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COMMENTS

THE SEARCH FOR A CONSTITUTIONAL JUSTIFICATION FOR THE NONCOMMERCIAL PRONG OF 18 U.S.C. § 2423(C)

Jessica E. Notebaert*

I. INTRODUCTION

In September 2011, the Third Circuit became the first U.S. court of appeals to definitively address the constitutionality of a federal statute criminalizing citizens' noncommercial, overseas sexual conduct.[1] In *United States v. Pendleton*, it upheld the noncommercial prong[2] of 18 U.S.C. § 2423(c) against the defendant's facial challenge.[3] The *Pendleton* court, like other courts that have considered the issue, held that the Foreign Commerce Clause gave Congress the power to pass § 2423(c), which criminalizes "travel[ing] in foreign commerce, and engag[ing] in any illicit sexual conduct with another person."[4] But no two courts have used

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[1] United States v. Pendleton, 658 F.3d 299, 308–11 (3d Cir. 2011). Other courts have explicitly reserved the issue, declining to address it until it would be dispositive of the case before the court. *See, e.g.*, United States v. Clark, 435 F.3d 1100, 1109–10 (9th Cir. 2006).

[2] 18 U.S.C. § 2423(c) criminalizes two types of conduct—engaging in commercial sex acts and committing the sexual abuse of a minor. *See infra* text accompanying notes 19–24. Accordingly, the statute is said to have two prongs, a "commercial" prong and a "noncommercial" prong. *See Clark*, 435 F.3d at 1105.

[3] 18 U.S.C. § 2423(c) (2006); *Pendleton*, 658 F.3d at 311.

[4] 18 U.S.C.§ 2423(c); *Pendleton*, 658 F.3d at 308–11; *see also Clark*, 435 F.3d at 1103; United States v. Flath, 845 F. Supp. 2d. 951, 954–957 (E.D. Wis. 2012); United States v. Martinez, 599 F. Supp. 2d 784, 808 (W.D. Tex. 2009); United States v. Bianchi, No. 06-19, 2007 WL 1521123, at *5 (E.D. Pa. May 22, 2007); *cf.* United States v. Bredimus, 352 F.3d

precisely the same reasoning in reaching that conclusion, leaving the noncommercial prong of § 2423(c) on shaky constitutional ground.[5]

This Comment analyzes the possible constitutional justifications for the noncommercial prong of § 2423(c), which has primarily been used to prosecute U.S. citizens who engage in child sex abuse overseas. It advocates for a single test to determine the constitutionality of a criminal statute passed pursuant to Congress's Foreign Commerce Clause authority. It also argues that there is an alternate constitutional basis for statutes criminalizing citizens' overseas conduct—Congress's power to pass laws effectuating treaty obligations. As prosecutions of § 2423(c) violations become more frequent,[6] definitively resolving the statute's constitutional status may prevent protracted pretrial proceedings disputing the statute's legitimacy and normalize decisions across the lower federal courts.

Part II of this Comment describes the background of § 2423(c), including the statute's origins, current form, and operation. It also surveys recent Foreign Commerce Clause jurisprudence, particularly as it relates to § 2423(c), with the goal of identifying and analyzing the different approaches taken by lower federal courts.

Part III.A articulates a test for analyzing whether a statute that criminalizes citizens' overseas conduct is constitutional under the Foreign Commerce Clause. Applying that test, this Part concludes that Congress exceeded its authority under the Foreign Commerce Clause when it passed the noncommercial prong of § 2423(c). Part III.B argues that prosecutions under § 2423(c) of noncommercial child sex abuse occurring overseas may be constitutionally sound, but under Congress's Necessary and Proper Clause powers, not its Foreign Commerce Clause authority. The Necessary and Proper Clause authorizes Congress to pass laws, such as § 2423(c), to implement the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (Optional Protocol), a multilateral treaty to which the United States is a signatory.[7]

200, 208 (5th Cir. 2003) (reaching the same conclusion in a case litigating the constitutional status of a related statute, 18 U.S.C. § 2423(b)).

[5] *See infra* text accompanying notes 66–147.

[6] Justice News, U.S. Dep't of Justice, Attorney General Eric Holder Speaks at the National Summit on Protecting Children from Sexual Exploitation (Oct. 14, 2011), *available at* http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-1110141.html ("In recent years, investigations and prosecutions of child exploitation crimes have increased dramatically. . . . [The challenge of child exploitation] demands our most aggressive, innovative, and comprehensive possible response.").

[7] Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,

Part III.C argues that prosecutors who wish to avoid litigating the unsettled constitutional status of § 2423(c) can obtain substantially the same results for substantially the same conduct under a related statute, § 2423(b). Section 2423(b) criminalizes, in pertinent part, "travel[ing] in foreign commerce, *for the purpose* of engaging in any illicit sexual conduct with another person."[8] The drafters of the 2003 PROTECT (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today) Act passed § 2423(c) because they feared that the need to prove intent under § 2423(b) prevented prosecutors from aggressively prosecuting sex offenders.[9] But this fear is proving unfounded because of the ways in which modern investigatory techniques, Federal Rule of Evidence 414, and the increasingly frequent admission of expert testimony in child sex exploitation cases have affected criminal trial practice.

Finally, Part IV summarizes the arguments contained in Parts II–III and comments briefly on the significance of settling the issues discussed therein. In an era of globalization, Congress's increasing attempts to exert its reach extraterritorially require courts to be able to engage in informed discussions regarding Congress's constitutional authority to criminalize citizens' overseas conduct.

II. BACKGROUND

A. TRACKING THE ORIGINS AND OPERATION OF SECTION 2423(C)

Section 2423(c) was one of a number of provisions enacted in 2003 as part of the PROTECT Act, a comprehensive piece of federal legislation designed to address the growing concern over child pornography, sex tourism, and other forms of sexual exploitation of children.[10] It is one of

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opened for signature May 25, 2000, S. TREATY DOC. NO. 106-37, 2171 U.N.T.S. 227 (entered into force Jan. 18, 2002); Missouri v. Holland, 252 U.S. 416, 432 (1920).

[8] 18 U.S.C. § 2423(b) (emphasis added).

[9] *See infra* text accompanying notes 30–36.

[10] S. REP. NO. 108-2, at 1–2 (2003) (explaining that the purposes of the PROTECT Act were "to restore the government's ability to prosecute child pornography offenses successfully" and to "accomplish several other changes in existing law to aid in the investigation and prosecution of child pornography offenses, such as creating extraterritorial jurisdiction"); 149 CONG. REC. 445–46 (2003) (statement of Sen. Orrin Hatch) (summarizing the PROTECT Act and its goals); 149 CONG. REC. 9079 (2003) (statement of Rep. Sue Myrick) ("The PROTECT Act sends a clear message to those who prey upon children that if they commit these crimes, they will be punished. This legislation provides stronger penalties against kidnapping, ensures lifetime supervision of sexual offenders and kidnappers of children, gives law enforcement the tools it needs to effectively prosecute these crimes, and provides assistance to the community when a child is abducted.").

four related provisions, sometimes called the "travel statutes,"[11] that criminalize travel in interstate or foreign commerce that is connected to sexual abuse.[12]

The first of the other three provisions, § 2421, criminalizes transporting an individual in interstate or foreign commerce with the intent that the individual engage in prostitution or any other criminal sexual activity.[13] The current version of § 2421 originated in 1910 as the Mann Act, once known as the White-Slave Traffic Act.[14] The purpose behind the Mann Act was "to protect women who were weak from men who were bad,"[15] although its scope has since expanded.[16] The second provision, § 2423(a), criminalizes transporting a minor in interstate or foreign commerce with the intent that the minor engage in prostitution or any other criminal sexual activity.[17] The third, § 2423(b), criminalizes traveling in interstate or foreign commerce for the purpose of engaging in any illicit sexual conduct, as defined by statute.[18]

Section 2423(c) criminalizes traveling in foreign commerce and engaging in illicit sexual conduct.[19] Illicit sexual conduct is defined in § 2423(f) as:

> (1) [A] sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex

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[11] *See* VIRGINIA M. KENDALL & T. MARKUS FUNK, CHILD EXPLOITATION AND TRAFFICKING: EXAMINING THE GLOBAL CHALLENGES AND U.S. RESPONSES 91–107 (2012).

[12] United States v. McGuire, 627 F.3d 622, 623–24 (7th Cir. 2010).

[13] 18 U.S.C. § 2421.

[14] *See* White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–24 (2006)); *McGuire*, 627 F.3d at 624. The original Mann Act criminalized, *inter alia*, transporting in interstate or foreign commerce, "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery." Mann Act, 36 Stat. at 825.

[15] Wyatt v. United States, 362 U.S. 525, 530 (1960) (quoting Denning v. United States, 247 F. 463, 465 (5th Cir. 1918)).

> It was in response to shocking revelations of subjugation of women too weak to resist that Congress acted. . . . As the legislative history discloses, the Act reflects the supposition that the women with whom it sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be protected against themselves.

Id. at 530 (citing H.R. REP. NO. 61-47, at 10–11 (1910)).

[16] *Compare* Mann Act, 36 Stat. 825 (focusing on transporting women and girls for "prostitution or debauchery"), *with* 18 U.S.C. § 2421 (focusing on transporting anyone for any criminal sex offenses).

[17] 18 U.S.C. § 2423(a).

[18] *Id.* § 2423(b).

[19] *Id.* § 2423(c).

> act (as defined in section 1591) with a person under 18 years of age.[20]

The combination of § 2423(c) and (f)(2) criminalizes, in a nutshell, giving or receiving anything of value in exchange for any sex act with a minor.[21] This combination is known as the "commercial prong" of the sex tourism statute.[22] The combination of § 2423(c) and (f)(1) criminalizes the sexual abuse of minors.[23] This combination is known as the "noncommercial prong" of the sex tourism statute.[24]

The purpose of 2003's PROTECT Act was to "give[] law enforcement authorities valuable new tools to deter, detect, investigate, prosecute, and punish crimes against America's children."[25] In addition to drafting new provisions increasing prosecutors' ability to track and collect evidence against child pornographers, the PROTECT Act substantially revised 18 U.S.C. § 2423.[26] The PROTECT Act replaced the then-current version of § 2423(b) with § 2423(b)–(g).[27] The revision left § 2423(b) substantially intact,[28] but added § 2423(c) ("Engaging in illicit sexual conduct in foreign places"), § 2423(d) ("Ancillary offenses," i.e., "arrang[ing], induc[ing], procur[ing], or facilitat[ing] the travel of a person knowing that such a person is traveling in interstate or foreign commerce for the purpose of engaging in illicit sexual conduct"), § 2423(e) ("Attempt and conspiracy"), § 2423(f) (defining "illicit sexual conduct"), and § 2423(g) (providing an affirmative defense to certain charges under this statute).[29]

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[20] *Id.* § 2423(f). Per 18 U.S.C. § 2246(2):

> [T]he term "sexual act" means—(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Chapter 109A criminalizes: aggravated sexual abuse (*id.* § 2241); sexual abuse (*id.* § 2242); sexual abuse of a minor or ward (*id.* § 2243); and abusive sexual conduct (*id.* § 2244).

[21] 18 U.S.C. §§ 1591(e)(3), 2423(c), 2423(f)(2).

[22] *See* United States v. Clark, 435 F.3d 1100, 1109–10 (9th Cir. 2006).

[23] 18 U.S.C. §§ 2241–48, 2423(c), 2423(f)(1).

[24] *See Clark*, 435 F.3d at 1109–10.

[25] Presidential Statement on Signing the PROTECT Act of 2003, 39 WEEKLY COMP. PRES. DOC. 504 (Apr. 30, 2003).

[26] *See* PROTECT Act, Pub. L. No. 108-21, sec. 105(a), § 2423, 117 Stat. 650, 653–54 (2003) (codified at 18 U.S.C. § 2423 (2006)).

[27] *See id.*

[28] The conspiracy prong of the old version of § 2423(b) was moved to § 2423(e) of the new version. *Compare* 18 U.S.C. § 2423(b) (2000), *with* sec. 105(a), 117 Stat. at 654.

[29] Sec. 105(a), 117 Stat. at 653–54.

The primary effect of adding § 2423(c) was to remove one of the greatest barriers to enforcement of § 2423(b)—the requirement that prosecutors prove that mens rea existed prior to travel.[30] Under the precursor to § 2423(c)—the pre-2003 version of § 2423(b)[31]—a prosecutor had to prove that a defendant formed the intent to engage in illicit sexual activity prior to his travel in interstate or foreign commerce.[32]

The PROTECT Act eliminated this intent requirement.[33] The conference report regarding the Act stated, "Current law requires the government to prove that the defendant traveled with the intent to engage in the illegal activity. Under [§ 2423(c)], the government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country."[34] In other words, a defendant could be prosecuted for traveling to a foreign country and engaging in illicit sex in violation of § 2423(c), even if he had no preconceived intent to do so.[35] Thus, the elements that prosecutors now need to prove under § 2423(c) are: (1) that the defendant is either a U.S. citizen or an alien admitted to the United States for permanent residence; (2) that the defendant traveled in foreign commerce; and (3) that while the defendant was in the foreign place, he engaged in illicit sexual conduct with another person.[36]

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[30] Congress first attempted to eliminate the need for prosecutors to prove the intent element in sex tourism cases in the Sex Tourism Prohibition Improvement Act (STPIA), which was proposed, but not passed, in 2002. *Clark*, 435 F.3d. at 1104 (citing H.R. REP. NO. 107-525, at 2–3 (2002)). The STPIA would have added a statute to the books that criminalized illicit sexual activities while abroad, regardless of whether the defendant had formed the intent to do so prior to traveling overseas. H.R. REP. NO. 107-525, at 2–3 (2002). Although the STPIA failed, the PROTECT Act, proposed just a year later, adopted its language nearly verbatim in § 2423(c). *Compare id.* at 2–3, *with* H.R. REP. NO. 108-66, at 5 (2003) (Conf. Rep.).

[31] PROTECT Act, sec. 105(a), § 2423, 117 Stat. at 653–54 (describing the changes to the existing statute).

[32] 18 U.S.C. § 2423(b) (2000) (amended 2003).

[33] 18 U.S.C. § 2423(c) (2006).

[34] H.R. REP. NO. 108-66, at 51 (2003) (Conf. Rep.); *see also* United States v. Martinez, 599 F. Supp. 2d 784, 803 (W.D. Tex. 2009).

[35] *Id.*

[36] *See, e.g.*, Pattern Criminal Jury Instructions of the Seventh Circuit 635 (2012) [hereinafter 7th Cir. PJI]; Pattern Criminal Jury Instructions 11th Cir. § 93.3 (2010) [hereinafter 11th Cir. PJI]. "To 'travel in foreign commerce' means that the defendant moved from a place within the United States to a place outside the United States." 11th Cir. PJI, *supra*, § 93.3. "[I]llicit sexual conduct" means: (1) "causing a person under 18 years of age to engage in a sexual act by using force or placing that person in fear that any person will be subjected to death, serious bodily injury, or kidnapping"; (2) "a sexual act with a person under 18 years of age after rendering that person unconscious or administering a drug, intoxicant, or other substance that substantially impairs a person"; (3) "a sexual act with a person who is under 16 years of age and is at least four years younger than the defendant"; or (4) "a commercial sex act with a person under 18 years of age." *Id.*

The PROTECT Act did not include a jurisdictional statement,[37] and the legislative history surrounding its passage makes no explicit reference to a constitutional provision giving Congress the power to pass such wide-sweeping legislation. By contrast, the Sex Tourism Prohibition Improvement Act (STPIA), a precursor to the PROTECT Act that was proposed but not passed in 2002, included a "Constitutional Authority Statement" grounding Congress's authority to pass the law in its power to regulate commerce under Article I, Section 8 of the U.S. Constitution.[38] When Congress enacted the PROTECT Act instead of the STPIA, it neglected to include a similar statement of constitutional authority.[39] Nevertheless, courts that have considered the constitutionality of the PROTECT Act appear to have assumed that the Commerce Clause and, in the case of § 2423(c), the Foreign Commerce Clause, authorized Congress to pass the Act.[40]

B. OBSERVING § 2423(C)'S NONCOMMERCIAL PRONG IN ACTION: THE PROSECUTION OF THOMAS PENDLETON

On July 24, 2008, Thomas S. Pendleton, a Pennsylvania native and

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[37] The Ninth Circuit recognized this in *United States v. Clark*, 435 F.3d 1100, 1104 (9th Cir. 2006).

[38] H.R. REP. NO. 107-525, at 5 (2002).

[39] The proponents of the preconference version of Senate Bill 151, which proposed amendments and additions to existing child pornography laws that would eventually become part of the PROTECT Act, did spend a great deal of time discussing the constitutionality of the proposed laws. However, they focused exclusively on the portions of the statute that were responding to *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), a Supreme Court case that implicated the First Amendment in child pornography prosecutions. *See* 149 CONG. REC. 448–50 (2003) (statement of Sen. Patrick Leahy). In particular, Senator Leahy discussed the steps the Senate Committee on the Judiciary had taken to ensure that the reforms to the child pornography prosecution laws were constitutional in light of *Free Speech Coalition*. *See id.* at 449 ("At our hearing . . . Constitutional and criminal law scholars—one of whom was the same person who warned us last time that [previous legislation] would be struck down—stated that the PROTECT Act as introduced in the last Congress could withstand Constitutional scrutiny, although there were parts that were very close to the line."); *see also id.* at 445 (statement of Sen. Orrin Hatch) ("We must now act quickly to repair our child pornography laws to provide for effective law enforcement in a manner that accords with the Court's ruling."). There was no discussion of the constitutionality of the sex tourism statutes once they were added in the conference report. *Cf.* H.R. REP. NO. 108-66 (2003) (Conf. Rep.); 149 CONG. REC. 9079–96 (relaying testimony regarding the conference report before the House of Representatives).

[40] *See, e.g.*, United States v. Pendleton, 658 F.3d 299, 308–311 (3d Cir. 2011); *see also Clark*, 435 F.3d at 1103; United States v. Bredimus, 352 F.3d 200, 204–08 (5th Cir. 2003); United States v. Flath, 845 F. Supp. 2d 951, 954–57 (E.D. Wis. 2012); United States v. Martinez, 599 F. Supp. 2d 784, 808 (W.D. Tex. 2009); United States v. Bianchi, No. 06-19, 2007 WL 1521123, at *4–5 (E.D. Pa. May 22, 2007).

U.S. citizen, was indicted by a federal grand jury under § 2423(c).[41] Pendleton was tried on that indictment in the U.S. District Court for the District of Delaware in September 2009.[42] The facts adduced at Pendleton's trial told a disturbing story of child sexual exploitation.[43] In late November 2005, Pendleton traveled from Philadelphia to Germany.[44] Shortly after arriving in Germany, Pendleton met a fourteen-year-old boy named Dieter.[45] Dieter resided at a group home because his father passed away and his mother was too ill to raise him.[46] Pendleton and Dieter struck up a friendship, corresponding through letters and postcards.[47]

Throughout early 2006, Pendleton made occasional visits to Dieter at his group home.[48] In the summer of 2006, Pendleton invited Dieter to go on an overnight biking and camping trip with him.[49] Dieter agreed.[50] On the second night of the trip, while Pendleton and Dieter were in their shared tent, Pendleton initiated sexual contact with Dieter.[51] Dieter pushed Pendleton away and ran out of the tent.[52] Dieter went to the campsite manager's home, and the manager called Dieter's custodians, who picked him up and took him back to the group home.[53] Until Pendleton was tried, Dieter's only subsequent contact with Pendleton was a letter that Dieter received.[54]

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[41] 18 U.S.C. § 2423(c); United States v. Pendleton, No. 08-111, 2009 WL 330965, at *1 (D. Del. Feb. 11, 2009).

[42] Transcript of Record at 1, 336–38, United States v. Pendleton, No. 08-111 (D. Del. Jan. 20, 2010).

[43] *See generally id.*

[44] News Release, U.S. Immigration & Customs Enforcement, Delaware Child Predator Sentenced to 30 Years in Federal Prison: The Man Was Convicted by a Jury on Sex Tourism and Failure to Register Charges (Feb. 4, 2010), *available at* http://www.ice.gov/news/releases/1002/100204wilmington.htm [hereinafter Delaware Child Predator Sentenced].

[45] Transcript of Record, *supra* note 42, at 96–97. Although the victim had turned eighteen by the time of his testimony, I have chosen to use a pseudonym in this Comment for privacy purposes.

[46] *Id.* at 92.

[47] *Id.* at 99. Dieter testified that he thought it was "exciting" to get postcards from Pendleton. *Id.* at 108. He said he received postcards depicting Rockefeller Place in New York and Independence Hall in Philadelphia, among other landmarks. *Id.*

[48] *Id.* at 99.

[49] *Id.* at 108–09.

[50] *Id.*

[51] *Id.* at 115–18.

[52] *Id.* at 120.

[53] *Id.* at 126, 130.

[54] *Id.* at 130–31. Police found what was presumably a draft of the letter, dated May 29, 2006, on Pendleton's computer when he was arrested. It read, in part:

> My Dear Dieter: I need to write to you to express my great sorrow and sadness that my thoughtless and insensitive actions have caused you so much pain. What I had intended to be a

Pendleton argued in pretrial proceedings that the noncommercial prong of § 2423(c) was "facially unconstitutional because it exceeds congressional authority under the Foreign Commerce Clause of the United States Constitution."[55] Pendleton's arguments were unavailing.[56] The *Pendleton* district court found that § 2423(c) was well within Congress's power to regulate foreign commerce.[57] Pendleton was convicted at the subsequent jury trial.[58] Relying heavily on Pendleton's prior convictions for sexually abusing children, the district court judge sentenced Pendleton to the statutory maximum of thirty years in prison and a lifetime of supervised release.[59] On appeal to the Third Circuit, Pendleton again attacked the constitutionality of the noncommercial prong of § 2423(c).[60] On September 7, 2011, the Third Circuit upheld § 2423(c) and affirmed Pendleton's conviction.[61]

Pendleton's case—though clearly a distressing example of child sex exploitation—seems relatively unremarkable upon initial examination. According to Department of Justice statistics, he was one of 1,916 suspects arrested in the same reporting year for nonviolent sex offenses.[62] Even the

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> gesture and action to signify a friendship and love was carried too far and clearly shocked and frightened you. This result is the exact opposite of what I had intended, which was to reassure you of my feelings for you and to help deepen the bond between us, as well as to relax you and make you feel better and more comfortable . . . . I conclude by repeating how sorry I am that I have been the cause of such pain, and that I hope you can get over this, to recover and to be strengthened by the experience and that sometime you will be able to forgive me and accept me as your friend, loving and trustworthy. With deep regret but with real hope, your once and future friend.

Id. at 271–74.

[55] United States v. Pendleton, No. 08-111-GMS, 2009 WL 330965, at *2 (D. Del. Feb. 11, 2009).

[56] *Id.* at *6.

[57] *Id.* at *3–4; *see infra* text accompanying notes 107–109, 122–125.

[58] United States v. Pendleton, 658 F.3d 299, 302 (3d Cir. 2011).

[59] 18 U.S.C. § 2423(c) (2006). Pendleton has a long and unsympathetic history of sexually abusing young boys. Delaware Child Predator Sentenced, *supra* note 44. In 1981, he was convicted by a Michigan court for molesting an eleven-year-old while serving as a church camp counselor. *Id.* In a 1992 New Jersey case, he was convicted of sexual assault, attempted aggravated sexual assault of a minor, and endangering the welfare of a child in a case involving sexual abuse of a twelve-year-old boy on biking trips in Virginia and New Jersey. *Id.* In 2001, he was convicted by the government of the Republic of Latvia of sexually abusing both a nine-year-old child and a thirteen-year-old child over the span of six months. *Id.*

[60] *Pendleton*, 658 F.3d at 302.

[61] *Id.* at 311.

[62] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2008—STATISTICAL TABLES 17 tbl.4.1 (2010), *available at* www.bjs.gov/content/pub/html/fjsst/2008/fjs08st.pdf. A nonviolent sex offense includes, *inter alia*, "transporting an individual (including minors) from one place to another in interstate or foreign commerce

result is unsurprising—95.6% of nonviolent sex offense cases terminated in the same reporting year as Pendleton's resulted in convictions.[63] There was minimal media coverage of Pendleton's trial and conviction. Yet Pendleton's case was significant because it presented the first opportunity for federal appellate review of the constitutionality of the noncommercial prong of § 2423(c), potentially setting the stage for Supreme Court review of the issue.[64]

C. ANALYZING THE DIVERGENT INTERPRETATIONS OF THE FOREIGN COMMERCE CLAUSE

The Foreign Commerce Clause is part of Article I, Section 8 of the U.S. Constitution: "*The Congress shall have power . . . [t]o regulate Commerce with foreign Nations*, and among the several States, and with the Indian Tribes."[65] This clause actually contains three concepts: the Foreign Commerce Clause ("[t]o regulate Commerce with foreign Nations"), the Interstate Commerce Clause ("[t]o regulate Commerce . . . among the several States"), and the Indian Commerce Clause ("[t]o regulate Commerce . . . with the Indian Tribes").

The Foreign Commerce Clause is largely unexplored territory for

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with the intent and purpose of engaging in prostitution, or any sexual activity for which any person can be charged with a criminal offense." *Id.* at 64.

[63] MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2009—STATISTICAL TABLES 18 tbl.4.2 (2012), *available at* http://bjs.gov/content/pub/pdf/fjs09st.pdf. Of those who went to trial, sixty-two were convicted and only four were acquitted. *Id.*

[64] Other defendants have been charged under the noncommercial prong of § 2423(c), but most of them have pleaded guilty. *See, e.g.*, United States v. Rudd, 662 F.3d 1257, 1259 (9th Cir. 2011); United States v. Prowler, 320 F. App'x 721, 721 (9th Cir. 2009); United States v. Castellon, 213 F. App'x 732, 733 (10th Cir. 2007); United States v. Bollea, 144 F. App'x 69, 70 (11th Cir. 2005). At least one defendant has been convicted under this prong, but he has not appealed his sentence. *See* United States v. Martinez, 599 F. Supp. 2d 784, 803 (W.D. Tex. 2009). Reviewing *Pendleton* would also give the Supreme Court the opportunity to address a second important issue concerning prosecutions of citizens' overseas conduct—which criminal venue statute should be used in such cases. The Second and Ninth Circuits refuse to apply 18 U.S.C. § 3238 (which applies to offenses not committed in any U.S. judicial district) unless the offense charged was committed *entirely* outside of the United States. *See* United States v. Pace, 314 F.3d 344, 351 (9th Cir. 2002); United States v. Gilboe, 684 F.2d 235 (2d Cir. 1982). The Third, Fourth, and Fifth Circuits apply § 3238 where some conduct occurs in the United States and some conduct occurs overseas. *Pendleton*, 658 F.3d at 305; United States v. Levy Auto Parts, 787 F.2d 946, 950, 952 (4th Cir. 1986); United States v. Erwin, 602 F.2d 1183, 1185 (5th Cir. 1979). This circuit split implicates a defendant's constitutional rights to have his trial "held in the State where the said crimes shall have been committed" and to be heard by a "jury of the state and the district wherein the crime shall have been committed," U.S. CONST. art. III, § 2 & amend. VI, and deserves attention from the Supreme Court.

[65] U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

jurists and commentators,[66] especially relative to its cousin, the Interstate Commerce Clause. However, as travel between the United States and foreign nations becomes a frequent reality for more and more U.S. citizens, the extent of the U.S. government's authority to criminalize the activities of citizens abroad takes on increasing importance.[67] Cases attacking the constitutionality of § 2423(b) and (c) present an ideal opportunity to explore the constitutional justification for criminal legislation explicitly designed to apply extraterritorially. Most challenges to § 2423(b) and (c) have invoked the Foreign Commerce Clause.[68] Defendants often argue that these criminal provisions fall outside of Congress's constitutional authority "[t]o regulate Commerce with foreign Nations."[69]

No clear test exists for evaluating the constitutionality of criminal laws passed pursuant to Congress's Foreign Commerce Clause authority.[70] Out of the murkiness, it is possible to discern three general analytical frameworks. First, some courts have relied on Interstate Commerce Clause jurisprudence and applied the tests articulated in *United States v. Lopez* and its progeny to the Foreign Commerce Clause context.[71] Those courts treat the United States and the relevant foreign nation as sister-states and consider whether the statute would be a valid exercise of Congress's Commerce Clause power in the interstate context.[72] If the statute would

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[66] Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 950 (2010) ("[T]he Foreign Commerce Clause has received little sustained analytical attention."); Julie Buffington, Comment, *Taking the Ball and Running with It:* U.S. v. Clark *and Congress's Unlimited Power Under the Foreign Commerce Clause*, 75 U. CIN. L. REV. 841, 842 (2006).

[67] Colangelo, *supra* note 66, at 951. Indeed, as Professor Colangelo notes, recent hubbub regarding the Foreign Commerce Clause has led to a spate of student notes and comments analyzing the case of Michael Clark, *see* United States v. Clark, 435 F.3d 1100 (9th Cir. 2006), and making tentative forays into analyses of the Foreign Commerce Clause. *Id.* at 949, 951 n.5. Perhaps Professor Colangelo's expansive article on the history, doctrinal development, and current application of the Foreign Commerce Clause is the best evidence of the increasing importance of the Foreign Commerce Clause to assessing the constitutionality of congressional action.

[68] *See supra* note 40.

[69] U.S. CONST. art. I, § 8, cl. 3.

[70] *See infra* text accompanying notes 82–147; *see also* Buffington, *supra* note 66, at 846 ("[N]o clear guidelines for determining the constitutionality of a statute that restricts a U.S. citizen's conduct in foreign commerce have emerged."). This lack of clarity applies only to Congress's positive authority; the proper test for evaluating whether state action violates the dormant Foreign Commerce Clause is well settled, but extensive discussion thereof is beyond the scope of this Comment. *See* Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434 (1979).

[71] *See, e.g.*, United States v. Bredimus, 352 F.3d 200, 205 (5th Cir. 2003); United States v. Martinez, 599 F. Supp. 2d 784, 805–09 (W.D. Tex. 2009).

[72] *See, e.g.*, *Bredimus*, 352 F.3d at 205; *Martinez*, 599 F. Supp. 2d at 805–09.

survive constitutional scrutiny in that instance, it survives constitutional scrutiny under this approach to Foreign Commerce Clause interpretation.[73]

The second analytical framework also starts with Interstate Commerce Clause case law, but it is heavily influenced by dormant Foreign Commerce Clause jurisprudence.[74] Courts that apply this framework find that precedential treatment of the dormant Foreign Commerce Clause—which concerns the states' authority to regulate foreign commerce in the absence of federal action—gives Congress "broad and plenary" authority to legislate in the foreign commerce arena.[75] Because these courts have found that Congress's power is greater under the Foreign Commerce Clause than the Interstate Commerce Clause,[76] they may be more inclined to find that § 2423(b) and (c) are valid enactments, even if a strict application of *Lopez* and its progeny would not support such a finding in the interstate context.

The third analytical framework also starts with *Lopez*. Instead of combining *Lopez* with dormant Foreign Commerce Clause case law, however, the commentators and individual judges[77] whose analyses fall into this third category combine *Lopez* with sovereignty and international law concerns in arriving at their Foreign Commerce Clause tests.[78] Proponents of this approach have found that the scope of Congress's Foreign Commerce Clause authority is *narrower* than the scope of its Interstate Commerce Clause authority.[79] Thus, they would examine statutes purporting to criminalize citizens' conduct abroad *more* stringently than they would statutes regulating interstate behavior.[80] This Comment ultimately argues that a version of this third analytical framework is the most appropriate test for considering a criminal statute's constitutionality under the Foreign Commerce Clause.[81]

1. *First Analytical Framework: The* Lopez *Categories*

All three of the analytical frameworks that courts and commentators have used to assess Foreign Commerce Clause cases rely, at their core, on the currently reigning Interstate Commerce Clause test. In order for a

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[73] *Bredimus*, 352 F.3d at 205; *Martinez*, 599 F. Supp. 2d at 805–09.

[74] *See Japan Line*, 441 U.S. at 453–54 (considering the constitutionality of a state statute purporting to regulate foreign commerce).

[75] United States v. Pendleton, No. 08-111-GMS, 2009 WL 330965, at *3–4 (D. Del. Feb. 11, 2009) (citing United States v. Clark, 435 F.3d 1100, 1114 (9th Cir. 2006)).

[76] *See, e.g.*, *Pendleton*, 2009 WL 330965, at *6; *Clark*, 435 F.3d at 1111, 1113, 1116.

[77] No U.S. district court or U.S. court of appeals majority has applied this framework.

[78] *See, e.g.*, Colangelo, *supra* note 66; Buffington, *supra* note 66.

[79] *See infra* Part II.C.3.

[80] *See infra* Part II.C.3.

[81] *See infra* Part III.A.

statute to be within Congress's Interstate Commerce Clause powers, it must regulate one of the "three broad categories of activity" set forth in *United States v. Lopez*: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce"; or (3) "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[82] Further, the conduct that the statute at issue seeks to regulate must be economic in nature.[83]

A number of courts have directly applied this Interstate Commerce Clause test to cases decided under the Foreign Commerce Clause by treating the United States and the relevant foreign nation as if they were sister-states.[84] For example, in *United States v. Bredimus*, the defendant traveled from Texas to Thailand, via Hong Kong and Tokyo, in 2001.[85] His trip had a dual purpose: first, to attend scheduled business meetings, and second, to "make videotapes and digital images of Thai children engaged in sexually explicit conduct."[86]

The defendant was indicted under § 2423(b) and moved to dismiss the indictment, arguing that Congress exceeded its authority under the Commerce Clause by enacting § 2423(b).[87] The *Bredimus* district court denied the defendant's motion, finding that § 2423(b) "[did] not exceed Congress's authority under the Commerce Clause because Congress has the authority to keep the channels of foreign commerce free from immoral or injurious uses."[88] In affirming, the Fifth Circuit, relying on *Lopez* and *Morrison*, observed that other courts have upheld statutes similar to § 2423(b) on a "channels of commerce" theory.[89]

The United States District Court for the Western District of Texas has also applied Interstate Commerce Clause precedent in the Foreign Commerce Clause context. In *United States v. Martinez*, the twenty-year-

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[82] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (internal citations omitted).

[83] United States v. Morrison, 529 U.S. 598, 613 (2000).

[84] *E.g.*, United States v. Bredimus, 352 F.3d 200, 204–06 (5th Cir. 2003); United States v. Martinez, 599 F. Supp. 2d 784, 790–91 (W.D. Tex. 2009).

[85] *Bredimus*, 352 F.3d at 202.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 203.

[89] *Bredimus*, 352 F.3d at 207–08. The Fifth Circuit noted, but did not rely on, its opinion that "the deference accorded to Congress [is] more compelling when, as here, the commerce at issue is foreign, as opposed to interstate." *Id.* The court referred to *United States v. Von Foelkel*, 136 F.3d 339, 341 (2d Cir. 1998) (upholding 18 U.S.C. § 2262(a)(1)); *United States v. Bailey*, 112 F.3d 758, 766 (4th Cir. 1997) (upholding 18 U.S.C. § 2261(a)); and *United States v. Wright*, 128 F.3d 1274, 1276 (8th Cir. 1997) (upholding 18 U.S.C. § 2262(a)(1)). The Third Circuit panel that decided *United States v. Pendleton* also upheld § 2423(c) against a Foreign Commerce Clause challenge on the "channels of commerce" theory. 658 F.3d 299, 308–11 (3d Cir. 2011).

old defendant took a minor girl from her aunt's house, led her on foot across a bridge from El Paso, Texas, to Juarez, Mexico, and forced her to have sex with him.[90] The defendant was indicted for, *inter alia*, "[e]ngaging in illicit sexual conduct in foreign places, in violation of 18 U.S.C. § 2423(c)."[91]

The defendant moved to dismiss the charges against him, arguing that § 2423(c) was unconstitutional because it was outside the scope of Congress's Foreign Commerce Clause authority.[92] The Western District of Texas held that § 2423(c) passed constitutional muster.[93] Instead of relying on the "channels of commerce" theory that the *Bredimus* court applied, the *Martinez* court relied on the "substantially affects" prong of *Lopez*.[94] It found that there was "a rational basis for concluding that leaving non-commercial sex with minors outside of federal control could affect the price for child prostitution services and other market conditions in the child prostitution industry."[95]

Not all judges who have considered the constitutionality of the noncommercial prong of § 2423(c) under this analytical framework concluded that it is constitutional. Judge Roth dissented from the portion of the majority opinion in *United States v. Bianchi* upholding § 2423(c) against a Commerce Clause challenge. Applying *Lopez*, he opined that "criminalizing non-commercial activity abroad exceeds Congress's power under the Foreign Commerce Clause."[96] Judge Roth found that there was "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."[97] By removing the intent requirement in the 2003 amendments to § 2423(b), Congress "severed any jurisdictional tie to the prohibited activity."[98] "Vesting Congress with such a general international police power," Judge Roth reasoned, "would violate both [the defendant's] constitutional rights and the limited nature of our federal government."[99]

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[90] United States v. Martinez, 599 F. Supp. 2d 784, 790–91 (W.D. Tex. 2009).

[91] *Id.* at 791.

[92] *Id.* at 791–92.

[93] *Id.* at 808.

[94] *Id.*

[95] *Id.* The *Martinez* court noted in a throwaway comment that federal courts have given Congress "almost complete deference" when "enacting laws regulating foreign commerce," but did not appear to rely on the expanded authority the way other courts have. *Id.*

[96] United States v. Bianchi, 386 F. App'x 156, 163 (3d Cir. 2010) (Roth, J., concurring in part and dissenting in part).

[97] *Id.*

[98] *Id.* at 164.

[99] *Id.*

In sum, courts that graft the *Lopez* framework directly onto the Foreign Commerce Clause analysis do two things: First, they determine whether the conduct regulated fits within one of *Lopez*'s definitions of "commerce." Then, they consider whether there is a rational basis to believe that the statute actually does regulate one of the three categories of "commerce." Some courts have used this framework to uphold § 2423(b) and (c) against facial challenges.[100] It is also the basis for the two alternative analytical approaches described *infra*. Both use the *Lopez* Interstate Commerce Clause test as a jumping-off point for their respective Foreign Commerce Clause tests.

2. *Second Analytical Framework: Combining* Lopez *with Dormant Commerce Clause Jurisprudence to Justify Increased Congressional Authority Under the Foreign Commerce Clause*

Some courts have found that Congress's power to regulate conduct under the Foreign Commerce Clause is greater than its power under the Interstate Commerce Clause.[101] The reasoning behind this approach is relatively consistent across the courts that apply it. The analysis usually involves at least two of the following three arguments: First, the commerce power is separated into three distinct sections—the Interstate Commerce Clause, the Foreign Commerce Clause, and the Indian Commerce Clause—and there is little intrasentence unity in the constitutional phrasing.[102] Second, the original intent of the Framers was to grant Congress broader authority in regulating foreign commerce than interstate commerce, because the unique federalist concerns of the fledgling nation limited the federal government's authority only vis-à-vis the states.[103] Finally, the courts consider as binding authority a long and relatively settled line of dormant Foreign Commerce Clause cases from *Gibbons v. Ogden* through *Japan Line Ltd. v. County of Los Angeles*, which tend to suggest that Congress has broad power.[104]

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[100] *See id.* at 156; United States v. Bredimus, 352 F.3d 200 (5th Cir. 2003); *Martinez*, 599 F. Supp. 2d at 784; *see also* Buffington, *supra* note 66, at 846 & n.38 (collecting cases).

[101] *See, e.g.*, United States v. Clark, 435 F.3d 1100, 1103 (9th Cir. 2006); United States v. Pendleton, No. 08-111-GMS, 2009 WL 330965, at *3 (D. Del. Feb. 11, 2009).

[102] *See, e.g.*, Nicholas Christophilos, Comment, *Constitutional Law—Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003—Congress Did Not Exceed Its Constitutional Authority by Criminalizing Commercial Sex Abroad—* United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006)*, 30 SUFFOLK TRANSNAT'L L. REV. 515, 518 (2007).

[103] *Clark*, 435 F.3d at 1102–03.

[104] *See, e.g.*, *id.*

i. Textual Interpretation

Scholars debate the notion of intrasentence uniformity—the idea that words and phrases connected to each other in the Constitution ought to be interpreted in a way that is consistent with each other.[105] Courts and commentators who find that the Foreign Commerce Clause and the Interstate Commerce Clause call for different tests believe that the Commerce Clause sets forth three distinct powers, each with its own unique meaning: "Though each clause is controlled by the same introductory phrase, the Framers appear to have considered the individual commerce powers—foreign, interstate, and Indian—as distinct subclauses, requiring separate analysis."[106]

For example, en route to finding that the noncommercial prong of § 2423(c) was a valid exercise of Congress's constitutional authority, the Third Circuit observed in *Pendleton* that the Foreign Commerce Clause has "followed its own distinct evolutionary path."[107] Deciding that the Interstate Commerce Clause and the Foreign Commerce Clause encapsulate different congressional powers allows advocates of this second analytical framework to decide that the "Foreign Commerce Clause *is* different from the Interstate Commerce Clause," and therefore to move away from the *Lopez* framework.[108] This belief allows courts to place fewer limits on Congress's Foreign Commerce Clause authority than on its Interstate Commerce Clause authority.[109]

ii. Original Intent—Federalism and the Need for One National Voice

The courts and commentators who apply this second analytical framework also believe that the original intent of the Framers was to grant Congress broader authority in regulating foreign commerce than in regulating interstate commerce because of the unique federalist concerns of the early United States. This belief has some basis in Supreme Court jurisprudence: "Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several

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[105] *Id.* at 1110 (collecting scholarly articles). *See generally* Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003).

[106] Daniel Bolia, Comment, *Policing Americans Abroad: The PROTECT Act, the Case Against Michael Lewis Clark, and the Use of the Foreign Commerce Clause in an Increasingly Flat World*, 48 S. TEX. L. REV. 797, 804 (2007).

[107] United States v. Pendleton, 658 F.3d 299, 306 (3d Cir. 2011) (citing *Clark*, 435 F.3d at 1113).

[108] *Clark*, 435 F.3d at 1110–11.

[109] *Id.* at 1111 ("[T]he Supreme Court has read the Foreign Commerce Clause as granting Congress sweeping powers.").

States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."[110]

The thrust of this argument is that Foreign Commerce Clause cases are free from the "[f]ederalism and state sovereignty concerns" that led courts to limit Congress's authority to pass laws pursuant to its Interstate Commerce Clause power.[111] In other words, Interstate Commerce Clause cases implicate the argument that the continued existence of the federal system depends upon "some appraisal and accommodation of the competing demands of the state and national interests involved."[112] Foreign Commerce Clause cases lack these federalism concerns; therefore, these courts and commentators argue, the rationale behind restricting federal power in the interstate context simply does not apply in the Foreign Commerce Clause domain.[113]

Further, proponents of this second analytical framework often draw on a related originalist argument that the Framers intended Congress's authority under the Foreign Commerce Clause to be far-reaching so that the United States could speak with one voice in foreign affairs. One commentator sought to prove that "the Founders intended Congress to have—and the Supreme Court has interpreted the Constitution as providing—broader powers in the realm of foreign commerce than in commerce between the states."[114] He argued for increased congressional authority in foreign affairs because the Constitution emerged, in part, out of a need for a uniform, federal voice to speak for the new nation in issues involving commerce with foreign nations.[115] Ultimately, the argument goes, the result of combining the Interstate Commerce Clause test with the absence of federalism concerns and "the necessity that the nation speak with one voice" is that "any statute that would be granted constitutional deference when it regulates interstate commerce is accorded even greater deference when Congress is regulating foreign commerce."[116]

iii. Doctrinal Development of the Dormant Foreign Commerce Clause

Courts and authors in this second framework have also analyzed dormant Foreign Commerce Clause jurisprudence and concluded that it

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[110] Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 448 (1979) (citing, *inter alia*, THE FEDERALIST NO. 42, at 279–83 (James Madison) (Jacob E. Cooke ed., 1961)).

[111] *Clark*, 435 F.3d at 1113.

[112] *Id.*

[113] *Id.*

[114] Bolia, *supra* note 106, at 802–03.

[115] *Id.* at 803.

[116] United States v. Martinez, 599 F. Supp. 2d 784, 805 (W.D. Tex. 2009) (citing United States v. Bredimus, 352 F.3d 200, 208 (5th Cir. 2003)).

supports the proposition that Congress has broad authority to regulate in the foreign commerce arena. The Supreme Court's dormant Foreign Commerce Clause jurisprudence dates back to 1824 and *Gibbons v. Ogden*, which held that the Foreign Commerce Clause "comprehend[s] every species of commercial intercourse between the United States and foreign nations."[117]

Later courts put flesh on the dormant Foreign Commerce Clause skeleton articulated by *Gibbons*, most notably in *Japan Line*.[118] *Japan Line* considered whether a state tax could be imposed on instrumentalities of foreign commerce.[119] The County of Los Angeles argued that the Commerce Clause analysis should be identical regardless of whether the commerce at issue was foreign or interstate.[120] The Supreme Court considered and explicitly rejected that argument, finding that "[w]hen construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required."[121]

A number of courts, including the *Pendleton* district court, have relied on *Japan Line* to support giving even more deference to Congress when it legislates pursuant to the Foreign Commerce Clause than when it legislates pursuant to the Interstate Commerce Clause.[122] The *Pendleton* district court first noted that "Congress is authorized to regulate the . . . three broad categories of activity" that are sketched out in *Lopez*.[123] It then cited *Japan Line* for the proposition that "Congress' power to regulate foreign commerce, however, is even greater than its power to regulate interstate commerce."[124] Without identifying a specific *Lopez* category that the conduct addressed in § 2423(c) would fall under, the Court concluded that under this "broad and plenary" Foreign Commerce Clause power, the element that a defendant travel in foreign commerce placed the statute "'squarely within Congress' authority to regulate and protect' Foreign

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[117] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193 (1824).

[118] *See* Japan Line Ltd. v. Cnty. of L.A., 441 U.S. 434 (1979); *see also* Buffington, *supra* note 66, at 843–46.

[119] *Japan Line*, 441 U.S. at 434.

[120] *Id.* at 446.

[121] *Id.* The *Japan Line* Court held that when a state sought to tax the instrumentalities of foreign commerce, two additional considerations—besides the usual constitutional issues—come into play: (1) "the enhanced risk of multiple taxation"; and (2) the fact that "[f]oreign commerce is preeminently a matter of national concern" and "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential." *Id.* at 446–48.

[122] United States v. Pendleton, No. 08-111-GMS, 2009 WL 330965, at *3–4 (D. Del. Feb. 11, 2009).

[123] *Id.* at *3.

[124] *Id.* (citing *Japan Line*, 441 U.S. at 434).

Commerce."[125]

The clearest example of the application of this second analytical framework is the Eastern District of Wisconsin's recent decision in *United States v. Flath*.[126] The *Flath* court briefly acknowledged that Congress's powers over "Commerce with foreign Nations, and among the several States" are contained in the same constitutional provision, but noted that the two powers have "significant distinctions."[127] Most importantly, "the interplay of federalism and state sovereignty, so prevalent in the interstate commerce context, is absent in the foreign commerce arena."[128] Further, the *Flath* court relied on *Japan Line* to find that "Congress has broader power to regulate commerce with foreign nations than among states."[129] After making these initial observations, the court considered the *Lopez* categories and found that "the use of the channels and instrumentalities of foreign commerce is necessarily a part of the commission of the targeted offense," contained in § 2423(c).[130] That finding, combined with "Congress's broader power to regulate foreign commerce than interstate commerce and the absence of federalism and state sovereignty considerations," led the *Flath* court to find that § 2423(c) "is a proper regulation of persons in foreign commerce and of the uses of the channels of foreign commerce under Congress's foreign commerce power."[131]

3. *Third Analytical Framework: Combining* Lopez *with Constraining Originalist and Foreign Sovereignty Arguments to Restrict Congressional Authority*

Some commentators and individual judges—but no district courts or appellate majorities—have found that Congress's power to legislate pursuant to the Foreign Commerce Clause is not as expansive as its power under the Interstate Commerce Clause.[132] This approach tends to include one or more of the following characteristics: First, there is a textual argument that the language of the Commerce Clause—which regulates commerce "with" foreign nations but "among" the states—contemplates different approaches to assessing congressional authority under the Foreign Commerce Clause and the Interstate Commerce Clause, respectively.[133]

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[125] *Id.* at *3–4 (citing United States v. Clark, 435 F.3d 1100, 1114 (9th Cir. 2006)).
[126] United States v. Flath, 845 F. Supp. 2d 951 (E.D. Wis. 2012).
[127] *Id.* at 954–55.
[128] *Id.* at 955.
[129] *Id.* (citing *Japan Line*, 441 U.S. at 448).
[130] *Id.*
[131] *Id.* at 956–57.
[132] *See, e.g.*, Colangelo, *supra* note 66, at 969–70; Buffington, *supra* note 66, at 857–58.
[133] Colangelo, *supra* note 66, at 954.

Second, the application of dormant Foreign Commerce Clause jurisprudence to positive Foreign Commerce Clause cases is inapposite because of the starkly different factual scenarios presented by the two types of statutes.[134] Relatedly, norms of international sovereignty require a greater restriction of Congress's authority to criminalize conduct occurring in a foreign locale than norms of federalism require when criminalizing conduct occurring in the United States.[135]

i. Textual Interpretation

Proponents of this third analytical approach do not believe that commerce takes on a different meaning depending on its referent (foreign Nations, several States, or Indian Tribes). Instead, they ascribe a consistent meaning to "commerce," and therefore use the *Lopez* framework to define the three categories of commerce regulated by the Commerce Clause as a whole[136]:

> Whatever the meaning of "commerce," it presumably has the same meaning whether that commerce takes place "among the states" or occurs "with foreign nations." Likewise, the power to "regulate" commerce among the states presumptively is the same power that Congress has to "regulate" commerce with Indian tribes. Indeed, one might say that there is only one power—the power to regulate commerce—that applies to three situations.[137]

Instead of focusing on the differences between types of "commerce" or "regulat[ion]," the emphasis in this framework is on the differences between the words "among" and "with."[138] The fact that the Framers of the Constitution switched from "with" to "among" when talking about foreign nations and the states, respectively, indicates that the former is meant to allow Congress to regulate activity between the United States and foreign nations, not activity among other foreign nations or in foreign nations.[139]

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[134] *Id.* at 953.

[135] *See, e.g.*, Colangelo, *supra* note 66, at 953 ("The Foreign Commerce Clause . . . raises not only novel and pressing doctrinal questions, but also serious normative issues that habitually attend the unilateral projection of domestic law abroad by escalating the potential for both international friction and unfairness to individuals."); Joanna Doerfel, Comment, *Regulating Unsettled Issues in Latin America Under the Treaty Powers and the Foreign Commerce Clause*, 39 U. MIAMI INTER-AM. L. REV. 331, 349 (2008).

[136] Colangelo, *supra* note 66, at 986.

[137] Prakash, *supra* note 105, at 1149.

[138] Colangelo, *supra* note 66, at 970–71.

[139] *See id.* Professor Colangelo argues that the word "with" requires that there be a "nexus" between the conduct criminalized and the United States. If a statute meets that requirement, falls into one of the *Lopez* categories, and respects foreign sovereignty norms, it is valid under the Foreign Commerce Clause. *Id.* at 954–55.

ii. Distinguishing the Dormant Foreign Commerce Clause

This analytical framework does not ignore or dispute the authority of the long line of cases establishing the federal government's dominance in the area of foreign commerce.[140] Rather, commentators argue that those cases are inapposite because they are interpretations of the dormant Foreign Commerce Clause; thus, they address only the states' inability to regulate commerce with foreign nations (and Congress's ability to curtail attempted exercises of such authority), not Congress's constitutional authority to affirmatively regulate conduct.[141] Lower courts have "cherry-pick[ed]" statements by the Supreme Court extolling the broad power of Congress in the foreign commerce context and, without considering whether the respective rationales behind the dormant Foreign Commerce Clause and positive Foreign Commerce Clause are consistent, used those quotations to uphold statutes that may actually violate the Foreign Commerce Clause.[142]

The rationale behind the dormant Foreign Commerce Clause cases—that in revenue and international trade cases, federal authority must trump state authority—"do[es] not exist in the context of the illicit sex acts statute . . . . [T]hus, Congress should not have the same discretion to regulate the conduct of U.S. citizens or aliens who travel in foreign commerce."[143] As one commentator put it:

> [I]t makes sense for Congress to have broad power to regulate foreign trade and the taxation of instrumentalities of foreign commerce because of international relations concerns. . . . [I]t is arguably not as important for Congress to act in a unified manner in regulating the illicit sex acts of a U.S. citizen abroad because this conduct can be regulated . . . by the foreign nation in which the crime occurs.[144]

In other words, because the Foreign Commerce Clause cases that give broad latitude to the federal government arise almost exclusively in the dormant Foreign Commerce Clause context, they are inapplicable when considering whether the Foreign Commerce Clause gives Congress the positive authority to pass criminal statutes.[145]

Finally, an individual's overseas conduct—no matter how despicable—simply "does not give rise to the same foreign relations concerns that the Supreme Court articulated in *Japan Line*," and "Congress

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[140] *Id.* at 959–69.

[141] *Id.*

[142] *Id.* at 957.

[143] Buffington, *supra* note 66, at 857.

[144] *Id.* at 858.

[145] United States v. Frank, 486 F. Supp. 2d 1353, 1355–56 (S.D. Fla. 2007) ("[I]ts [sic] is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.") (citing Geofroy v. Riggs, 133 U.S. 258, 267 (1890)).

should not have broader power to enact a Foreign Commerce Clause statute regulating a U.S. citizen's criminal conduct abroad than it has in regulating the citizen's interstate conduct."[146] A related argument proffered for constraining congressional authority under the Foreign Commerce Clause is that "[i]ntrusions into the realm of other sovereigns must be legitimate exercises of power and must be taken with the utmost consideration toward the situs nation." With respect to § 2423(c), at least one commentator has argued, "Congress encroached upon the realm of another sovereign."[147]

III. DISCUSSION

Having reviewed the background of the noncommercial prong of § 2423(c) and the current, varied approaches to analyzing statutes under the Foreign Commerce Clause, the next step is to determine whether the Foreign Commerce Clause—or any other constitutional grant of authority to Congress—allows courts to enforce, consistent with the U.S. Constitution, the noncommercial prong of § 2423(c).[148] Part A argues that when courts are considering the constitutionality of statutes passed pursuant to Congress's Foreign Commerce Clause power, they should ask not only whether the statute regulates "commerce," as defined by the Court's Interstate Commerce Clause jurisprudence, but also whether such commerce is "with" a foreign nation. Part A concludes that the Foreign Commerce Clause does not give Congress the authority to pass the noncommercial prong of § 2423(c).

Part B argues that Congress's power to pass legislation to enforce U.S. treaty obligations may give Congress the authority to pass the noncommercial prong of § 2423(c). Part C then argues that, in the event that neither the Foreign Commerce Clause nor Congress's power to pass laws implementing treaties provides a constitutional justification for the noncommercial prong of § 2423(c), prosecutors have new tools and trial strategies that make convictions under § 2423(b) more likely, such that § 2423(b) has become an effective—and constitutionally sound—alternative to § 2423(c).

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[146] Buffington, *supra* note 66, at 858.

[147] Doerfel, *supra* note 135, at 349.

[148] "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." United States v. Morrison, 529 U.S. 598, 607 (2000); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

A. CRAFTING A FOREIGN COMMERCE CLAUSE TEST FOR § 2423(C)

The Supreme Court should consent to review *United States v. Pendleton*, or a similar case, in order to provide definitive guidance to lower courts considering the extent of Congress's power under the Foreign Commerce Clause. As explained below, this Comment finds the analytical framework described *supra* in Part II.C.3 most persuasive, but even under a straightforward application of the *Lopez* test, as modified by subsequent cases, the noncommercial prong of § 2423(c) fails a Commerce Clause challenge. This Part first explains why the combination of § 2323(c) and (f)(1) does not regulate commerce under currently reigning Supreme Court jurisprudence. It then briefly explores why the fact that Congress is operating in the foreign, rather than the interstate, context supports a narrower interpretation of Congress's commerce power.

Like all courts that have addressed the constitutionality of § 2423(c), this Comment starts by examining whether the statute regulates commerce as defined by *Lopez* and subsequent cases.[149] Congress can pass statutes pursuant to its Commerce Clause authority if there is a rational basis for concluding that the legislation regulates one of the three categories of commerce laid out in *Lopez*—(1) the channels of commerce, (2) the instrumentalities of commerce, or (3) intrastate activity that has a substantial effect on commerce.[150] The noncommercial prong of § 2423(c) does not regulate an instrumentality of commerce. An instrumentality of commerce is something that facilitates interstate commerce, such as a train,[151] a ship,[152] or a cargo container.[153] Section 2423(c) regulates individuals' conduct, not the planes or boats that transport those individuals.

Section 2423(c) also does not regulate a channel of commerce. The channels of commerce are "the interstate transportation routes through which persons and goods move," including highways, railroads, navigable

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[149] There is a great deal of common sense behind interpreting like words in a like fashion and different words in a different fashion. Prakash, *supra* note 105, at 1149. Therefore, this Comment takes the approach that "commerce" should be given the same definition across the three parts of the Commerce Clause—the Foreign Commerce Clause, the Interstate Commerce Clause, and the Indian Commerce Clause. This has the added benefit of giving lower courts ample Supreme Court guidance as they undertake their constitutional analyses—there is no need to reinvent the Commerce Clause wheel in response to the growing importance of the Foreign Commerce Clause.

[150] Gonzales v. Raich, 545 U.S. 1, 22 (2005); United States v. Morrison, 529 U.S. 598, 613 (2000).

[151] Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1, 9 (1877).

[152] Transp. Co. v. Wheeling, 99 U.S. 273, 283 (1878).

[153] Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 445–46 (1979).

waters, and airspace.[154] It has been argued that because § 2423(c) requires a defendant to travel in foreign commerce, it clearly regulates a channel of commerce.[155] But § 2423(c) does not truly purport to regulate passage on international flights; it purports to regulate citizens' sexual conduct abroad.[156] Section 2423(c) is distinguishable from statutes that regulate the use of the channels of commerce for injurious purposes because under those statutes, the channels of commerce either are used in the commission of the offense[157] or are used with a criminal purpose in mind.[158] Neither of those conditions is present in § 2423(c).

Indeed, if courts upheld § 2423(c) under a "channels of commerce" framework solely because at some point—perhaps years or decades before committing a criminal act—an offender traveled in foreign commerce, Congress could criminalize essentially any action by anyone who travels to a foreign country. Congress could criminalize overseas traffic violations, jaywalking, drug use, or virtually any other conduct by U.S. citizens if the only jurisdictional hook required was that the defendant first traveled from the United States to a foreign country.[159] The Commerce Clause does not grant such extensive power.[160] Further, such broad legislative power raises

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[154] United States v. Ballinger, 395 F.3d 1218, 1225–26 (11th Cir. 2005) (quoting *Morrison*, 529 U.S. at 613); *see also* Pierce Cnty. v. Guillen, 537 U.S. 129, 147 (2003) (upholding legislation "aimed at improving safety in the channels of commerce," including streets, roads, and federal highways); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 518 (1941) (recognizing that navigable waters, railroads, and highways are "channels of commerce," which can be regulated under Congress's commerce powers).

[155] *See, e.g.*, United States v. Pendleton, 658 F.3d 299, 310 (3d Cir. 2011).

[156] 18 U.S.C. § 2423(c) (2006).

[157] *See, e.g.*, *id.* § 2421 (criminalizing knowingly transporting an individual in interstate or foreign commerce with the intent that the transported individual engage in prostitution).

[158] *See, e.g.*, *id.* §§ 1341 (criminalizing the use of the mail "for the purpose of executing" a criminal scheme or artifice), 2423(b) (criminalizing traveling in interstate or foreign commerce "for the purpose of engaging in any illicit sexual conduct"). The Committee on Federal Criminal Jury Instructions of the Seventh Circuit appears to have read § 2423(c) to contain a requirement that the defendant travel with a criminal purpose in mind; it characterized the offense as "the defendant . . . traveling in foreign commerce *to engage in* illicit sexual conduct with a minor." 7th Cir. PJI, *supra* note 36, at 635 (emphasis added). But this essentially adds back into the statute the intent element that the PROTECT Act deliberately removed, *see supra* Part II.A, and this one reading of the statute cannot save it.

[159] *See* United States v. Bianchi, 386 F. App'x 156, 164 (3d Cir. 2010) (Roth, J., concurring in part and dissenting in part) ("Because Congress severed any jurisdictional tie to the prohibited activity, it is untenable to use the travel element of section 2423(c) to shoehorn a subsequent, unconnected crime into the category of activities that substantially affect foreign commerce."); *cf. Morrison*, 529 U.S. at 615 (2000) ("[I]f Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence . . . .").

[160] *Cf.* United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) ("[U]nlike the earlier cases to come before the Court here neither the actors nor their conduct

policy concerns related not only to the appropriate reach of U.S. authority but also to the related concern of maintaining respect for foreign states' sovereignty within their borders.

The noncommercial prong of § 2423(c) cannot satisfy the "substantially affects" prong of *Lopez* either. Under the substantially affects prong, Congress has the "power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[161] As discussed in Part II.C.1, at least one court[162] used this theory to uphold § 2423(c) on the ground that the effect of child sex abuse on the market for child prostitution (i.e., the idea that if a "consumer" of child sex abuse obtains his desired good for free, the entire commercial market is affected) is analogous to the effect of private wheat production on the highly regulated wheat market[163] or of private marijuana production on the illegal marijuana market.[164]

The substantially affects prong, as developed in *Raich*, has certainly expanded Congress's power to regulate commerce, but it did not render that power unlimited.[165] Child sex abuse is not an economic commodity equivalent to wheat or marijuana. The *Wickard* Court acknowledged that the problem with a farmer's production of wheat for individual consumption is that he "forestall[s] resort to the market," thus removing a potential purchaser from the supply–demand equation.[166] Likewise, the *Raich* Court approved Congress's regulation of home-grown marijuana because marijuana is "a fungible commodity for which there is an established, albeit illegal, interstate market," and "leaving home-consumed marijuana outside federal control would . . . affect price and market conditions."[167]

But child sex abuse is not a commodity that is typically purchased on

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has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. . . . In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.").

[161] Gonzales v. Raich, 545 U.S. 1, 17 (2005); *see also* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

[162] *Cf.* United States v. Martinez, 599 F. Supp. 2d 784, 808 (W.D. Tex. 2009).

[163] *Wickard*, 317 U.S. at 128–29.

[164] *Raich*, 545 U.S. at 18–19.

[165] *See* United States v. Morrison, 529 U.S. 598, 608 (2000); *cf.* National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2585–91 (2012) (articulating limits on Congress's Commerce Clause power).

[166] *Wickard*, 317 U.S. at 127; *see id.* at 128 ("[Home-grown wheat] supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.").

[167] *Raich*, 545 U.S. at 18.

the open market; there is no similar tradeoff in which if individual production is regulated, the consumer is forced to participate in a commercial market that can be controlled by the federal government. Most child sex abuse is perpetrated by children's family members and close acquaintances,[168] not anonymous purchasers. Criminalizing the abuse of children does not encourage abusers to start engaging in market activity, such as paying providers of child prostitutes, that can be regulated as a commercial enterprise. It just prohibits private, noneconomic activity that occurs wholly outside the markets.[169] Thus, the noncommercial prong of § 2423(c) is similar to the provision of the Violence Against Women Act (VAWA) that was struck down in *United States v. Morrison*.[170] The statutory provision at issue in *Morrison* penalized engaging in gender-motivated violence.[171] In striking down that law as an impermissible extension of Congress's Commerce Clause authority, the *Morrison* Court held that Congress cannot "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[172] The activity prohibited by the noncommercial prong of § 2423(c) is of the same noneconomic, criminal character as the activity regulated by VAWA, and since VAWA could not satisfy the substantially affects prong of *Lopez*, § 2423(c) cannot either.

Although the foregoing analysis explains why the noncommercial prong of § 2423(c) is unconstitutional under the Interstate Commerce Clause test, there are good reasons why courts should adopt a slightly modified (and stricter) test for statutes that purport to regulate activity pursuant to Congress's Foreign Commerce Clause authority. In particular, there is a persuasive textual argument that the Framers' choice to regulate commerce "with" foreign nations but "among" the states gives different meanings to the respective clauses.[173]

The plain definitions of "with" and "among" seem to support commentators' arguments that the different word choices signal different

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[168] *See* Thomas Lyon, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1203–04 & n.4 (2012) (collecting sources).

[169] *Cf.* Cortney Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343, 392 (2013) ("Intrafamily sexual abuse occurs without regard to the market.").

[170] 529 U.S. at 617 (holding that Congress's commerce power did not grant it the power to pass 18 U.S.C. § 13981).

[171] *Id.* at 601–02, 605–06.

[172] *Id.*; *see also id.* at 613.

[173] It is worth noting that the statutory definition of "foreign commerce" in the Criminal Code also highlights the importance of the word "with." The term "foreign commerce," per statute, means "commerce *with* a foreign country." 18 U.S.C. § 10 (2006) (emphasis added).

constitutional standards.[174] "With" is "a function word" used "to indicate a participant in an action, transaction, or arrangement."[175] "Among" means "by or through the aggregate of" or "through the joint action of."[176] "Among" by definition implicates the aggregate activity of sister-states, but "with" has no such denotation. These definitions suggest that Congress's power to regulate in the foreign context is narrower than in the interstate context because Congress cannot base its authority on an argument that a foreign nation's intracountry activity, in the aggregate, substantially affects foreign commerce. If the aggregate of noneconomic intracountry activity in a foreign nation falls outside of Congress's Commerce Clause authority, a statute passed pursuant to the Foreign Commerce Clause is only valid if it regulates the instrumentalities or channels of foreign commerce. This limitation seriously curtails Congress's authority under the Foreign Commerce Clause and makes it even clearer that § 2423(c) exceeds congressional authority.

The original intent and dormant Foreign Commerce Clause arguments discussed *supra* Part II.C provide additional support for the conclusion reached by the textual analysis—that the "best" Foreign Commerce Clause test is an adaptation of the Interstate Commerce Clause test as constrained by the language of the Foreign Commerce Clause. The Foreign Commerce Clause was initially proposed and included in the Constitution to allow Congress to regulate trade with foreign nations and to prevent the states from developing inconsistent foreign trade policies that harmed the status of the developing United States in foreign affairs.[177] But there is no indication in the early history or subsequent interpretations of the Foreign Commerce Clause that the Framers or early jurists intended Congress to have greater power to regulate under the Foreign Commerce Clause than the Interstate Commerce Clause.[178]

Further, there is no principled rationale for relying on *Japan Line* and other dormant Foreign Commerce Clause cases to support an argument that Congress has plenary power to regulate pursuant to the Foreign Commerce Clause.[179] Those cases reflect the unique federalist quality of governance in the United States; Congress's power to regulate foreign commerce is broad when compared to the power of the states to regulate foreign commerce.[180] But that argument cannot be used to argue that Congress's Foreign

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[174] *See supra* note 139.
[175] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1438 (11th ed. 2011).
[176] *Id.* at 41.
[177] *See supra* text accompanying notes 140–147.
[178] *See supra* text accompanying notes 140–147.
[179] *See supra* Part II.C.2.iii.
[180] *Id.*

Commerce Clause power is virtually unlimited, as courts have mistakenly done.[181] Where Congress acts to negate state action (in the case of the dormant Foreign Commerce Clause), the typical federalist concerns arise and, as in the interstate context, Congress's power trumps state power. But when Congress acts in a positive manner, by passing laws that regulate overseas conduct, it runs into a different constraint on power—the sovereignty of foreign nations.[182] Concern that congressional action may infringe on other nations' autonomy makes it good policy to ensure that Congress's power is carefully limited according to the Constitution.

Careful analysis of Commerce Clause case law and policy makes clear that the noncommercial prong of § 2423(c) exceeds the authority granted to Congress by the U.S. Constitution.

B. REFRAMING THE ISSUE—USING CONGRESS'S TREATY POWER

Despite the failure of the Foreign Commerce Clause to support the noncommercial prong of § 2423(c), the statute should survive facial challenges to its constitutionality. Outside of the First Amendment context, a facial challenge to the constitutionality of a statute will succeed *only* by "establish[ing] that no set of circumstances exists under which the [statute] would be valid."[183] An examination of Congress's power to legislate to enforce the United States' treaty obligations shows that § 2423(c) is likely constitutional.

The Constitution endows Congress, through Article II, Section 2, Clause 2 and the Necessary and Proper Clause, with the authority to pass laws to implement treaties.[184] The executive branch has the power to make treaties.[185] But once a valid treaty has been enacted, it falls on Congress to pass legislation, if necessary, to enforce the treaty's provisions.[186] If a treaty is valid, "there can be no dispute about the validity of [statutes] under Article I, Section 8, [enacted] as a necessary and proper means to execute

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[181] *Id.*

[182] *See* sources cited *supra* note 135.

[183] United States v. Salerno, 481 U.S. 739, 745 (1987). The First Amendment is unique because it also recognizes an "overbreadth" doctrine. Schall v. Martin, 467 U.S. 253, 269 n.18 (1984).

[184] U.S. CONST. art. I, § 8, cl. 18, art. II, § 2, cl. 2; *see also* United States v. Belfast, 611 F.3d 783, 804 (11th Cir. 2010) ("Collectively, these clauses empower Congress to enact any law that is necessary and proper to effectuate a treaty made pursuant to Article II."); United States v. Flath, 11-CR-69, 2011 WL 6299941, at *9 (E.D. Wis. Sept. 14, 2011) (recommending to the district court that "it was proper for Congress to enact § 2423(c) under the Necessary and Proper Clause of the Constitution to implement the Optional Protocol").

[185] U.S. CONST. art. II, § 2, cl. 2.

[186] *See* Missouri v. Holland, 252 U.S. 416, 432 (1920); United States v. Lue, 134 F.3d 79, 82 (2d Cir. 1998).

the powers of the Government."[187]

For example, in 2001, Congress passed 18 U.S.C. § 2340A and related statutes to implement the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[188] The Eleventh Circuit tested the constitutionality of this enactment in *United States v. Belfast*.[189] The *Belfast* court held that "[t]he United States validly adopted the CAT pursuant to the President's Article II treaty-making authority, and it was well within Congress's power under the Necessary and Proper Clause to criminalize [] torture, as defined by the Torture Act."[190] The defendant argued that § 2340A exceeded Congress's power to pass laws to implement treaties domestically, because the language of the statute was broader than the language of the treaty.[191] But the *Belfast* court observed that statutory language does not have to mirror treaty language verbatim; it only has to track treaty language in all "material respects."[192]

In 2002 (just a year before enacting the PROTECT Act) the United States ratified the Optional Protocol.[193] The Optional Protocol expressed "grave[] concern[] at the significant and increasing international traffic of children for the purpose of the sale of children, child prostitution, and child pornography."[194] The treaty requires party states to prohibit the sale of children, child prostitution, and child pornography.[195] The treaty explicitly calls upon each member party to ensure that those offenses are "fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally."[196] The Optional Protocol builds on the Convention on the Rights of the Child, which requires member states—including the United States—to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, . . . including sexual

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[187] *Holland*, 252 U.S. at 432.

[188] Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382 (2004); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987). For another example, see *Lue*, 134 F.3d at 84 (upholding the constitutionality of the Hostage Taking Act as a valid exercise of Congress's power under the Necessary and Proper Clause to pass domestic laws enforcing the Hostage Taking Convention).

[189] 611 F.3d 783 (11th Cir. 2010).

[190] *Id.* at 793.

[191] *Id.* at 803.

[192] *Id.* at 806 (citing *Lue*, 134 F.3d at 84).

[193] Optional Protocol, *supra* note 7.

[194] *Id.* at pmbl.

[195] *Id.* at art. 1.

[196] *Id.* at art. 3, ¶ 1.

abuse."[197] The Optional Protocol explicitly calls for member states, including the United States, to implement domestic legislation protecting children from sexual abuse by their citizens, regardless of whether the abuse occurs domestically or overseas. Because § 2423(c) responds to that command, it is a constitutional exercise of Congress's power to pass legislation to enforce treaty obligations.

Some courts have observed, in dicta, that the Optional Protocol authorized Congress to pass § 2423(c).[198] One U.S. magistrate speculated that "§ 2423 was passed to enforce a multilateral treaty designed to protect children from *transnational and domestic* child sex prostitution."[199] She concluded that "it was proper for Congress to enact § 2423(c) under the Necessary and Proper Clause of the Constitution to implement the Optional Protocol."[200] Because § 2423(c) rationally relates to specific Articles of the Optional Protocol dealing with child prostitution, the statute "reasonably implements the Optional Protocol."[201] Even the *Pendleton* district court contemplated that § 2423(c) and (f)(1) are "'necessary and proper' to the implementation of the United States' international treaty obligations" under the Optional Protocol.[202] Courts should more confidently rely on Congress's Necessary and Proper Clause power to implement the Optional Protocol when considering the constitutionality of § 2423(c), rather than relying on the Commerce Clause analysis challenged in Part III.A.

C. AVOIDING THE ISSUE—RENEWED ABILITY TO PROSECUTE UNDER § 2423(B)

Even if a court eventually decides that § 2423(c) is not a valid exercise of congressional authority—or if prosecutors want to avoid relying on

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[197] Convention on the Rights of the Child, *supra* note 7, at art. 19.

[198] United States v. Martinez, 599 F. Supp. 2d 784, 798–99 (W.D. Tex. 2009); United States v. Pendleton, No. 08-111-GMS, 2009 WL 330965, at *4 (D. Del. Feb. 11, 2009); United States v. Bianchi, No. 06-19, 2007 WL 1521123, at *5 (E.D. Pa. May 22, 2007); United States v Frank, 486 F. Supp. 2d 1353, 1358–59 (S.D. Fla. 2007); *see also* United States v. Flath, 11-CR-69, 2011 WL 6299941, at *9 (E.D. Wis. Sept. 14, 2011). Although the *Flath* district court decided the case on the narrower Foreign Commerce Clause ground, *see* United States v. Flath, 845 F. Supp. 2d 951, 957 (2012), and did not adopt the portion of the magistrate's recommendation relating to the Optional Protocol, it did note that "it finds no discernible fault with the [m]agistrate's recommendation in th[at] regard." *Id.*

[199] *Martinez*, 599 F. Supp. 2d at 799 (referring to the Optional Protocol).

[200] *Flath*, 2011 WL 6299941, at *9.

[201] *Id.*

[202] *Pendleton*, 2009 WL 330965, at *4 (citing S. TREATY DOC. NO. 106-37, 39 L.L.M. 1285); *see also Frank*, 486 F. Supp. 2d at 1356–58; United States v. Pepe, No. 07-168 DSF, slip op. at 6 (C.D. Cal. Dec. 3, 2007).

§ 2423(c) until its constitutional status is more settled[203]—prosecutors can obtain substantially the same results by using § 2423(b) to prosecute child molesters whose conduct occurs overseas.[204] Section 2423(b) stands on solid constitutional ground.[205] The criminal act in § 2423(b) is not necessarily the exploitation of a child, but rather "the foreign travel with an illicit intent."[206] Because § 2423(b) criminalizes traveling with the intent to commit a sexual offense with a minor, offenders accomplish their criminal purpose when they use the channels of commerce.[207]

The current version of § 2423(c) "targets the same individuals as does § 2423(b)," but attempts to make it easier for prosecutors to punish those individuals.[208] Although it is admirable to increase prosecutions of individuals who take advantage of lax foreign laws on sex offenses, it is not permissible to do so by violating constitutional precepts. Rather, prosecutors should take advantage of trial strategies that are becoming increasingly popular—and successful—in child sex exploitation cases where intent must be proven but is difficult to prove by direct evidence.[209]

First, a major advance in resources available to prosecutors seeking to prove intent under § 2423(b) is the increasing willingness of courts to admit expert testimony on the behavior and characteristics of child molesters.[210]

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[203] Prosecutors can, of course, use both 18 U.S.C. § 2423(b) and (c) where appropriate.

[204] An added advantage of relying on § 2423(b) is that it avoids the overcriminalization debate that § 2423(c) might provoke. The propriety of criminal statutes lacking a mens rea requirement, such as § 2423(c), has been hotly contested. *See Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 2 (2010) (statement of Rep. Robert C. "Bobby" Scott, Chairman, H. Subcomm. on Crime, Terrorism, & Homeland Sec.) (referring to the "disturbing disappearance of the common law requirement of mens rea"). Further, critics of overcriminalization are concerned at the rapid growth of the federal criminal code and argue against the implementation of duplicative statutes. *See id.* at 1–2. Because § 2423(c) strikes at largely the same conduct as § 2423(b), but removes the intent requirement, it is fertile ground for overcriminalization objections. Section 2423(b) has no such problems.

[205] *See, e.g.*, United States v. Bianchi, 386 F. App'x 156, 162 (3d Cir. 2010) (citing United States v. Tykarsky, 446 F.3d 458, 470 (3d Cir. 2006)); United States v. Bredimus, 352 F.3d 200, 208 (5th Cir. 2003); United States v. Shutts, No. 07-20816-CR, 2008 WL 162662, at *4 (S.D. Fla. Jan. 16, 2008); United States v. Kaechele, 466 F. Supp. 2d 868, 892–99 (E.D. Mich. 2006).

[206] United States v. Martinez, 599 F. Supp. 2d 784, 796 (W.D. Tex. 2009) (citing *Bredimus*, 352 F.3d at 210).

[207] *See, e.g.*, *Shutts*, 2008 WL 162662, at *4.

[208] United States v. Pendleton, 658 F.3d 299, 304 (3d Cir. 2011).

[209] *See Bianchi*, 386 F. App'x at 162 (wondering why "the government would need or even want to charge § 2423(c) violations when the evidence of § 2423(b) violations . . . is . . . clear").

[210] *See, e.g.*, United States v. Hayward, 359 F.3d 631, 637 (3d Cir. 2004) (finding that testimony by a behavioral scientist was admissible as expert testimony where it "'focused

As an example, in *United States v. Hayward*, a behavioral scientist and FBI agent, Kenneth Lanning, was permitted to testify regarding "patterns exhibited by many acquaintance child molesters."[211] Those patterns include "selection of victims from dysfunctional homes, formulation of a customized seduction process, lowering the victim's inhibitions about sex, isolating the victim, and soliciting the victim's cooperation in the victimization process."[212]

The defendant in *Hayward* argued that Agent Lanning's testimony violated Federal Rule of Evidence 704(b), which prohibits an expert in a criminal case from stating an opinion "about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."[213] The *Hayward* court rejected this argument, recognizing that the circuit courts have long approved admission of expert testimony that "merely supports an inference or conclusion that the defendant did or did not have the requisite mens rea, so long as the expert does not draw the ultimate inference or conclusion for the jury."[214]

Courts have interpreted Rule 704(b) to permit expert testimony regarding characteristics of sex offenders generally but not regarding experts' opinions as to whether a particular defendant is a sex offender or is guilty of the crime charged.[215] Thus, in *Hayward*, because Agent Lanning never testified directly about the defendant's personal mens rea, only about the typical motives and practices of a child molester, his testimony did not violate Rule 704(b) and was properly admitted over objection.[216] Similarly, in *United States v. Romero*, the court permitted Agent Lanning to testify regarding characteristics of sex offenders:

> [T]he main thrust of Agent Lanning's testimony described the modus operandi of modern child molesters: devoting large amounts of time to finding and establishing relationships with children; choosing emotionally or mentally disturbed children because of their susceptibility to manipulation; probing the child's needs and interests and then mirroring those needs or attempting to fulfill them; and engaging in compulsive behavior even when that behavior increases the risk of getting caught.[217]

The Seventh Circuit acknowledged that expert testimony serves to

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primarily on the modus operandi—on the actions normally taken by child molesters to find and seduce their victims'") (quoting United States v. Romero, 189 F.3d 576, 586 (7th Cir. 1999)). *But see* United States v. Raymond, 700 F. Supp. 2d 142 (D. Me. 2010).

[211] *Hayward*, 359 F.3d at 636.

[212] *Id.*

[213] FED. R. EVID. 704(b); *Hayward*, 359 F.3d at 636.

[214] *Hayward*, 359 F.3d at 636 (citing United States v. Bennett, 161 F.3d 171, 185 (3d Cir. 1998); United States v. Morales, 108 F.3d 1031, 1038 (9th Cir. 1997)).

[215] *See, e.g.*, *Hayward*, at 636; *Romero*, 189 F.3d at 582.

[216] *Hayward*, 359 F.3d at 636–37.

[217] *Romero*, 189 F.3d at 585.

illuminate the criminal nature behind what seems like innocent conduct, which can help a jury decide whether a defendant had the intent to molest a specific child.[218]

In *Pendleton*, the testimony of an expert like Agent Lanning could have been used to provide the jury with enough background knowledge to conclude beyond a reasonable doubt that the defendant traveled in foreign commerce *with the intent* to engage in illicit sexual conduct with Dieter.[219] Pendleton certainly spent a lot of time cultivating a relationship with Dieter. He spent over six months corresponding with Dieter by mail and visiting Dieter at his group home before molesting him on the bike trip. Pendleton targeted an emotionally vulnerable boy—he had a deceased father and a sick mother and lived in an orphanage with virtually no other contact with the outside world. He spent time building up a shared interest—biking—that he later used to take advantage of Dieter. And, when he sent a letter to Dieter after molesting him, he likely engaged in "compulsive behavior even when that behavior increase[d] the risk of being caught."[220]

Further, in addition to admitting expert testimony, courts have allowed witnesses to testify at § 2423 trials regarding a defendant's past abuse of children.[221] Courts have admitted such testimony as modus operandi evidence over defense counsel objections that it is impermissible propensity evidence, admission of which violates Federal Rule of Evidence 404(b).[222] Courts have admitted such evidence under Rules 413 and 414, which allow evidence of a defendant's previous crimes of sexual assault and child molestation that "demonstrat[es] a propensity to commit such crimes."[223]

As with the expert testimony, this tool could have been used to convict Pendleton under § 2423(b). At Pendleton's trial, the prosecution produced a witness, Mark Rowe, who testified that when he was approximately twelve years old, Pendleton molested him.[224] Pendleton's molestation of Mark and his molestation of Dieter bore striking similarities. As with

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[218] *Id.* at 586 (analogizing to expert testimony admitted in drug trafficking cases to comment on the criminal purpose behind social behavior of drug traffickers).

[219] The significance is that the government could have obtained a conviction under the constitutionally sound 18 U.S.C. § 2423(b) instead of the potentially constitutionally deficient § 2423(c).

[220] *Romero*, 189 F.3d at 585.

[221] FED. R. EVID. 414; *see, e.g.*, United States v. McGuire, 627 F.3d 622, 626–27 (7th Cir. 2010); United States v. Rogers, 587 F.3d 816, 821 (7th Cir. 2009); United States v. Zahursky, 580 F.3d 515, 525 (7th Cir. 2009).

[222] *McGuire*, 627 F.3d at 626–27.

[223] *Id.* at 627.

[224] Transcript of Record, *supra* note 42, at 191–96. Again, the victim is now over eighteen years of age, but his name has been changed throughout this Comment. *See supra* note 45.

Dieter, Pendleton knew Mark for several months before committing any acts of molestation and, in Mark, he targeted another child with psychological problems.[225]

The actual conduct also looked quite similar—Pendleton and Mark were introduced through an adult friend of Pendleton (Mark's mother), and Mark was convinced to go on a biking trip with Pendleton.[226] On the trip, Mark had a tent to himself, but one night, Pendleton came into the tent and asked Mark if he could give Mark a massage.[227] Pendleton started massaging the boy's stomach and then sexually assaulted him.[228] The story of Pendleton's pursuit and molestation of Mark runs nearly parallel to that of his pursuit and molestation of Dieter; it would have been easily admitted as modus operandi evidence that could have helped a jury infer intent and likely return a guilty verdict under § 2423(b).

IV. CONCLUSION

The noncommercial prong of § 2423(c) is not a valid exercise of Congress's power to regulate "Commerce with foreign Nations."[229] It may, however, be a valid exercise of Congress's power to enact legislation to enforce treaties to which the United States is a party. Thus, prosecutions of individuals under § 2423(c)—like the prosecution of Thomas Pendleton—are permissible under the U.S. Constitution. Further, prosecutors now have more tools than ever for prosecuting individuals who sexually molest children abroad under § 2423(b), which permits prosecutors to avoid using § 2423(c) until it stands on sturdier constitutional footing (or, perhaps, to charge both § 2423(b) and (c), where appropriate).

Ultimately, the analysis contained in Parts II–III of this section does not apply only to § 2423(c). Rather, the analytical framework and conclusion offered apply to any statute criminalizing conduct occurring entirely overseas. As Congress seeks to expand its reach extraterritorially, it is increasingly important that courts adequately consider these issues in evaluating defendants' inevitable constitutional challenges. Further, it would be advisable for Congress to draft future legislation with these types of issues in mind. Adding jurisdictional "hooks," such as intent requirements on statutes purporting to regulate travel, or even (albeit nonbinding) statements of constitutional authority to guide courts' analyses,

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[225] Transcript of Record, *supra* note 42, at 178.
[226] *Id.* at 192–94, 198–99.
[227] *Id.* at 200.
[228] *Id.* at 200–01.
[229] U.S. CONST. art. I, § 8, cl. 3.

may clear up some of the confusion that has led to such drastically divergent opinions regarding the constitutional justifications for § 2423(c).