of activity which bears the substantial relationship to interstate activity that justifies action by Congress under the Commerce Clause).

247. *See supra* Section III.A.

248. *See, e.g.*, Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism*," 92 CAL. L. REV. 1441, 1464–76 (2004) (mentioning the striking down of arguably constitutional actions of other branches, ignoring of precedent, and judicial legislation, among others).

249. S. Jay Plager & Lynne E. Pettigrew, *Rethinking Patent Law's Uniformity Principle: A Response to Nard and Duffy*, 101 NW. U. L. REV. 1735, 1737–38 (2007).

250. *Id.* at 1738 (citing Transcript of Oral Argument at 53, Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1056.pdf).

251. *Id.*

Unlike the majority circuits, the Tenth Circuit, although expressing its obvious concern for protecting minors from predators, refused to defer to policy prerogatives in deciding whether the relevant sections were responsive to current technological problems brought about by the advent of the Internet.[252] Although Congress subsequently indicated its disapproval for this approach, the later legislation actually vindicated the Tenth Circuit's decision. Rather than relying on courts to bring statutes "up to date" with technological advances, judicial refusal to inconsistently interpret identical statutory language resulted in appropriate and remedial congressional action to align an outdated statute with modern policy imperatives. By interpreting §§ 2252 and 2252A's jurisdictional element strictly, and requiring evidence of actual transportation or shipment in "interstate or foreign commerce,"[253] the Tenth Circuit's disagreeable judicial interpretation provided Congress with the proper incentive to draft statutory language with more precision and awareness for the ramifications of its textual choices.

VI. CONCLUSION

The optimal interpretation of the evidentiary standard in the former §§ 2252 and 2252A placed the affirmative burden upon the government to demonstrate that any illicit materials were transported, shipped, distributed, received, or possessed "in interstate or foreign commerce." Once the government demonstrated that a defendant used the Internet for illegal purposes, it still needed to demonstrate that the child pornography transmitted through the Internet actually moved across state lines. The statutory text did not provide that such behavior constituted illegal conduct merely because the alleged perpetrator utilized an "instrumentality" or "facility" of interstate commerce, or if the activity merely "affected" interstate commerce. In effect, this is a very low threshold since evidence of the interstate element could have been shown through "testimony regarding the location of . . . servers accessed by defendant, or some other evidence."[254]

While the plain text of the statutes supported this reading of Congress's intent, reference to comparable and distinguishable language used in analogous statutes, as well as to the legislative history underlying the child pornography sections, further accentuated and buttressed the interpretation. Further, this approach aligned with the Supreme Court's emphasis on implementing the ordinary meaning of the statutory language. Ultimately, the prevailing view absolved Congress of its responsibility to monitor and update statutory jurisdictional standards; in essence, this result improperly transferred legislative authority to the judiciary.[255] Because technology continues to

252. *See* United States v. Schaefer, 501 F.3d 1197, 1207 (10th Cir. 2007) (holding that Mr. Schaefer's use of the Internet, standing alone, was insufficient to satisfy the jurisdictional requirements of these statutes).

253. *Id.*

254. *See id.* at 1208 (Tymkovich, J., concurring) (inferring interstate movement because AOL servers were located outside the state (citing United States v. Wollet, 164 Fed. App'x. 672 (10th Cir. 2006))).

255. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 885 n.50 (1977) ("[J]udicial rewriting of statutes would derogate Congress's 'incentive to draft a narrowly tailored law in the first place.'" (citing

evolve, courts should not neglect their obligation to give force to the statutory text regardless of idiosyncratic policy concerns implicated by outdated legislative text.

Osborne v. Ohio, 495 U.S. 103, 121 (1990))).