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Rational Basis Is The Only Rational Solution: Resolving Foreign Commerce Clause Confusion

Justin Senior

RATIONAL BASIS IS THE ONLY RATIONAL SOLUTION: RESOLVING FOREIGN COMMERCE CLAUSE CONFUSION

Justin Senior[*]

Abstract

Congress enacted the PROTECT Act in 2003 to curtail the sexual abuse of children by U.S. citizens abroad. While the Act has not received much attention from scholars or courts, defendants in court consistently challenge its constitutionality. Congress maintains that it has the Foreign Commerce Clause power to prohibit the illicit sex activity in question. However, the Foreign Commerce Clause, unlike its Interstate and Indian Commerce Clause brethren, has received very little attention. The Supreme Court has rarely—and not at all recently—discussed the Foreign Commerce Clause; and its lack of guidance in this arena has led to a recently widened circuit split regarding the constitutionality of the Act and the scope of the Foreign Commerce Clause.

Lower courts are at a loss for how to approach and analyze the Foreign Commerce Clause in the context of the Act. Some courts use the Interstate Commerce Clause framework; others create new language and establish their own tests. These approaches have overcomplicated analysis for the foreign context. While other scholars have discussed this issue, they have generally contributed to the confusion by also creating new tests. This Note is the first endeavor to simplify the approach to Foreign Commerce Clause cases. It argues that courts should employ the age-old rational basis standard. This solution represents a commonsense approach and simplifies analysis for Foreign Commerce Clause cases in the future; additionally, it clears up the overcomplicated state of the jurisprudence created by the circuit split.

* J.D. Candidate 2017, University of Florida Levin College of Law. I am dedicating this Note to my dad, Bill, for showing me the value of "mental toughness" and teaching me how to read, write, and throw. I want to thank my mom, Pat, and my sister, Lexi, for their endless love, support, and positivity. Additionally, I would like to thank Professor Sharon Rush for her mentorship as well as her invaluable thoughts and comments, without which this Note would have never made it to the finish line. Thank you to Bianca Manos, whose encouragement and companionship got me through all of law school, let alone this Note-writing process. Finally, I would like to thank the staff editors and members of the *Florida Law Review*, to whom I am forever indebted, not only for their diligent work on this Note and every other part of our publication, but also for their laughter, generosity, comfort, guidance, and friendship both in and out of the office.

INTRODUCTION

Larry Michael Bollinger was an ordained Lutheran minister.[1] In 2004, he moved to Haiti to oversee a large ministry at a religious center that served "hundreds of children."[2] He was also a sex addict.[3] In 2009, Bollinger began molesting and sexually abusing young Haitian girls.[4] After returning to the United States and admitting his sexual contact with young girls in Haiti to a psychologist, Bollinger remained "adamant" that

1. United States v. Bollinger, 798 F.3d 201, 203 (4th Cir. 2015).
2. *Id.*
3. *Id.*
4. *Id.*

he had not molested any children in the United States—most likely thinking he could disclose his illicit sex with children in Haiti because he "was beyond the reach of the law" in another country.[5]

A grand jury indicted Bollinger and charged the minister with two counts of engaging in illicit sex acts with minors after travelling in foreign commerce, thereby violating 18 U.S.C. § 2423(c) of the PROTECT Act.[6] The PROTECT Act, or the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today,[7] aims, in relevant part, to "close significant loopholes in the law that persons who travel to foreign countries seeking sex with children are currently using to their advantage in order to avoid prosecution."[8] Specifically, § 2423(c) of the PROTECT Act gives Congress the power to punish U.S. citizens who travel in foreign commerce and then engage in an illicit sex act with anyone under the age of eighteen.[9] Congress currently possesses the power to enact this statute through its Foreign Commerce Clause power.

The U.S. Constitution has three Commerce Clauses: Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[10] While the U.S. Supreme Court has regularly examined the second clause—the Interstate Commerce Clause—always attempting to shape and define the scope of Congress's power using past Commerce Clause jurisprudence to guide its decisions, the Court has yet to thoroughly explore the Foreign Commerce Clause (the power "[t]o regulate Commerce with foreign Nations"). Accordingly, the Interstate Commerce Clause has garnered major scholarly attention, while the Foreign Commerce Clause has only recently started to enter the scholarly domain.[11] Although the Court has discussed the Foreign Commerce Clause,[12] it has yet to grant certiorari to this recent brand of Foreign Commerce Clause cases: those asking whether Congress has the extraterritorial power to punish U.S. citizens

5. *Id.* at 204.

6. *Id.*

7. Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended in 18 U.S.C. § 2423(c) (2012)).

8. H.R. REP. NO. 107-525, at 3 (2002).

9. 18 U.S.C. § 2423(c) (2012).

10. U.S. CONST. art. I, § 8, cl. 3.

11. *See, e.g.*, Naomi Harlin Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 FLA. L. REV. 1139, 1148 (2013).

12. *See, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 (1979) ("[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments." (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976))).

who molest children in other countries.[13] Congress currently possesses and exercises this power through the PROTECT Act.

Because the Supreme Court has not only avoided granting certiorari to cases discussing the PROTECT Act but has also failed to provide any guidance or establish any analytical framework for deciding Foreign Commerce Clause cases, lower courts have addressed and decided such cases with disparate methods.[14] The Supreme Court's limited discourse concerning the Foreign Commerce Clause marks the importance of "speak[ing] with one voice when regulating commercial relations with foreign governments."[15] However, the Court's failure to establish a framework or test with which lower courts can decide foreign commerce cases with a unified voice has led to a recently widened circuit split.[16] This lack of guidance, and subsequent lack of unity, creates an urgent need for an official, singular approach with which to decide Foreign Commerce Clause issues. Several excursions into Foreign Commerce Clause jurisprudence—such as Professor Naomi Harlin Goodno's *Florida Law Review* Article,[17] to which this Note refers frequently—have dealt with this issue by examining the circuit split, but none have taken the newest case law into account; specifically, current scholarship has not addressed a new standard created by the U.S. Court of Appeals for the Fourth Circuit in *United States v. Bollinger*,[18] which this Note analyzes later to come to a conclusion about the current state of Foreign Commerce Clause case treatment.

This Note explores the current and confusing landscape of Foreign Commerce Clause jurisprudence. While some lower courts have directly applied major elements of interstate commerce analysis to foreign commerce issues,[19] other courts have established their own distinctive

13. *See, e.g.*, United States v. Bianchi, 386 F. App'x 156, 157 (3d Cir. 2010), *cert. denied*, 562 U.S. 1200 (2011); United States v. Clark, 435 F.3d 1100, 1102 (9th Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007).

14. *See infra* Part III (discussing the circuit split on this issue).

15. *Michelin*, 423 U.S. at 285.

16. *See infra* Part III.

17. Goodno, *supra* note 11, at 1178–88 (demonstrating Foreign Commerce Clause jurisprudence in chart form).

18. 798 F.3d 201, 215–16 (4th Cir. 2015) (creating a new requirement that Congress can regulate any activity that demonstrably affects commerce).

19. *See, e.g.*, United States v. Al-Maliki, 787 F.3d 784, 792–93 (6th Cir. 2015) (importing Interstate Commerce Clause analysis on the basis that Congress's Foreign Commerce Clause power might not be more expansive than its interstate power); United States v. Pendleton, 658 F.3d 299, 308 (3d Cir. 2011) (applying Interstate Commerce Clause analysis from the "time-tested" *Lopez* framework); United States v. Homaune, 898 F. Supp. 2d 153, 159 (D.D.C. 2012) (applying Interstate Commerce Clause analysis to the question of whether the Foreign Commerce Clause sanctioned the International Parental Kidnapping Crime Act).

standards.[20] Part I of this Note focuses on the innate differences between the Interstate and Foreign Commerce Clauses by: (1) briefly discussing their individual backgrounds and (2) determining whether courts can (or should) use interstate analysis in the foreign context. Additionally, Part I concludes that the Foreign Commerce Clause might require its own independent framework, as some other scholars suggest.[21] Part II discusses both the legislative history and evolution of the PROTECT Act. Part III examines the recently-widened circuit split and the way the storied interstate jurisprudence has misinformed modern courts in their Foreign Commerce Clause analysis. Part IV argues that § 2423(c) is constitutional. Part V then suggests that courts use a rational basis approach rather than a new framework for analyzing foreign commerce issues.

I. COMMERCE CLAUSE BACKGROUND

Effectively answering whether interstate commerce analysis applies to foreign commerce issues requires a general understanding of the relevant history and background of Interstate Commerce Clause jurisprudence. A struggle to balance federal and state power lies at the heart of almost every Interstate Commerce Clause case;[22] in such cases, the Supreme Court focuses on preserving state sovereignty.[23] On the other hand, federalism does not constrain Congress's foreign commerce

20. *See, e.g.*, *Bollinger*, 798 F.3d at 215–16 (holding that "the Foreign Commerce Clause allows Congress to regulate activities that demonstrably affect such [foreign] commerce"); United States v. Clark, 435 F.3d 1100, 1114 (9th Cir. 2006) (suggesting that Congress has authority to legislate if the subject of a statute has a "constitutionally tenable nexus with foreign commerce").

21. *See, e.g.*, Goodno, *supra* note 11, at 1152 (concluding that "the Foreign Commerce Clause needs its own distinct and comprehensive legal framework that reflects relevant history precedent, and text").

22. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("We enforce the 'outer limits' of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government."); *see also* Goodno, *supra* note 11, at 1151 n.56 ("The history of the commerce clause adjudication is, in a very real sense, the history of federalism." (quoting JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 158 (8th ed. 2010))).

23. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 620 (2000) ("[T]he Framers' carefully crafted [a] balance of power between the States and the National Government."); United States v. Lopez, 514 U.S. 549, 575 (1995) ("This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.").

power.[24] Where the framers, and subsequently the courts, emphasize the importance of differentiating national and local activities in the interstate context, this emphasis is absent in the foreign context, wherein the government need not address issues of state sovereignty. This major difference indicates that the interstate commerce analysis should not apply in the foreign context.

A. *Interstate Commerce Clause History*

The history of Interstate Commerce Clause jurisprudence reaches back almost two hundred years to seminal cases such as *Gibbons v. Ogden*.[25] While modern courts employ a tri-category framework established in *United States v. Lopez*[26] and do not frequently look back to older cases to support the essence of their analyses, this Note attempts to lay a concise foundation for a general understanding of how the interstate analysis evolved.

In *Gibbons*, the Court provided the first judicial definition of commerce. Chief Justice John Marshall indicated that commerce included "intercourse and trade among the several States" as well as "navigation" in states.[27] The Court has developed different views on what constitutes commerce and what Congress may regulate. Over one hundred years later, the Court in *NLRB v. Jones & Laughlin Steel Corp.*[28] held that Congress had the power to regulate activities that had a "close and substantial relation to interstate commerce."[29] Expressing concerns for federalism, this Court also warned that Congress must respect our dual system of government.[30] Shortly thereafter, the Court introduced the "aggregate effect" principle in *Wickard v. Filburn*.[31] The Court held that Congress has the power to regulate local intrastate activities—in this case

24. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 n.13 (1979) (implying that neither federalism nor state sovereignty limit Congress's power to regulate foreign commerce).

25. 22 U.S. (9 Wheat.) 1 (1824).

26. 514 U.S. 549, 558–59 (1995); *see infra* notes 35–36 and accompanying text.

27. *Gibbons*, 22 U.S. (9 Wheat.) at 65.

28. 301 U.S. 1 (1937).

29. *Id.* at 37.

30. *Id.* ("[T]he scope of [the interstate commerce power] must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.").

31. 317 U.S. 111, 127–28 (1942) ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

the production of wheat for personal use—if they aggregately have a "substantial economic effect" on interstate commerce.[32]

Several cases echoed this language into the mid-1990s.[33] In some cases, the Court expanded and clarified concepts such as "navigation," holding that Congress has the power to regulate the transportation of passengers as well as the "channels of interstate commerce."[34] Finally, in 1995 the Court in *Lopez* established the analytical framework modern courts use in determining Interstate Commerce Clause issues.[35] Building upon the concepts of intercourse, trade, and substantial effect, the Court created a tri-category framework: Congress may regulate (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) those activities that have a substantial relation to interstate commerce or that substantially affect interstate commerce.[36] Courts have adopted this framework as the new standard, and it has ostensibly limited Congress's Commerce Clause power. In *United States v. Morrison*,[37] the Court noted that while violence against women did affect the national economy, this "noneconomic, violent criminal conduct" did not—even in its aggregate—have a substantial effect on interstate commerce.[38] This Court, along with the Court in *Lopez*, expressed concerns for federalism, holding that regulating the activities in each case would constitute a national police power that ignores state sovereignty.[39]

The three categories the Court in *Lopez* set forth relate only to interstate commerce and omit any mention of foreign commerce.[40] Furthermore, the Court not only in *Lopez* and *Morrison* but also in several of the other watershed cases mentioned above, explicitly articulates its

32. *Id.* at 125.

33. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 302 (1964) ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ." (quoting *Wickard*, 317 U.S. at 125)).

34. *E.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917))).

35. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995).

36. *Id.*

37. 529 U.S. 598 (2000).

38. *Id.* at 617.

39. *See id.* at 618; *Lopez*, 514 U.S. at 567.

40. *See* Goodno, *supra* note 11, at 1162. For individual analysis of each of these three categories, see *id.* at 1156–58.

concern for federalism and state sovereignty.[41] How can courts apply this framework to foreign commerce cases, which U.S. case law indicates have no such concern with federalism and state sovereignty? Nonetheless, a host of courts apply this interstate framework in the foreign context.[42]

B. *Foreign Commerce Clause History*

The Supreme Court's Foreign Commerce Clause jurisprudence is far less extensive. While the Court has had many dynamic discussions concerning the Interstate Commerce Clause, it has rarely touched on foreign commerce issues.[43] Despite this limited discourse, however, the Court has remained consistent on the Foreign Commerce Clause by indicating that federalism does not constrain its "exclusive and plenary" power.[44] Moreover, while the Court has yet to establish its own framework for such issues, it has indicated that Foreign Commerce Clause issues require "a more extensive constitutional inquiry" than Interstate Commerce Clause issues.[45] *Japan Line, Ltd. v. County of Los Angeles*[46] provides a thorough summary of relevant Foreign Commerce Clause jurisprudence for the purposes of this Note.[47]

In *Japan Line*, the Court went one step further and expressly rejected the appellee's argument that "the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved."[48] Subsequently, rather than creating a new framework, the Court simply echoed its prior Foreign Commerce Clause cases and held that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."[49]

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41. *See, e.g.*, Bd. of Trs. of Univ. of Ill. v. United States, 289 U.S. 48, 57 (1933) (insisting that "[t]he principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce").

42. *See infra* Section III.A.

43. *See, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 456 (1979) (analyzing a foreign commerce issue); Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) (discussing the federal government's approach to foreign commerce cases); *Bd. of Trs.*, 289 U.S. at 53 (examining the breadth of the Foreign Commerce Clause).

44. *See, e.g.*, *Bd. of Trs.*, 289 U.S. at 56–57 ("As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action.").

45. *Japan Line*, 441 U.S. at 446.

46. 441 U.S. 434 (1979).

47. *See id.* at 448–49.

48. *Id.* at 446.

49. *Id.* at 449 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285–86 (1976)) ("The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause.").

C. *The Interstate Commerce Clause Analysis Cannot Be Superimposed on Foreign Commerce Issues*

This review of fundamental Interstate and Foreign Commerce Clause jurisprudence indicates that the modern tri-category framework used for analyzing Interstate Commerce Clause issues does not—and should not—apply to Foreign Commerce Clause issues. While the Court developed the Interstate Commerce Clause framework with state sovereignty and federalism concerns in mind, it does not take such concerns into account while deciding foreign commerce issues. Additionally, not only has the Court indicated that the Interstate framework does not fit in the foreign context,[50] but it has also indicated that the Founders intended for Congress's Foreign Commerce Clause power to exceed its Interstate Commerce Clause power.[51] If Congress has more power to regulate commerce "with foreign nations" than it does "among the several states," and federalism and state sovereignty concerns do not inhibit its power to regulate foreign commerce, then it stands to reason that courts should not apply the tri-category framework for Interstate Commerce Clause issues from *Lopez* to Foreign Commerce Clause questions. This framework is unduly demanding in the foreign context. Part III's discussion of the modern circuit split further supports this argument. However, a discussion of the PROTECT Act must precede any discussion of the circuit split.

II. THE PROTECT ACT

Formerly known as the "Sex Tourism Prohibition Improvement Act of 2002,"[52] the PROTECT Act (§ 2423) provides for the prosecution of U.S. citizens who molest children abroad.[53] Adapted and expanded from a brief statute originally regarding only the transportation of minors with the intent to engage in criminal sexual activity,[54] § 2423 has undergone consistent and substantial changes. In 1994, the legislature implemented one of the first big changes by creating two vague subsections.[55] The first subsection criminalized the knowing transportation of minors with the

50. *See Japan Line*, 441 U.S. at 446.

51. *See id.* at 448; *see also* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 475 (1941) ("Despite the formal parallelism of the grants, there is no tenable reason for believing that anywhere nearly so large a range of action was given over commerce 'among the several states' as over that 'with foreign nations.'").

52. H.R. REP. NO. 107-525, at 1 (2002).

53. 18 U.S.C. § 2423 (2012).

54. 18 U.S.C. § 2423 (1988).

55. 18 U.S.C. § 2423 (1994).

"intent to engage in criminal sexual activity."[56] Also focused on intent, the second subsection pertained to U.S. citizens' travel in either interstate or foreign commerce "for the purpose of engaging in any sexual act . . . with a person under 18 years of age."[57] Furthermore, both of these subsections provided that anyone prosecuted under this statute "shall be fined" or "imprisoned not more than 15 years."[58] This is an increased sentence from the original version of the statute's requirement of "not more than 10 years."[59] Additionally, Congress added to the first subsection that the criminal offender did not have to succeed in transporting a minor or engaging in a criminal sexual act, but only had to "attempt[] to do so."[60]

Between 2000 and 2012, Congress continued to both expand and clarify the statute. The biggest change, however, came in 2006. Congress added five new subsections, which not only included new punishable conduct and definitions that added clarity to the statute, but also doubled the term of imprisonment to "not more than 30 years."[61]

This Note focuses on one of these new subsections, § 2423(c), which removes the intent requirement from subsection (b) and attempts to criminalize "[a]ny United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person."[62] Congress enacted this legislation to remove the intent requirement simply because "proving intent in such cases is extremely difficult."[63] The legislature wanted to expand the Act so that it could punish any "individuals who travel to foreign countries and engage in illicit sexual conduct with a minor regardless of where the intent to do so was formed."[64] This removal of intent changes the behavior that Congress regulates. In § 2423(b), Congress regulated the channels of commerce consistent with its ability to keep them "free from immoral and injurious uses."[65] Conversely, in § 2423(c), Congress does not regulate the channels or instrumentalities of commerce; Congress simply regulates any individual who travels abroad and then engages in illicit sex acts. This distinction presents an issue because it calls into

56. *Id.* § 2423(a).
57. *Id.* § 2423(b).
58. *Id.* § 2423(a)–(b).
59. 18 U.S.C. § 2423 (1988).
60. 18 U.S.C. § 2423(a) (1994).
61. 18 U.S.C. § 2423 (2006).
62. 18 U.S.C. § 2423(c) (2012).
63. 148 CONG. REC. H3886 (daily ed. June 25, 2002).
64. 148 CONG. REC. H3885 (daily ed. June 25, 2002).
65. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917)).

question whether Congress is actually regulating commerce. As a result, many defendants have challenged the constitutionality of this federal statute.[66]

Congress added definitions that detail what constitutes "illicit sexual conduct" under § 2423.[67] Essentially, Congress has defined two types of illicit sex acts: commercial[68] and noncommercial.[69] Subsection 1591(c)(1) of the same Title defines a commercial sex act as "any sex act, on account of which anything of value is given to or received by any person."[70] This definition simplifies "sex act" and essentially equates it with a transaction. While it might make sense for Congress to have the Foreign Commerce Clause power to regulate commercial sex acts following foreign travel, Congress's ability to regulate noncommercial illicit sex acts abroad is less certain. Congress uses travelling to a foreign nation as its only hook into commerce, and some scholars mock this as a flimsy relation.[71]

The many legislative changes, including increasing the term of imprisonment, the several clarifications, and the removal of intent, all speak to Congress's intent to broaden the scope of what it can criminalize. However, the courts have been unable to find "one voice" with which to decide whether the long arm of Congress has extended too far, as the following discussion of the circuit split indicates.

III. THE CIRCUIT SPLIT

Several courts have struggled with analyzing the bounds of Congress's Foreign Commerce Clause power. Professor Goodno's article sorts these courts and their varying approaches into three distinct categories: (1) courts "[m]echanically applying the Lopez framework without explanation"; (2) courts "[a]dopting a new 'tenable nexus' test"; and (3) courts applying the *Lopez* framework but recognizing that Congress has "broader power to regulate foreign commerce."[72] While this Part will similarly discuss these three categories, it will also discuss and expand on two new approaches that courts have established since the

66. *See, e.g.*, United States v. Bollinger, 798 F.3d 201, 207 (4th Cir. 2015); United States v. Al-Maliki, 787 F.3d 784, 791 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 204 (2015); United States v. Pendleton, 658 F.3d 299, 305 (3d Cir. 2011); United States v. Bianchi, 386 F. App'x 156, 161–62 (3d Cir. 2010); United States v. Clark, 435 F.3d 1100, 1104 (9th Cir. 2006); United States v. Bredimus, 352 F.3d 200, 207–08 (5th Cir. 2003).

67. 18 U.S.C. § 2423(f).

68. *Id.* § 2423(f)(2).

69. *Id.* § 2423(f)(1).

70. *Id.* § 1591(e)(3).

71. *See, e.g.*, Goodno, *supra* note 11, at 1141 (asking whether Congress can regulate a U.S. citizen "littering in France" or "prohibit a U.S. citizen from eating pasta in Italy").

72. *Id.* at 1178.

publication of Professor Goodno's article. First, the court in *United States v. Al-Maliki*[73] held that no part of the *Lopez* framework applies to § 2423(c).[74] Second, and most recently, the court in *United States v. Bollinger*[75] created a new standard: the Foreign Commerce Clause allows Congress to "regulate activities that demonstrably affect such commerce."[76]

A. *Courts Blindly Superimposing the* Lopez *Framework Without Any Justification*

In 2011, the district court in *United States v. Schneider*[77] convicted a U.S. citizen under subsection (b) of the PROTECT Act.[78] Schneider traveled to Russia with the intent to engage in noncommercial illicit sex with a young boy, Zavarov.[79] When Schneider challenged the constitutionality of § 2423(b), the district court directly imported the first category of the *Lopez* framework and maintained it was a proper regulation of the channels of commerce.[80] This court gave no reason for applying interstate commerce analysis; it simply decided to follow the U.S. Court of Appeals for the Third Circuit, which rejected a similar claim of unconstitutionality without any reasoning.[81]

This mechanical application of the interstate commerce framework—without reasoning or explanation—does not make sense. This court, as well as several others that mechanically apply the interstate framework in deciding other foreign commerce issues,[82] ignores the essential Supreme Court precedent indicating that interstate and foreign commerce

73. 787 F.3d 784 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 204 (2015).

74. *See id.* at 792–93.

75. 798 F.3d 201 (4th Cir. 2015).

76. *Id.* at 215–16.

77. 817 F. Supp. 2d 586 (E.D. Pa. 2011).

78. *Id.* at 601–02.

79. *Id.* at 590.

80. *Id.* at 602. For another example of a case in which the constitutionality of § 2423(b) was upheld, see United States v. Bredimus, 352 F.3d 200, 208 (2003) (upholding the constitutionality of § 2423(b) on the grounds that "a court should allow Congress greater deference in regulating the channels of foreign commerce").

81. *See Schneider*, 817 F. Supp. 2d at 602 (citing United States v. Tykarsky, 446 F.3d 458, 470 (3d Cir. 2006)) (disagreeing with the contention that Congress exceeded its Commerce Clause power by simply quoting the tri-category framework from *United States v. Lopez*, 514 U.S. 549, 558–59 (1995)).

82. *See, e.g.*, United States v. Cummings, 281 F.3d 1046, 1049, 1051 (9th Cir. 2002) (applying the tri-category framework from *Lopez* mechanically to the International Parental Kidnapping Crime Act (IPKCA), which criminalizes the removal of "a child from the United States . . . with [the] intent to obstruct the lawful exercise of parental rights").

require different analyses.[83] Moreover, superimposing the interstate commerce analysis on a foreign commerce issue without any explanation of *why* the framework does—or should—apply overlooks the reality that the Supreme Court referred only to interstate commerce in each of the three categories from *Lopez*[84] and never "explicitly or implicitly stated that the *Lopez* Interstate Commerce Clause framework (or the negative implications of it) should apply to the Foreign Commerce Clause."[85]

B. *Courts Applying an Overbroad, Constitutionally "Tenable Nexus" Test*

In 2006, for the first time, a court recognized that perhaps the *Lopez* framework did not guide the analysis for a challenge of the PROTECT Act's constitutionality, in the case of *United States v. Clark*.[86] In this case, the court examined the "commercial sex act" prong of § 2423(c).[87] The defendant in this case, Michael Lewis Clark, resided primarily in Cambodia but retained his U.S. citizenship and made annual trips back to the United States.[88] While in Cambodia, Clark "routinely payed" about two dollars to each boy he molested.[89] Clark's payment brings his conduct under the commercial prong of the statute.

This court recognized its unique situation[90] and explicitly rejected the tri-category framework from *Lopez*, citing *Lopez*, *Jones & Laughlin Steel*, and *Japan Line* as precedent.[91] Observing that the *Lopez* framework "developed in response to the unique federalism concerns that define congressional authority in the interstate context" and that "[t]he scope of the interstate commerce power 'must be considered in the light of our dual system of government,'" the court indicated that "no analogous framework exists for foreign commerce."[92] The court further identified "evidence that the Founders intended the scope of the foreign commerce

83. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446 (1979) (holding that foreign commerce analysis requires "a more extensive constitutional inquiry").

84. *See Lopez*, 514 U.S. at 558–59.

85. Goodno, *supra* note 11, at 1181.

86. 435 F.3d 1100, 1114–15 (9th Cir. 2006).

87. *Id.* at 1105.

88. *Id.* at 1103.

89. *Id.* at 1104.

90. *See id.* at 1102 (admitting that "[i]t is not so much that the contours of the Foreign Commerce Clause are crystal clear, but rather that their scope has yet to be subjected to judicial scrutiny").

91. *Id.* at 1103 ("Instead of slavishly marching down the path of grafting the interstate commerce framework onto foreign commerce, we step back and take a global, commonsense approach to the circumstance presented here . . . .").

92. *Id.* (quoting United States v. Lopez, 514 U.S. 549, 557 (1995)).

power to be the greater" as compared with interstate commerce.[93] In its rejection of the *Lopez* framework, the court ultimately noted that while using interstate commerce analysis for foreign commerce issues "is not an insurmountable task" depending on the context, it can "feel like jamming a square peg into a round hole."[94]

To support its conclusion that the *Lopez* framework does not apply to foreign commerce cases, the court indicated that the Supreme Court has defined Congress's authority "under the Indian Commerce Clause without reference to the rigid categories of *Lopez*."[95] Combined with the absence of "federal/state interplay seen in the Interstate Commerce Clause cases," this encouraged the court to adopt a new test: whether the regulated activity has a "constitutionally tenable nexus with foreign commerce."[96]

This test bears a striking resemblance to a traditional rational basis approach. In fact, it seems like it accomplishes the same result. The court clarifies the goal of the test by simplifying its objective: determining whether the statute has "a rational relationship to Congress's authority under the Foreign Commerce Clause."[97] This is rational basis language. Knowing that it should not apply the *Lopez* framework, the court concluded that it should "view the Foreign Commerce Clause independently from its domestic brethren"[98] and held that the combination of foreign travel with "a commercial transaction while abroad implicate[d] foreign commerce to a constitutionally adequate degree."[99] In an effort to develop a new test, the court simply used a rational basis standard but did so by creating new language.

The court suggested that foreign travel "trigger[s]" the statute, and the subsequent commercial sex act creates a "constitutionally tenable nexus."[100] However, the court then contrasts the "economic character" of a commercial sex act with activities that the noncommercial prong of § 2423(c) attempts to regulate, by analogizing to *Lopez* and *Morrison*. In both of those cases, the Supreme Court "voiced strong concerns over Congress's use of the Commerce Clause to enact 'a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms.'"[101]

93. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979).
94. *Clark*, 435 F.3d at 1103.
95. *Id.* at 1113.
96. *Id.* at 1114.
97. *Id.*
98. *Id.* at 1116.
99. *Id.* at 1114.
100. *Id.*
101. *Id.* at 1115 (quoting United States v. Morrison, 529 U.S. 598, 610 (2000)).

Accordingly, the court cited its duty of constitutional avoidance and limited its holding to § 2423(c)'s "regulation of commercial sex acts."[102]

The tenable nexus test, which the court fails to define or explain, appears to have few limitations, if any. The term "tenable" denotes that while perhaps the relationship to commerce can be argued—or defended against argument—it need not be proven or concretely articulated. This test then essentially allows courts to uphold legislation if there is a rational basis for concluding that the legislation encompasses activity that might hypothetically affect commerce with a foreign nation. This is a rational basis standard under a different name.

In *United States v. Bianchi*,[103] the Third Circuit adopted the *Clark* court's reasoning to uphold the constitutionality of both the commercial and noncommercial prongs of § 2423(c) without explanation.[104] The *Bianchi* court simply found the *Clark* court's "reasoning persuasive."[105] However, the *Clark* court's holding lacks sound reasoning. Immediately after asking the question of "whether the statute bears a rational relationship to Congress's authority under the Foreign Commerce Clause," the court pointed out only that the defendant *did* travel in foreign commerce, and then engaged in an illicit sex act, and the defendant's combined actions sufficiently implicated foreign commerce to a "constitutionally adequate degree."[106] The court did not explain *why* or *how* the combination of these actions have a rational relationship to foreign commerce, only that they met the statute's requirements. Therefore, the *Bianchi* court's acceptance of the *Clark* court's "reasoning" is perplexing. While the *Bianchi* court did not use the "tenable nexus" language, it followed *Clark*'s rational relationship language.[107]

Additionally, the *Bianchi* court attempted to further support its position by emphasizing that the Supreme Court has "never struck down a law as exceeding Congress's Foreign Commerce Clause powers."[108] While Congress does have broader power regarding foreign commerce, it "has never been deemed unlimited."[109] Additionally, the court failed to recognize that the Supreme Court has scrutinized only a select few cases regarding Foreign Commerce Clause issues,[110] and the preeminent *Japan*

102. *Id.* at 1110.
103. 386 F. App'x 156 (3d Cir. 2010).
104. *Id.* at 161–62.
105. *Id.* at 161.
106. *Clark*, 435 F.3d at 1114.
107. *Bianchi*, 386 F. App'x at 164.
108. *Id.*
109. *Id.* at 163 (Roth, J., dissenting).
110. *See* cases cited *supra* note 13.

Line case from over thirty years ago dealt exclusively with a purely economic activity.[111] The court, again, tried to support its position by claiming that "[t]he Supreme Court's broad interpretation of the Foreign Commerce Clause applies with equal force to the non-commercial sexual conduct prong of § 2423(c) . . . ."[112] However, the court refuses to explain *why* it should apply with equal force, despite the illogical nature of the assertion. A contention that Congress's power to regulate commerce applies equally to commercial as well as noncommercial activity does not carry much weight without any explanation as to why, considering that noncommercial illicit sexual conduct "does not in any sense of the phrase relate to commerce *with foreign nations*."[113] The proper rationale for this situation is that not regulating the noncommercial activity could have an effect on commercial child sex tourism.[114]

The "tenable nexus" test presents significant issues, and the *Clark* and *Bianchi* courts generally fail to explain their reasoning in applying this test. It presents an issue because while it should have the same application and effect as a simple rational basis standard, it might take on a different meaning since the *Clark* court never defined it. In a sense, the tenable nexus test could fail to recognize any limit and might indeed create a "slippery slope" for future Congressional enactments with extraterritorial reach. If it has the same intended application as a rational basis standard but has a different name, courts might attribute additional power to it and potentially use it to prohibit activities otherwise outside of Congress's power; anything less than a rational basis standard is, by definition, irrational. Moreover, this test might fail to comply with the Supreme Court's assertion that the Commerce Clause is "subject to outer limits."[115] According to the cases in which this test is used, Congress can regulate an activity with a bare economic component—or an activity with no economic component—as long as the activity occurs "subsequent to some form of international travel."[116] But courts can more appropriately arrive at the same end result by adopting a rational basis standard and by examining the illicit sexual conduct and the ways it could affect commerce, rather than focusing on the travel.

111. *See generally* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) (examining a Foreign Commerce Clause issue concerning a Japanese shipping company's cargo that was used exclusively in foreign commerce but was subjected to double taxation by both Japan and property taxes from appellees in California).

112. *Bianchi*, 386 F. App'x at 162.

113. United States v. Clark, 435 F.3d 1100, 1117 (9th Cir. 2006) (Ferguson, J., dissenting).

114. *See infra* Part IV.

115. United States v. Lopez, 514 U.S. 549, 556–57 (1995).

116. *Clark*, 435 F.3d at 1117.

International travel is ostensibly the only hook into foreign commerce, but the statute does not punish the travel in or the immoral use of the channels of foreign commerce. In the case of the noncommercial prong of § 2423(c), the statute punishes some future conduct "entirely divorced from the act of traveling except for the fact that the travel occurs at some point prior to the regulated conduct."[117] Furthermore, neither the statute nor any court has identified a timeframe during which an illicit sex act must occur after the foreign travel.

Without a temporal link, can Congress regulate the noncommercial activity of a defendant ten years after the foreign travel takes place? Indeed, the dissenting judge in *Bianchi* takes issue with this inadequacy, finding "no rational basis to conclude that an illicit sex act with a minor undertaken on foreign soil, perhaps years after legal travel and devoid of any exchange of value, substantially affects foreign commerce."[118] But considering Congress's broader power in the foreign arena, courts should not have to find a substantial effect, but only a rational basis to conclude that the conduct could have some effect on commerce, especially in its aggregate.

Much like the dissenting judge in *Bianchi*, the dissenting judge in *Clark* argued that because travel in foreign commerce can put a noncommercial activity within the province of the Foreign Commerce Clause power, then Congress can regulate every act that occurs after the travel.[119] One might argue that this type of regulation no longer represents commerce power, but police power. However, if the noncommercial activity could have an effect on commerce, much like possessing small amounts of marijuana in *Gonzalez v. Raich*,[120] in which the court held that the noncommercial activity at hand could affect interstate commerce,[121] then why should Congress not be able to regulate the conduct in question?

Other courts have noted the shortcomings of the tenable nexus test. But would they perceive any shortcomings if the test was simply rational basis? Such a critique would be dubious, considering the unambiguous and well-established applications of the rational basis test in a myriad of

117. *Id.* at 1119.

118. United States v. Bianchi, 386 F. App'x 156, 163–64 (3d Cir. 2010) (Roth, J., dissenting).

119. *See Clark*, 435 F.3d at 1120–21 (Ferguson, J., dissenting). But this argument does not hold water. Congress cannot punish a U.S. citizen for travelling to Paris and giving the jacket on her back to a homeless person; no court would have a rational basis to conclude that such conduct would have any type of effect on commerce or a larger regulatory scheme. The contention that Congress could criminalize any conduct subsequent to foreign travel does not follow; Congress can, however, criminalize a noneconomic activity that could have an effect on commerce. *See* Gonzales v. Raich, 545 U.S. 1, 22 (2005).

120. 545 U.S. 1, 22 (2005).

121. *Id.* at 2 ("[T]he regulation is squarely within Congress' commerce power . . . .").

past cases. In any case, these courts have decided to apply the *Lopez* framework generally—much like the dissenters in *Clark* and *Bianchi*—but have also admitted that Congress has broader power under the Foreign Commerce Clause than the Interstate Commerce Clause.[122] While sticking to the *Lopez* framework represents an effort at constitutional avoidance, the admission of the differentiation in scopes of power indicates that the courts know the *Lopez* framework does not quite suffice, but they use it as the best current option.

C. *Courts Applying the* Lopez *Framework Generally but Acknowledging its Potential Inapplicability to Foreign Commerce Clause Issues*

This category of courts finds itself somewhere in between the first and second categories. Like the courts in the first category, courts in this category inappropriately apply *Lopez*. However, they recognize the shortcomings of doing so. Similar to courts in the second category, courts in this third category recognize that perhaps the *Lopez* framework should not apply—given Congress's broader Foreign Commerce Clause power and lack of state sovereignty and federalism concerns—but use it as a tried-and-true method rather than creating new tests or adopting the tenable nexus test without explanations. Also, this category contains a case from the Third Circuit, *United States v. Pendleton*,[123] that directly opposes the Third Circuit's holding in *Bianchi*.

Six months after travelling from New York to Germany, Pendleton molested a fifteen-year-old boy.[124] Pendleton challenged the constitutionality of the noncommercial prong,[125] and the Third Circuit rejected his argument.[126] Although the court admits that the *Lopez* framework was developed to "[a]ddress unique federalism concerns that are absent in foreign commerce," it applied the framework based on "hesitan[ce]" to deviate from "*Lopez*'s 'time-tested' framework without further guidance from the Supreme Court."[127] This signals a crucial need for Supreme Court guidance.

The *Pendleton* court misinterprets the issue at hand: rather than deciding *if* Congress can regulate the noncommercial activity in question, the court focused on *why* Congress enacted the statute in the first place.

122. *See, e.g.*, United States v. Pendleton, 658 F.3d 299, 307 (3d Cir. 2011); United States v. Flath, 845 F. Supp. 2d 951 (E.D. Wis. 2012).

123. 658 F.3d 299 (3d Cir. 2011).

124. *Id.* at 301.

125. *Id.* at 302.

126. *Id.* at 311.

127. *Id.* at 308 (Ferguson, J., dissenting) (quoting United States v. Clark, 435 F.3d 1100, 1119 (9th Cir. 2006)).

The court acknowledged that Congress enacted § 2423(c) to "close significant loopholes in the law that persons who travel to foreign countries seeking sex with children are currently using to their advantage in order to avoid prosecution"[128] and then supported this legislative intent with the fact that prosecutors "were having an 'extremely difficult' time 'proving intent in such cases.'"[129] The court then used this legislative intent to support why § 2423(c) is *constitutional* when the legislative intent only gives reasoning for why § 2423(c) was *enacted*. Based on this misreading, the court suggested that "Congress enacted § 2423(c) to regulate persons who use the channels of commerce to circumvent local laws that criminalize child abuse and molestation."[130] However, this language implies that the court thought § 2423(c) punishes individuals who travel with the intent to engage in illicit sex acts with children. But § 2423(b) encompasses this behavior, not § 2423(c). Congress enacted § 2423(c) to regulate persons who use the channels of commerce to travel and then at some time afterwards to engage in an illicit sex act with a minor, regardless of whether they travelled with the intent to do so.

The court then repeated its misreading of the statute by claiming that Congress may "attempt to prevent sex tourists from using the channels of foreign commerce to abuse children."[131] But that issue is not disputed in this case, as this case dealt with—or should have dealt with—§ 2423(c), not (b). This court failed to answer the pivotal question of whether Congress can punish a U.S. citizen for travelling in the channels of commerce without intent and then later engaging in an illicit sex act with a minor. In similar fashion, several cases that followed this opinion base their holdings accordingly. For example, in *United States v. Bey*,[132] the court simply concluded that the defendant's challenge of § 2423(c)'s constitutionality was meritless and based this conclusion solely on *Pendleton*'s holding that § 2423(c) "was a valid exercise of Congress's power under the Foreign Commerce Clause."[133]

Additionally, the court in *United States v. Flath*[134] followed the *Pendleton* court in applying the tri-category *Lopez* framework while recognizing its limits.[135] The court admitted that no analogous framework exists for determining whether Congress can regulate a specific activity under the Foreign Commerce Clause, yet found the *Lopez* framework "to

128. *Id.* at 310 (quoting H.R. REP. NO. 107-525, at 3 (2002)).
129. *Id.* (quoting 148 CONG. REC. 3886 (2002)).
130. *Id.* at 311.
131. *Id.*
132. No. 10-164-01, 2014 WL 7465663 (E.D. Pa. Dec. 31, 2014).
133. *Id.* at *15.
134. 845 F. Supp. 2d 951 (E.D. Wis. 2012).
135. *See id.* at 955.

be an appropriate starting point" anyhow, despite the "significant distinctions between the interstate and foreign commerce powers."[136] Notwithstanding the defendant's argument,[137] which the court conceded was "not without merit," the court felt "constrained to follow" the decisions of other courts in upholding the constitutionality of § 2423(c), including the *Pendleton* court.[138]

Yet again, it seems that another court—through the confusion that has resulted from a lack of Supreme Court guidance—has decided to follow the *Pendleton* court's misinterpretation of the relevant issues at hand. In more recent cases, some courts have taken different approaches.

D. *New Developments in PROTECT Act Case Law*

Courts have decided only a few cases pertinent to this issue since *Bianchi* and *Pendleton*. One such case is *United States v. Al-Maliki*.[139] While *Al-Maliki* does not fit neatly into any of the three categories discussed above, it discusses *Lopez* and represents a line of reasoning disparate from the courts in the split. In this case, Al-Maliki was charged under the noncommercial prong of § 2423(c).[140] The defendant challenged § 2423(c)'s constitutionality,[141] and like several of the courts discussed in this Note—such as *Clark*, in which the U.S. Court of Appeals for the Ninth Circuit practiced its duty of constitutional avoidance[142]—the U.S. Court of Appeals for the Sixth Circuit resolved

136. *Id.*

137. The defendant in the *Flath* case urged the court to adopt the reasoning of dissenting Judge Manion in *United States v. Vasquez*. *Id.* at 956 (citing United States v. Vasquez, 611 F.3d 325, 333 (7th Cir. 2012) (Manion, J., dissenting)). The dissent noted that courts "traditionally uphold Congress's power to regulate movement across state lines with an illicit purpose, not movement across state lines with an innocent purpose, followed at some later time by criminal conduct that is disconnected temporally from the travel." *Vasquez*, 611 F.3d at 333. This reasoning indicates that § 2423(b), which contained the intent requirement, was clearly within Congress's power to enact, whereas § 2423(c)'s constitutionality is less certain. Echoing the dissent from *Bianchi* discussed above, Judge Manion emphasized that "[a] person's mere travel across state lines does not give Congress authority to later regulate all of his future conduct." *Id.* at 335. But it appears that Judge Manion focused on the wrong issue; the issue is not whether a person's travel gives congress the authority to regulate action, but whether the action affects commerce. Certainly, the travel is a commercial act. But if an action—whether commercial or noncommercial—affects or could affect foreign commerce to some degree, then Congress should have the Foreign Commerce Clause power to regulate that action.

138. *Flath*, 845 F. Supp. 2d at 956.

139. United States v. Al-Maliki, 787 F.3d 784 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 204 (2015).

140. *Id.* at 789.

141. *Id.* at 790.

142. *See supra* note 102 and accompanying text.

that it "need not finally decide" the issue.[143] However, the court did not make that determination for the same reason as the *Clark* court; in fact, the court concluded that it did not need to make a decision because it had to review the constitutional challenge under plain-error review in accordance with Rule 52(b), after the plaintiff forfeited his challenge by failing to raise it below.[144]

The court simply equated the question of whether there was any error "that was obvious or clear" to the question of whether the statute is unconstitutional.[145] Because any determination of this statute's constitutionality is far from obvious or clear, the court correspondingly had to affirm the holding of the lower court that the statute was constitutional.[146] Nonetheless, the court suggests that it "doubt[ed]" that the Commerce Clause includes "the power to punish a citizen's noncommercial conduct while the citizen resides in a foreign nation."[147] Most courts have not come to the same conclusion.[148]

Initially, the court discussed the definition of commerce under the original meaning of the Constitution.[149] As originally understood, this court suggested, the Foreign Commerce Clause gave Congress the "power to regulate trade or intercourse with foreign countries."[150] Furthermore, the original meaning does not allow for Congress to "criminalize a citizen's noncommercial activity in a foreign country," as that does not fall under the definition of "commerce."[151] That being said, the court indicated that in the interstate context, the Supreme Court has departed from this original definition, and the *Lopez* framework acts as the modern definition of commerce.[152]

The court discusses the *Lopez* framework, but only to indicate that even if *Lopez* were applicable in the Foreign Commerce Clause context, § 2423(c) does not meet any of its three criteria.[153] Neither the "channels" nor "instrumentalities" categories fit § 2423(c), as § 2423(b) covers the criminalization of "traveling in the channels of commerce *for the purpose* of engaging in illicit sexual conduct with a minor."[154] Finally, the third

143. *Id.* at 792.
144. *Id.* at 791.
145. *Id.*
146. *Id.* at 791–92.
147. *Id.* at 791.
148. *See supra* Sections III.A–.C.
149. *Al-Maliki*, 787 F.3d at 792.
150. *Id.*
151. *Id.*
152. *Id.* (citing United States v. Lopez, 514 U.S. 549, 558–59 (1995)).
153. *Id.* at 792–93.
154. *Id.* at 792 (emphasis added). The court also indicates that § 2423(a) involves the instrumentalities category, but that exceeds the scope of this Note.

category, substantial effect, does not apply either.[155] According to the Supreme Court in *United States v. Morrison*, Congress cannot regulate the conduct governed by the noneconomic prong of § 2423(c) on the grounds of any aggregate effect: "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[156] Justice Clarence Thomas supported this rejection in a more recent decision, claiming that "Congress may not regulate noneconomic activity, such as sex crimes, based on the effect it might have on . . . commerce."[157] While these quotes certainly help the side arguing for the unconstitutionality of the PROTECT Act, the first is outdated and the second is a nonbinding dissent. The most recent relevant language, from *Gonzales v. Raich*, would indicate that Congress can in fact regulate such activity: "In assessing the scope of Congress' authority under the Commerce Clause . . . [w]e need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."[158]

The *Al-Maliki* court's ideas suggest that Congress has outstripped its Foreign Commerce Clause power in its enactment of, at the very least, the noncommercial prong of § 2423(c). Moreover, the *Al-Maliki* court also adhered to these judicial musings, both holding and dicta, when it asserted that "Congress's failure to even try to show the aggregate effect of noncommercial sexual activity on foreign commerce highlights its lack of power here."[159] However, this opinion finds itself at odds with the Court in *Lopez*, which posits that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."[160] Considering that Congress's Foreign Commerce Clause has a broader power than its interstate power, Congress should not need legislative findings to enact a statute with extraterritorial reach if it does not need those findings in the domestic arena.

The *Al-Maliki* court continues to suggest that because the noncommercial prong of § 2423(c) does not regulate the channels of commerce, people in commerce, or activities that substantially affect commerce, it seems to regulate any conduct that occurs after lawful travel in foreign commerce has ended.[161] As a result, the court perceived this

155. *See id.*

156. United States v. Morrison, 529 U.S. 598, 617 (2000).

157. United States v. Kebodeaux, 133 S. Ct. 2496, 2512 (2013) (Thomas, J., dissenting).

158. Gonzales v. Raich, 545 U.S. 1, 22 (2005) (quoting United States v. Lopez, 514 U.S. 549, 557 (1995)).

159. *Al-Maliki*, 787 F.3d at 793.

160. *Lopez*, 514 U.S. at 562.

161. *See Al-Maliki*, 787 F.3d at 792.

statute as having the effect of giving Congress an international police power. Indeed, the *Al-Maliki* court indicated, as an example, that Ohio has a statute punishing illicit sexual conduct with a minor because the state government has a "general police power,"[162] but "[t]here isn't—and can't be—a generalized federal crime for traveling in interstate commerce with no illicit purpose and then, after a few months, committing illicit sexual conduct with a minor."[163] The federal government does not have a general police power. However, at this point, proponents of § 2423(c) will argue—and the author agrees—that Congress has broader power in regulating commercial conduct in foreign countries than it does domestically. While undebatable, that fact does not allow for an unbridled reading or application of the Foreign Commerce Clause, which would grant the federal government the power to "intrude on the sovereignty of other nations—just as a broad reading of the Interstate Commerce Clause allows it to intrude on the sovereignty of the States."[164] Using a rational basis standard would put a reasonable check on Congress's Foreign Commerce Clause power, yet would still allow the power its greatest possible breadth, as courts would not need to have a rational basis to conclude a substantial effect exists (as they do in the domestic context), but just that some effect exists.

The most recent decision regarding this issue comes from the Fourth Circuit in *United States v. Bollinger*.[165] In this case, an ordained Lutheran minister travelled to Haiti, in 2004, to oversee a large ministry there.[166] Five years later, in 2009, Bollinger began "molesting young girls."[167] In 2012, a grand jury indicted Bollinger and charged him under the noncommercial prong of § 2423(c).[168] Naturally, Bollinger challenged the constitutionality of § 2423(c).[169] The Fourth Circuit upheld the constitutionality of the statute.[170]

This court made two major propositions relevant to this Note. First, the court concluded that the Foreign Commerce Clause demands its own interpretative framework.[171] While this Note agrees that none of the tests or approaches the lower courts have taken are acceptable, it argues not for a new framework, but for a simplification of the approach to this and

162. *Id.* at 793 (citing OHIO REV. CODE ANN. § 2907.04 (West 2015)).
163. *Id.*
164. *Id.*
165. 798 F.3d 201, 207 (4th Cir. 2015).
166. *Id.* at 203.
167. *Id.*
168. *Id.* at 204–05.
169. *Id.* at 205.
170. *Id.* at 208.
171. *Id.* at 211.

similar issues, which it will propose later.[172] Second, the *Bollinger* court created and applied a new test—the demonstrable effects test[173]—distinct from the common "tenable nexus" test discussed above.[174] Much like the other lower courts applying the tenable nexus test rather than using the *Lopez* framework,[175] the court in *Bollinger* subscribed to the opinion that Congress's Foreign Commerce Clause power exceeds that of its Interstate Commerce Clause power.[176] Because of this, the court reasoned that the third category in *Lopez*—activities that substantially affect interstate commerce—"is unduly demanding in the foreign context."[177] This led the court to establish its own test: "the Foreign Commerce clause allows Congress to regulate activities that demonstrably affect . . . commerce."[178]

The demonstrable effects test represents a unique but ambiguous divergence from the tenable nexus test. Much like the tenable nexus test, the demonstrable effects test lacks sufficient definition and explanation. However, the demonstrable effects test, compared with the tenable nexus test, appears to reign in Congress's power. While the term "tenable" implies that the court does not have to explicitly prove an activity's connection to foreign commerce, the term "demonstrable" denotes that the court must exhibit its capacity to prove or articulate an activity's evident effect on foreign commerce. The *Oxford English Dictionary* defines "demonstrable" as "capable of being shown or made evident" or as something that is "readily apparent."[179] Unfortunately, that analysis belongs only to this Note, and not to the *Bollinger* court, which held that a showing of demonstrable effect demands only that "the effect be more than merely imaginable or hypothetical."[180] The court's explanation of the test, therefore, does not parallel the word it chose. Although this language does not serve to create a test with much exactness, it might have the effect—if read in the same manner this Note reads it—of temporarily acting as a narrower test than the tenable nexus approach.

In reaching its conclusion that the regulated activity must have a demonstrable effect on foreign commerce, the court took a few liberties. While attempting to discern how directly an activity must affect foreign commerce before Congress may regulate it, the court indicated—like

172. *See infra* Part V.

173. *Bollinger*, 798 F.3d at 215–16.

174. *See supra* Section III.B.

175. *See, e.g.*, United States v. Clark, 435 F.3d 1100, 1114–15 (9th Cir. 2006).

176. *See Bollinger*, 798 F.3d at 211 (holding that "the power to regulate commerce . . . when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce" (quoting Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932)).

177. *Id.* at 215.

178. *Id.* at 215–16.

179. *Demonstrable*, OXFORD ENGLISH DICTIONARY (3d ed. 2014).

180. *Bollinger*, 798 F.3d at 216.

many other courts[181]—that Congress's power is broader in the foreign context.[182] For support, however, the court cited *National Federation of Independent Business v. Sebelius*, "noting that Congress's interstate power must be 'read carefully to avoid creating a general federal authority akin to the police power.'"[183] This misrepresents the *Sebelius* Court's actual assertion. The *Sebelius* Court did not specifically say that the interstate power must be read carefully, but referred rather to the entire Commerce Clause power as a whole, including the regulation of Commerce "with foreign [n]ations, and among the several states, and with the Indian Tribes."[184] It seems as though the *Bollinger* court intentionally placed the *Sebelius* Court's suggestion of "read[ing] carefully" in the much narrower context of just the Interstate Commerce Clause, rather than the Commerce Clause as a whole, for the purpose of illustrating the difference in breadth of power between the Interstate and Foreign Commerce clauses.[185] This implies that courts need not read the Foreign Commerce Clause carefully, which this Note would caution against; while Congress has greater power in the foreign arena, courts must still read the Clause carefully lest it ignore the outer limits to which the Clause is subject.[186] Although Foreign Commerce Clause analysis eliminates state sovereignty concerns, this Note encourages a careful reading of the Foreign Clause to prevent intruding upon the sovereignty of other nations, as prior case law has warned against.[187]

Moreover, the court seemingly failed to meet the requirements of its own test. The court stated that "[i]t is eminently rational to believe that prohibiting the non-commercial sexual abuse of children by Americans abroad has a demonstrable effect on sex tourism and the commercial sex industry."[188] But rather than articulating *how* this brand of noncommercial conduct can demonstrably affect sex tourism or the commercial sex industry, the court—much like the court in *Pendleton*—focused on *why* the legislation was enacted. In fact, the court quoted the same language as the *Pendleton* court, detailing the need for the legislation to "close significant loopholes."[189] The court also indicated

181. *See, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979); Pac. Seafarers, Inc. v. Pac. Far E. Line, Inc., 404 F.2d 804, 814 (D.C. Cir. 1968); Bulova Watch Co. v. Steele, 194 F.2d 567, 570 (5th Cir. 1952).

182. *See Bollinger*, 798 F.3d at 211.

183. *Id.* (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012)).

184. *Sebelius*, 132 S. Ct. at 2578.

185. *Bollinger*, 798 F.3d at 212 (citing *Sebelius*, 132 S. Ct. at 2578).

186. *See* United States v. Lopez, 514 U.S. 549, 556–57 (1995).

187. United States v. Al-Maliki, 787 F.3d 784, 793 (2015).

188. *Bollinger*, 798 F.3d at 218.

189. *Id.* (quoting H.R. REP. NO. 107-525, at 2–3 (2002)). "Many developing countries have fallen prey to the serious problem of international sex tourism. . . . Because poor countries are

that the "international community has suggested the need for a 'holistic approach' to combat forms of commercial sexual exploitation like child prostitution and child pornography."[190]

Showing legislative intent—however admirable—does not exhibit a demonstrable effect. But the court did attempt to show a demonstrable effect: it subscribed to the assertion of the U.S. District Court for the Western District of Texas that "there is a rational basis for concluding that leaving non-commercial sex with minors outside of federal control *could* affect the price of child prostitution services and other market conditions in the child prostitution industry."[191] This does not demonstrably prove or give evidence for the § 2423(c) noncommercial prong's effect on commerce, let alone commerce with a foreign nation. The court's use of the word "could" indicates that the court is hypothesizing. Ironically, by using this language as its only indication of the degree to which Bollinger's conduct has any effect on commerce, the court contradicted its own requirement that showing a demonstrable effect on commerce requires "the effect be more than merely imaginable or hypothetical."[192]

The belief that "regulating the non-commercial sexual abuse of minors would strengthen the regulation of commercial sexual abuse" is just that: a belief.[193] But finding a rational basis to conclude that regulating the noncommercial conduct could have an effect on a larger regulatory scheme, much like in *Raich*,[194] should allow Congress to prohibit the conduct. Perhaps if the court had legislative findings regarding a real effect rather than a hypothetical one, this court would have met its own test. However, without that, this conduct would appear to meet only a rational basis test, as the court made no argument beyond a hypothetical, which is too attenuated to qualify as demonstrable. The court's only remaining rationale for upholding the constitutionality of § 2423(c) was legislative intent, which does not equate to Congress's power to regulate the conduct at issue.

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often under economic pressure to develop tourism, those governments turn a blind eye toward this devastating problem because of the income it produces." *Id.* (quoting H.R. REP. NO. 107-525, at 2–3).

190. *Id.* at 218.

191. *Id.* at 219 (emphasis added) (quoting United States v. Martinez, 599 F. Supp. 2d 784, 807–08 (W.D. Tex. 2009)).

192. *Id.* at 216.

193. *Id.* at 219 (citing United States v. Bianchi, 386 F. App'x 156, 162 (3d Cir. 2010)).

194. Gonzales v. Raich, 545 U.S. 1, 19 (2005).

IV. THE NONCOMMERCIAL PRONG OF § 2423(C) IS CONSTITUTIONAL

Depending on which test a court uses, the noncommercial prong of § 2423(c) might be constitutional. Certainly, an application of the tenable nexus test might make it appear constitutional. But what about the demonstrable effects test from *Bollinger*? While the *Bollinger* court upheld the constitutionality of the statute, it did not meet its own test.[195] Without legislative findings, the noncommercial prong falls short of meeting the requirements of the demonstrable effects test, despite the court's holding. While Congress is not normally required to make formal legislative findings, such findings alone might be sufficient to uphold the constitutionality of the statute under the demonstrable effects test.[196] However, the court's articulation of the demonstrable effects test is unduly demanding in the foreign context.

That being said, the *Bollinger* court, for all its shortcomings, was certainly on the right track. Had the court chosen a word other than "demonstrable" and made an effort to clarify the test's objectives and criteria, this Note might argue the complete validity of the court's disposition. Although it did not meet its own test, the court used appropriate reasoning. The court's rationale—that not regulating the noncommercial conduct could in fact have an effect on commerce[197]—differentiated itself from the other courts in the split. Most other courts focused on linking the travel—which they considered to be the sole economic activity—to the conduct,[198] or focused on Congress's legislative intent.[199] But the issue is not necessarily whether commercial travel can bring noncommercial conduct under Foreign Commerce Clause power, but whether the noncommercial conduct could in fact affect commercial activity—in this case, the commercial child sex trade and foreign child sex tourism. This Note contends that there is a rational basis for concluding that non-regulation of the noncommercial activity could affect commerce.

While the noncommercial illicit sex act has no economic component, some scholars argue that, "as part of a larger regulatory scheme," these noncommercial acts do substantially affect foreign commerce.[200] This

195. *See Bollinger*, 798 F.3d at 203 (upholding the statute's constitutionality based on Congress's Foreign Commerce Clause power).

196. *See* United States v. Lopez, 514 U.S. 549, 562 (1995).

197. *See Bollinger*, 798 F.3d at 219.

198. *See, e.g.*, United States v. Clark, 435 F.3d 1100, 1117 (9th Cir. 2006) (Ferguson, J., dissenting) (focusing on the requirement of the travel and the criminal act sharing a rational or tenable nexus).

199. *See, e.g.*, United States v. Pendleton, 658 F.3d 299, 310–11 (3d Cir. 2011).

200. *E.g.*, Christine L. Hogan, Note, *Touring Commerce Clause Jurisprudence: The Constitutionality of Prosecuting Non-Commercial Sexually Illicit Acts Under 18 U.S.C.*

regulatory scheme language comes from *Raich*,[201] which is—in some respects—quite analogous to *Bollinger*.[202] The noneconomic activity in question in *Morrison*,[203] on the other hand, is not analogous because that activity could not have an aggregate effect on commerce and was not part of a "larger regulatory scheme."[204]

In *Raich*, the Court examined the Federal Controlled Substances Act (CSA),[205] which criminalized the manufacture, distribution, and possession of controlled substances—in this case, marijuana.[206] The Court then decided that "Congress can regulate purely intrastate activity that is not itself 'commercial' . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[207] The Court's rational basis to conclude that the possession of small amounts of marijuana could aggregately affect the black market[208] is analogous to the *Bollinger* court's line of reasoning that not regulating the noncommercial activity could have an effect on the related commercial activity.[209] Following that rationale, this Note argues that by subjecting these cases to a rational basis standard, courts will correctly find § 2423 constitutional.

In any event, the lower courts are in disarray, and they require guidance independent from the *Lopez* framework. Because the Supreme Court has yet to discuss the Foreign Commerce Clause in this context, or in a similar depth as the Interstate Commerce Clause, it has had no chance to "articulate the constitutional boundaries beyond which Congress may not pass in regulating the conduct of citizens abroad."[210] This has created a slippery slope. Additional need for an independent framework is evident considering the Supreme Court's distinct treatment of the Indian

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§ 2423(C), 81 ST. JOHN'S L. REV. 641, 657 (2007) (discussing child sex tourism as a widespread economic crisis).

201. Gonzales v. Raich, 545 U.S. 1, 19 (2005).

202. In both cases, the courts analyze noneconomic activities and discuss how they, in aggregate, could affect commerce. *Compare Raich*, 545 U.S. at 19 (finding an aggregate effect on a larger regulatory scheme involving personal possession of marijuana), *with Bollinger*, 798 F.3d at 219 (positing that the non-regulation of noneconomic activity could have a substantial effect on the large regulatory scheme involving international child sex trading).

203. United States v. Morrison, 529 U.S. 598, 613 (2000).

204. *Raich*, 545 U.S. at 19.

205. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. § 801 (2012)).

206. *Raich*, 545 U.S. at 7.

207. *Id.* at 18.

208. *See id.* at 18–19 (comparing the facts of *Raich* to *Wickard v. Filburn*, 317 U.S. 111 (1942), and stating, "[h]ere too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions").

209. *See* United States v. Bollinger, 798 F.3d 201, 219 (4th Cir. 2015).

210. *Id.* at 209.

Commerce clause.[211] The Supreme Court has also determined that it "is also well established that the Interstate and Indian Commerce Clauses have very different applications," implying that it is inappropriate to apply the commerce clause doctrine developed in the context of commerce "among" States to trade "with" Indian tribes.[212] However, this Note argues that rather than creating or using a new framework, the Court should turn to a fundamental judicial standard of review and analyze Foreign Commerce Clause cases using a rational basis standard.

The Court's application of its lowest standard of review, the rational basis test, will provide it with sufficient latitude to address foreign commerce issues. Allowing regulation of activities that do not reach the level of substantially affecting commerce—which the Interstate Commerce Clause would require for regulation—gives Congress and the courts more expansive power to regulate foreign commerce consistent with both Foreign Commerce Clause case law and legislative intent. Additionally, applying the rational basis standard will inhibit courts from permitting any irrational regulation of foreign conduct. For example, one current concern with § 2423(c) is that its only hook into foreign commerce is international travel; a rational basis standard would proscribe the irrational punishment of a U.S. citizen for travelling to Paris and giving the jacket on her back to a homeless person; no court would have a rational basis to conclude that such conduct would have any type of effect on commerce or a larger regulatory scheme.

V. RATIONAL BASIS: THE ONLY RATIONAL SOLUTION

Rather than creating its own framework, this Note suggests that bereft of Supreme Court guidance, lower courts have overcomplicated their analyses of Foreign Commerce Clause issues. As rational basis is the Court's lowest standard of review, Congress's power to regulate commerce is at its greatest when making determinations through a rational basis lens. If a law does not meet rational basis, then it is irrational. As such, because Congress's Commerce Clause power is greater in the foreign context than in the interstate context, it should use the tool that allows it to bring the most conduct under its scope in accordance with the Constitution. That tool is rational basis.

The tests the lower courts created convolute analysis and muddle these rarely navigated Foreign Commerce Clause waters. The tenable nexus test is simply an ambiguously defined reiteration of the rational basis test. But why create new language when it will certainly complicate future analysis? Courts will then have multiple tests, some of which accomplish

211. *Id.* at 211.

212. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

the same result. Moreover, the demonstrable effects test will similarly perplex courts. While the *Bollinger* court's rationale fits neatly into a rational basis approach,[213] its explanation of its test indicates that it requires some sort of proof or legislative findings; however, the Court does not even require such proof or findings in the Interstate Commerce Clause domain, and therefore that requirement is unduly demanding in the foreign arena, where Congress's power is greater. Much like the *Clark* court—and the courts that subsequently utilized the tenable nexus test—the *Bollinger* court gives a vague and terse definition of its test.[214] Neither of these tests will be helpful for future analyses and will most likely overcomplicate issues, shift focus on to the wrong concepts, and inundate courts with an unnecessary number of analytical options to choose from, which will have a negative impact on the judiciary's ability to speak with "one voice" on Foreign Commerce Clause issues.

Some scholars suggest additional frameworks. This Note disagrees with creating a new framework and argues for a simple rational basis approach. For example, Professor Goodno suggests a four-factor test for this issue: "(1) impact on the United States; (2) territorial nexus; (3) congressional intent; and (4) respect for international norms."[215] While this Note does not give an in-depth analysis of this four-factor test, it does provide a brief explanation of its disagreement with it. First, this test appears to be more complex than any test the courts have for interpreting and analyzing Foreign Commerce Clause cases. Considering its broad power in this arena, the court should not have to meet *mo*re standards. More important for the scope of this Note is that congressional intent should not play a main role in determining whether Congress has the power to regulate some particular activity. Intent does not equal power. Too many lower courts have misinterpreted the issue at hand, or have used legislative intent to indicate *why* Congress enacted § 2423(c) rather than *how* it has to power to do so.[216] Legislative intent, it appears, has only served to point courts in the wrong direction in this case.

The language and multiplicity of the factors in this test will serve, much like the additional tests that lower courts have created, to further complicate the already overly convoluted Foreign Commerce Clause field. Finally, courts should not use the tri-category framework from *Lopez* because it is too demanding for the foreign context; for example, courts should not have to have a rational basis to conclude that an activity *substantially* affects commerce, just that it has some effect on commerce. Determining the degree to which the activity affects commerce rests

213. *See Bollinger*, 798 F.3d at 219.

214. *See id.* at 216 ("Requiring a showing of demonstrable effect, of course, still requires that the effect be more than merely imaginable or hypothetical.").

215. Goodno, *supra* note 11, at 1204.

216. *See supra* Section III.C.

outside the scope of this Note. However, it stands to reason that because the Foreign Commerce Clause power is greater than the Interstate Commerce Clause power, the activity should not have to have so great an effect to fall under Congress's power.

CONCLUSION

The fact that some U.S. citizens have made a habit out of exploiting other nations' lax or nonexistent governmental standards or, in the case of *Bollinger*, feel beyond reproach and the reach of law, creates a great need for legislation to curtail such behavior. If the Court adopts the rational basis standard in the Foreign Commerce Clause setting, as this Note proposes, it will find the current legislation, § 2423(c), constitutional as there is a rational basis to conclude that not regulating the illicit sex at issue could have an effect on a larger regulatory scheme. On the other hand, if the Court adopted a more stringent standard requiring it to meet various elements or make certain findings, this could lead to impermissibly and arbitrarily limiting the power of the Foreign Commerce Clause. The Supreme Court should push the new standards created by lower courts to the wayside and return to Constitutional Law standard of review basics: it should apply a rational basis standard to make determinations about Foreign Commerce Clause cases.