What Happens Abroad Does *Not* Stay Abroad: *United States v. Pendleton* and Congress's Constitutional Authority to Regulate Child Sex Abuse Abroad

Alaina Caliendo[†]

[†] J.D. Candidate, Seton Hall University School of Law, 2014; B.A., Quinnipiac University, 2011. The author would like to thank Professor Jenny-Brooke Condon for her invaluable guidance and support during the writing process. I would also like to thank my family and friends for their love and constant encouragement, without which I would not have made it to where I am today. Finally, thank you to the *Seton Hall Circuit Review* and its members for making this Comment possible.

I. INTRODUCTION

Child sex tourists: they could be pediatricians, retired army sergeants, dentists, or university professors.[1] Society often visualizes sex-tourists as stereotypical pedophiles with a ten-page rap sheet of sex offenses. Yet, sex tourists may not fit the stereotype society expects. "Tourists engaging in CST [Child Sex Tourism] often travel to developing countries looking for anonymity and the availability of children in prostitution."[2] Abusers who want to have sex with a child often pay other adults in order to receive these "services."[3]

Each year, the international commercial sex trade exploits approximately two million children.[4] Generally, one victimized child may serve as few as two or as many as thirty "clients" a week, which amounts to 100 to 1,500 tourists each year.[5] According to humanitarian experts, the United States, Mexico, and Canada alone account for

---

[1] *The Facts About Child Sex Tourism,* U.S. DEP'T OF STATE (Feb. 29 2008), http://2001-2009.state.gov/g/tip/rls/fs/08/112090.htm [hereinafter *State Department Facts* (2008)].

[2] *Id.*

[3] Stephanie Delaney, *Young Person's Guide to Combating Child-Sex Tourism*, ECPAT INTERNATIONAL, 5 (October 2008), http://resourcecentre.savethechildren.se/sites/default/files/documents/5209.pdf.

[4] *State Department Facts* (2008)*, supra* note 1.

[5] Brittany Bacon, *Stolen Innocence: Inside the Shady World of Child Sex Tourism*, ABC NEWS (July 17, 2007), http://abcnews.go.com/TheLaw/story?id=3385318.

twenty-five percent of the global market for child sex tourism abusers.[6] The Internet allows sex tourists and tour operators to write detailed accounts of their experiences in the child sex trade, including how to access children and the current market price by area.[7] On one website, for example, tour operators attempted to attract clientele by advertising "nights of sex 'with two young Thai girls for the price of a tank of gas.'"[8]

By sexually exploiting children, abusers inflict injury on children that impacts the child's "physical, mental, and emotional health."[9] Traffickers[10] generally prey upon vulnerable children—often runaways or victims of child abuse in their own homes—and exploit their weakness to gain control over them.[11] If children escape the grips of their traffickers, they often face a lifetime of psychological trauma. This psychological trauma impacts children's "ability to reintegrate back into society," and makes the healing process more difficult.[12] Various studies[13] suggest that combating child sex tourism must start with the "Johns"—the men (and sometimes women) who feed into this industry and pay for sex with young children.[14] Government leaders around the world now recognize that there is a market for child sex tourism and have come together to fight against the sexual exploitation of children.[15]

---

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Understanding Child Sex Tourism*, THE CODE, http://www.thecode.org/csec/background/ (last visited Mar. 4, 2014).

[10] A "trafficker" is one who enslaves these children through force by either physical or emotional harm and generally makes money off of forcing them to engage in commercial sex acts or forced labor. *The Traffickers,* POLARIS PROJECT, http://www.polarisproject.org/human-trafficking/overview/the-traffickers (last visited Feb. 22, 2013).

[11] Tina Frundt, *Enslaved in America: Sex Trafficking in the United States*, WOMEN'S FUNDING NETWORK, http://www.womensfundingnetwork.org/resource/past-articles/enslaved-in-america-sex-trafficking-in-the-united-states (last visited May 29, 2012).

[12] *Understanding Child Sex Tourism*, *supra* note 9; *see* Delaney, *supra* note 3, at 12–13.

[13] Jody Raphael & Brenda Myers-Powell, *From Victims to Victimizers: Interviews with 25 Ex-Pimps in Chicago*, SCHILLER DUCANTO & FLECK FAM. L. CTR. DEPAUL U. C. LAW 9 (Sept. 2010), http://newsroom.depaul.edu/PDF/FAMILY_LAW_CENTER_REPORT-final.pdf.

[14] *Id.* ("Ultimately, eliminating demand for prostitution will be the only truly effective way to end pimping, which always involves the exploitation and abuse of needy girls and women. Strategies to end demand are beginning to be employed by law enforcement officials through arrests of customers."); *see also* Youngbee Dale, *The Truth About Human Trafficking, Pimps, and Johns,* THE WASHINGTON TIMES (Jan. 12, 2012), http://communities.washingtontimes.com/neighborhood/rights-so-divine/2012/jan/12/truth-about-human-trafficking-pimps-and-johns/.

[15] *See generally* Delaney, *supra* note 3, at 14.

Countries are increasingly turning to creative means of prosecution to combat child sex tourism.[16] "At least 38 countries have extraterritorial laws that allow the prosecution of their citizens" for child sex tourism crimes that are committed abroad.[17] When a country criminalizes child sex tourism, however, offenders look for opportunities to commit this crime elsewhere, specifically seeking out countries where they perceive laws to be less effective in protecting children from sex crimes and exploitation.[18] For example, in the United States, many laws criminalize sex with minors and other forms of child sexual abuse. These strict laws may prompt offenders to pursue victims elsewhere, perhaps explaining the recent rise in U.S. citizen involvement in child sex tourism abroad.[19] For example, general visitor arrivals to Cambodia have tremendously increased.[20] One reason for the increase in sex tourism in this area includes the fact that other prime destinations for sex-tourism, such as Thailand, are "said to be cracking down on sex tourism, compelling sex offenders to find a new destination,"[21] and, in addition, the fact that Cambodia "appears to be well known for its lax law enforcement, pedophiles and opportunistic sex tourists alike have come."[22]

In countries such as Cambodia, Costa Rica, Mexico, and the Philippines, the laws concerning sex crimes and exploitation are less stringent than in other countries, providing offenders with a "loophole." Because these countries have less aggressive or less effective laws against child sex trafficking, they provide a harbor for offenders to commit their crimes with greater anonymity and fewer consequences.[23]

---

[16] *The Facts About Child Sex Tourism,* U.S. DEP'T OF STATE (Aug. 19, 2005), http://2001-2009.state.gov/g/tip/rls/fs/2005/51351.htm [hereinafter *State Department Facts* (2005)].

[17] *State Department Facts* (2008)*, supra* note 1.

[18] Delaney, *supra* note 3, at 8.

[19] PROTECTION PROJECT*, International Child Sex Tourism: Scope of the Problem and Comparative Case Studies*, JOHN HOPKINS U. PAUL H. NITZE SCH. OF ADVANCED INT'L STUD. 29 (Jan. 2007), *available at* http://www.protectionproject.org/wp-content/uploads/2010/09/JHU_Report.pdf.

[20] *Id*. at 106. In 2000 Cambodia had 466,365 visitors, which rose to 786,524 in 2002 and then in 2004 there was an even greater increase to 1,055,202. *Id.*

[21] *Id.*

[22] *Id.* Similarly, Costa Rica in 2003 had 510,751 American visitors, while in 2004—only one-year later—Costa Rica's number of visitors increased to 633,640. Costa Rica is an easy target country for sex tourists from America given that it is "easily reached from the United States . . . [t]ickets are inexpensive, many Costa Ricans speak English, and the dollar rules the day." Costa Rica now has a successful marketing image that welcomes individuals as a sex destination "where illicit sexual conduct involving minors was acceptable." *Id.* at 77–78.

[23] *Id.* at 77–78, 106–07.

There are various other factors that may contribute to the high volume of sex tourism in countries like Cambodia, including: weak local laws against sex crimes and exploitation, the ease with which abusers may plan sex-tourism trips via the Internet, affordable transportation, and poverty[24] in nations where the tourists visit.[25]

Although the foreign countries where most child sex tourism occurs have criminalized child sexual offenses, sadly, victims are unlikely to report the crime, and governments rarely prosecute the few cases that are reported.[26] This failure to prosecute may be due to police corruption, the weakness of government in poor and unstable countries, and the desperation of families struggling to survive in deeply impoverished nations. Poor and unstable governments often do not have the resources to enforce laws protecting children and thus too often turn a blind eye to these crimes in light of the revenue sex-tourism creates for their economy.[27] Furthermore, many child sex tourists believe that their conduct is beyond the reach of the United States government.[28] As a result, offenders try to cover up their actions by bribing "the police or other officials to avoid going to court," and even the child's family from telling officials.[29]

To help combat the international problem of child sex tourism, in 2003 the United States enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (the "PROTECT Act" or the "section 2423").[30] Congress intended to develop various tools, such as the PROTECT Act, to cover multiple forms of child sexual exploitation after it ratified the United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (the "Optional Protocol").[31] The PROTECT Act defines the scope of various offenses that exploit children through transportation and travel. Subsection (b) of the Act criminalizes foreign travel with the *intent* of traveling abroad to engage in sexual

---

[24] The poverty in developing countries is often characterized by lack of opportunities for real employment and "vast income gaps." PROTECTION PROJECT, *supra* note 19, at 21.

[25] *State Department Facts* (2008), *supra* note 1.

[26] Delaney, *supra* note 3, at 14–15.

[27] Sex Tourism Prohibition Improvement Act of 2002, H.R. REP. NO. 107-525, at 2 (June 24, 2002).

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

[29] *Id.*

[30] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, 18 U.S.C. § 2423 (2012).

[31] Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

activity with a minor.[32] Subsection (c), in contrast, punishes all travel in foreign commerce that leads to subsequent "illicit sexual conduct" with a minor, even if the travel was not for that purpose.[33] The PROTECT Act defines "illicit sexual conduct" in (f)(1) as a sexual act with a person under 18 years of age that would violate another law;[34] or in (f)(2) as any *commercial* sex act with a minor, which would include any exchange of money for sexual conduct with a minor.[35] The United States government can prosecute an offender through either definition, depending upon the facts of the case: both sexual abuse without an exchange of money and paid commercial sex acts fall within the statute's ambit.

Defendants have challenged the constitutionality of the PROTECT Act in numerous jurisdictions, claiming that Congress does not have constitutional authority to enact a statute that criminalizes an individual's act outside United States borders.[36] Defendants have argued that Congress's constitutional authority under the Foreign Commerce Clause[37] would be limitless if the PROTECT Act could be used to punish American citizens for the simple act of traveling abroad, without prior intent to engage in illicit sexual conduct.[38] The federal circuit courts that have analyzed the constitutionality of this aspect of the PROTECT Act have all agreed, however, that Congress had authority through the Foreign Commerce Clause to enact the statute.[39] Although courts seem to be in agreement about the constitutionality of the statute, the way in which the federal circuit courts have come to that conclusion is uneven and complicated. Courts disagree on the method of interpreting the Foreign Commerce Clause and how to apply it to section 2423(c)'s prohibition on foreign travel followed by sexual conduct with minors.[40] The circuit courts are unclear about Congress's authority to enact the

---

[32] PROTECT Act, 18 U.S.C. § 2423(b) (2012).

[33] *Id.* § 2423(c).

[34] *Id.* § 2423(f)(1).

[35] *Id.* § 2423(f)(2).

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

[37] U.S. CONST. art. I, § 8, cl. 3. (stating that Congress has the power "[*t]o regulate commerce with foreign nations*, and among the several states, and with Indian tribes." (emphasis added)). Over time, the Supreme Court has distinguished there are in fact two commerce clauses: (1) the Interstate Commerce Clause and (2) the Foreign Commerce Clause. *See* Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 448 (1979).

[38] *See Pendleton,* 658 F.3d at 309.

[39] *See generally Pendleton*, 658 F.3d 299; United States v. Weingarten, 632 F.3d 60 (2d Cir. 2011); United States v. Bianchi, 386 Fed. App'x. 156 (3d Cir. 2010); United States v. Clark, 435 F.3d 1100 (9th Cir. 2006); United States v. Bredimus*,* 352 F.3d 200 (5th Cir. 2003).

[40] *See* discussion *infra* Section III.

PROTECT Act because the Supreme Court has not provided the circuit courts with meaningful guidance on the specific boundaries of the Foreign Commerce power. As a result, some circuits have conflated the Foreign Commerce Clause and Interstate Commerce Clause analyses.[41]

For instance, in *United States v. Pendleton*, the Third Circuit determined that section 2423(c)'s criminalization of "illicit sexual conduct" that takes the form of non-commercial sex acts with children abroad is constitutional under the Foreign Commerce Clause.[42] The Ninth Circuit came to the same conclusion in *United States v. Clark*,[43] but the court employed a very different analysis than the Third Circuit. The Ninth Circuit's Foreign Commerce Clause inquiry focused on "whether the statute bears a rational relationship to Congress's authority under the Foreign Commerce Clause,"[44] and considered extraterritorial principles. In *Pendleton*, on the other hand, the Third Circuit applied a three-prong test that the Supreme Court developed in *United States v. Lopez*[45] for evaluating the constitutionality of laws regulating interstate commerce under the Interstate Commerce Clause.[46] The Third Circuit in *Pendleton* directly imported the *Lopez* framework to a Foreign Commerce Clause analysis without identifying the differences between interstate commerce and foreign commerce, and Congress's different authority with respect to each.[47] Thus, the Third Circuit's analysis created ambiguity for courts addressing Foreign Commerce Clause issues in the future. This creates a danger that courts will apply diverging rationales in similar cases.

This Comment will focus particularly on *United States v. Pendleton*, a case of first impression for the Third Circuit. No other federal circuit has found the PROTECT Act's criminalization of non-commercial sex abuse of minors abroad to be constitutional, where the intent to engage in that conduct arises abroad. Ultimately, this Comment argues that Congress has the constitutional authority to enact the PROTECT ACT, and that sections 2423(c) and (f)(1), which criminalize non-commercial sexual abuse of minors abroad even where the defendant does not travel abroad for that purpose,[48] are constitutional. In reaching this conclusion, I will address the debate among scholars

---

41 *Compare Clark,* 435 F.3d at 1103, *with Pendleton*, 658 F.3d at 306.
42 *Pendleton,* 658 F.3d at 311.
43 435 F.3d 1100 (9th Cir. 2006).
44 *Id*. at 1114–16.
45 United States v. Lopez, 514 U.S. 549, 558–59 (1995); *Pendleton*, 658 F.3d at 306.
46 *See* discussion *infra* Section III.
47 *Pendleton*, 658 F.3d at 306.
48 PROTECT Act, 18 U.S.C. §§ 2423(c), (f)(1) (2012).

regarding whether the courts have interpreted the Foreign Commerce Clause appropriately or if they have expanded Congress's authority beyond what the Founders intended.[49] This Comment also aims to provide conceptual clarity on why the PROTECT ACT is a proper exercise of congressional Foreign Commerce Clause authority based upon an economic effects theory.

Part II discusses the history behind the PROTECT Act and Congress's motivation for enacting a novel statute that reaches abroad to target sex-tourism by U.S. actors. Part III discusses the scope of the Foreign Commerce Clause, historically and as it is interpreted today, and Congress's authority to enact the PROTECT Act. Part IV argues that the PROTECT Act's regulation of non-commercial sex crimes abroad is constitutional under an economic effects theory, using a Foreign Commerce Clause framework—one that closely mirrors the framework that the United States Supreme Court developed for dealing with commerce within the United States. I analyze the authority under that standard to penalize those who travel abroad and sexually abuse minors, even where the offenders lack the original intent to commit the illicit act.[50] Lastly, Part V argues that the Supreme Court must provide a clear standard for analyzing issues arising out of the Foreign Commerce Clause so the circuit courts can analyze other statutes consistently.

II. THE PROTECT ACT'S HISTORY AND DEVELOPMENT

A. The Legislative History of the PROTECT Act

The PROTECT Act criminalizes various methods of sexually exploiting children through the use of travel and transportation. Subsection (a) focuses on individuals who *transport children* "with intent to engage in criminal sexual activity."[51] Subsection (b) criminalizes foreign travel for the *purpose* of having illicit sexual activity with a minor, but does not target the transport of children like subsection (a).[52] Subsection (c), the focus of this comment, criminalizes travel through foreign commerce followed by illicit sexual conduct with a

---

[49] *See* Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 956–57 (2010); *see also* Jessica E. Notebaert, *The Search for a Constitutional Justification for the Noncommercial Prong of 18 U.S.C. § 2423(c)*, 103 J. Crim. L. & Criminology 949 (2013).

[50] PROTECT Act, 18 U.S.C. § 2423(c) (2012).

[51] *Id.* § 2423(a).

[52] *Id.* § 2423(b).

minor while abroad.[53] Subsection (c) is similar to (b), which criminalizes traveling abroad *with intent*. Unlike (b), however, subsection (c) lacks any intent requirement, making it easier for the government to prosecute offenders. Finally, subsection (f)(1) defines "illicit sexual conduct" as the non-commercial sexual abuse of a minor abroad,[54] while subsection (f)(2) defines sexual conduct in a commercial sex context.[55] Splitting illicit sexual conduct into two types aims to capture those individuals that are not necessarily exchanging money for sexual acts with someone, thus casting a wider net for a variety of child sex abuse offenses.

Congress has amended the PROTECT Act numerous times. The first version of the statute, the Protection of Children Against Sexual Exploitation Act of 1977,[56] emerged during a period in which juvenile prostitution was a growing concern within the United States.[57] The media extensively reported on the issue, and evidence suggests that increasing numbers of young students were dropping out of school and engaging in prostitution.[58] Then-existing federal laws failed to protect children from being involved in prostitution.[59] The 1977 Act was enacted to directly address this issue but, unlike the current version of the PROTECT Act, targeted the transportation of minors abroad and across state lines only insofar as it related to engaging minors in commercial sex acts.[60]

Congress reformulated and renamed the statute in 1994. The 1994 version, called the Violent Crime Control and Law Enforcement Act of 1994, criminalized travel in foreign commerce for the purpose of engaging in illicit sexual conduct with a minor.[61] Almost a decade later,

---

[53] *Id.* § 2423(c).

[54] *Id.* § 2423(f)(1) (referencing Chapter 109A, which criminalizes different forms of sexual abuse, not involving exchange of money); *see also* 18 U.S.C. § 2241 (aggravated sexual abuse); 18 U.S.C. § 2242 (sexual abuse); 18 U.S.C. § 2243 (sexual abuse of a minor or ward).

[55] *Id.* § 2423(f) (capturing "(1) a sexual act . . . 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 act . . . with a person under 18 years of age").

[56] Act of Feb. 6, 1978, Pub. L. No. 95-225, 1978 Stat, 1585 (amending 18 U.S.C. § 2423 (1986)).

[57] D. Kelly Weisberg, *Children of the Night: The Adequacy of Statutory Treatment of Prostitution*, 12 AM. J. CRIM. L. 1, 11 (1984).

[58] *Id.* at 12

[59] *Id.* n.72.

[60] Act of Feb. 6, 1978, Pub. L. No. 95-225, 1978 Stat, 1585 (amending 18 U.S.C. § 2423 (1986)).

[61] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, Sec. 160001 (1994) (codified at 18 U.S.C. § 2423(b)).

in yet another revision of the statute, called the Sex Tourism Prohibition Improvement Act of 2002, Congress cited the Foreign Commerce Clause as the source of its authority to enact the law.[62] In 2003, Congress revised the statute again because the previous version's requirement that the State prove the existence of intent prior to travel made it almost impossible for prosecutors to secure convictions. The 2003 revision was named the PROTECT Act, which altered the 1994 statute to include those individuals who traveled abroad in foreign commerce without any purpose to have sex with minors, but later ended up engaging in illicit sexual conduct.[63] The PROTECT Act has undergone only a few minor revisions over the last ten years, and remains largely the same today as it was in 2003. Today, the Act imposes penalties exposing defendants to sentences of up to thirty years in prison.[64]

Records of congressional debates during each revision of the PROTECT Act provide important insight into Congress's motivation for this legislation. The congressional record shows Congress's recognition of child sex tourism as a "major component" of the "worldwide sexual exploitation of children."[65] Noting the increasing frequency of child sex tourism, Congress sought to close "significant loopholes" in United States law that made it easy for persons traveling to foreign countries who engage in sexual conduct with minors to avoid prosecution.[66]

Supporters of the legislation also stressed the need for aggressive changes in the law given that poor countries, "often under economic pressure to develop tourism . . . turn a blind eye toward this devastating problem because of the income it produces."[67] Other supporters noted that weak foreign laws as well as weak or nonexistent enforcement of foreign laws help fuel such exploitation by Americans abroad.[68] Given these difficulties, sponsors of the legislation also noted that, some foreign governments want greater help from the United States in targeting this conduct.[69] The statute's legislative history shows that some nations

---

[62] Sex Tourism Prohibition Improvement Act of 2002, H.R. REP. NO. 107-525, at 5 (June 24, 2002).

[63] Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 2003 S 151(2003) (codified at 18 U.S.C. § 2423(c) (2012)).

[64] PROTECT Act, 18 U.S.C. § 2423 (2012). As of 2006, the United States convicted thirty-six child sex tourism offenders under the PROTECT Act. *See* Bacon, *supra* note 5.

[65] Sex Tourism Prohibition Improvement Act of 2002, H.R. REP. NO. 107-525, at 2 (June 24, 2002).

[66] *Id.* at 3.

[67] *Id.* at 2.

[68] 148 CONG. REC. 3884, 3886 (daily ed. June 25, 2002) (statement of Rep. Smith).

[69] Sex Tourism Prohibition Improvement Act of 2002, H.R. REP. NO. 107-525, at 3 (June 24, 2002).

recognize they cannot tackle a growing transnational problem by themselves.[70] Others seek U.S. help because they view the United States as culpable, noting "that many of the sex tourists are American."[71] In fact, a 2001 survey by World Vision and the Cambodian government "estimate[d] that twenty-five percent of sex tourists worldwide are U.S. citizens."[72]

When Congress debated which revisions to include in the 2003 version of the PROTECT Act, a major concern among legislators was the fact that proving intent in cases of travel for sexual conduct with minors abroad is extremely difficult. The issue of proving intent "creat[ed] a loophole in the law for men who go abroad to have sex with minors," even though such conduct would be punishable as statutory rape at home.[73] Other members of Congress argued that it should not matter whether intent was formed in the United States or abroad.[74] Thus, Congress ultimately enacted section 2423(c) to criminalize sexual misconduct that occurs abroad, irrespective of whether offenders formed the intent to engage in misconduct prior to traveling abroad, or whether the purpose of the travel was to engage in sexual misconduct in another country.

B. The United Nations Optional Protocol

Another reason Congress revised 18 U.S.C. § 2423 and enacted the 2003 PROTECT Act was the Unites States' 2002 ratification of an Optional Protocol to the United Nations multilateral treaty called the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (the "Convention on the Rights of the Child").[75] The United States, under President Clinton, signed the Optional Protocol in July 2000,[76] and later ratified it with Senate approval and President Bush's signature on December 2002.[77] Shortly

---

[70] *Id.*

[71] *Id.*

[72] *Cambodia: Survivor of Child Sex Tourism Implores Government Leaders to Take Action,* WORLD VISION, http://www.worldvision.org/news.nsf/news/20070716_cambodia_cstp!OpenDocument&wvsrc=enews&lpos=main&lid=cambodia_cstp200708&Click= (last visited Mar. 2, 2014).

[73] 148 CONG. REC. 3884, 3886 (daily ed. June 25, 2002) (statement of Rep. Smith).

[74] *Id.* at 3885 (statement of Rep. Flake).

[75] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S 227 [hereinafter Optional Protocol].

[76] Protocols to the Convention on the Rights of the Child, July 5, 2000, S. TREATY DOC. NO. 106-37.

[77] Optional Protocol, *supra* note 75.

after ratification, the United States government amended 18 U.S.C. § 2423 to implement the provisions in the Optional Protocol.[78] Currently, more than 100 countries have signed and ratified this protocol.[79]

The Convention on the Rights of the Child prohibits the sexual exploitation of children[80] and requires signatories to punish tourists who engage in commercial sex acts with individuals under the age of eighteen.[81] The Convention states that parties must protect children "from all forms of sexual exploitation and abuse," and take all appropriate measures to ensure that children are not abducted, sold or trafficked.[82] The Optional Protocol goes on to impose "detailed requirements to end the sexual exploitation and abuse of children" on State signatories.[83] It mandates that signatories punish both individuals who transport minors for the purpose of sexually exploiting them, as well as offenders who actually engage in sexual conduct with children.[84] Signatories of the Optional Protocol are required to implement it within their respective criminal laws, "whether such offences are committed domestically or transnationally."[85]

In addition, Article 4 of the Optional Protocol states that each signatory can take measures to establish jurisdiction over the offenses that the Convention outlaws if the offender is a citizen or habitual resident of their State.[86] The Convention states that when offenders are extradited they are to be treated as if the crime was committed not only at the location it occurred, "but also in the territories of the States required to establish jurisdiction in accordance with [A]rticle 4."[87] This portion of the Optional Protocol extends each signatory's jurisdiction beyond the geographical boundaries of their State in order to punish the offender. Therefore, the Optional Protocol allows the United States, as well as all

---

[78] Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified at 18 U.S.C.§ 2423 (2012)).

[79] *Convention on the Rights of the Child: Optional Protocol on the sale of children, child prostitution and child pornography*, UNICEF, http://www. unicef.org/crc/ index_30204.html (last visited Sept. 26, 2012) [hereinafter *UNICEF Convention on the Rights of the Child*].

[80] Optional Protocol, *supra* note 75, art. 1. *See generally* Delaney, *supra* note 3, at 14.

[81] Optional Protocol, *supra* note 75, art. 4.

[82] Convention on the Rights of the Child art. 34–35, Nov. 20, 1989, 1577 U.N.T.S. 3.

[83] *UNICEF Convention on the Rights of the Child*, *supra* note 79.

[84] Optional Protocol, *supra* note 75, art. 3.

[85] *Id.*

[86] *Id.* art. 4 § (2)(A).

[87] *Id.* art. 5 § (4).

other signatories, to establish jurisdiction over an offender who violates the Protocol, as long as this offender is a citizen or permanent resident of the United States.

C. The United States' Interest in Punishing Its Citizens Under the PROTECT Act

The sexual abuse of minors, even when it occurs abroad, affects the United States as a nation by imposing costs on the physical and mental health of its citizenry.[88] United States children traveling with offenders who abuse them abroad will likely experience issues in the United States upon their return.[89] For instance, the dangers of sexual exploitation of children include "long-lasting physical and psychological trauma, disease . . . drug addiction, unwanted pregnancy, malnutrition, social ostracism, and possibly death."[90] Offenders not only harm the children they have sex with while abroad during the physical, sexual act itself, but also subject children to a wide range of lasting psychological harms. The United States has a strong interest in protecting its citizens from the destructive effects of child sex tourism.

The United States also has an interest in preventing known pedophiles form recidivating, domestically or abroad. Citizens who violate the PROTECT Act may also have a record for child related offenses in the United States.[91] The United States strictly prohibits the sexual abuse of children;[92] and because legal prohibitions thwart sex offenders from abusing children domestically they often turn to an international arena.[93] For instance, in *United States v. Pendleton*, Michigan first convicted the defendant, Thomas Pendleton, of sexually

---

[88] *See generally Understanding Child Sex Tourism*, *supra* note 9. While the article does not expressly draw this conclusion, the fact that children often times develop health issues as a result of child exploitation, creates an inference that it will lead to economic costs for the U.S. if the "John" carries the health issue back with him or if the minor child was brought abroad, which lead to health issues, and then returns to the United States. *Id.*

[89] If a child develops a health issue, mental or physical, while abroad as a result of sexual abuse/sexual exploitation, then he or she will have to cope with it back in the United States. *Id.*

[90] *State Department Facts* (2008), *supra* note 1; *see also* Delaney, *supra* note 3, at 5.

[91] PROTECTION PROJECT, *supra* note 19, at 40 ("[A]t least 13 perpetrators out of 50, or 26 percent, had been previously charged or convicted of child molestation).

[92] *See* 18 U.S.C. § 2423(f)(1) (referencing Chapter 109A, which criminalizes different forms of sexual abuse, not involving exchange of money (commercial)); 18 U.S.C. § 2241 (aggravated sexual abuse); 18 U.S.C. § 2242 (sexual abuse); 18 U.S.C. § 2243 (sexual abuse of a minor or ward).

[93] *See* Sex Tourism Prohibition Improvement Act of 2002, H.R. REP. NO. 107-525, at 3 (June 24, 2002).

abusing children in 1981,[94] and ordered him to serve twenty-four months of probation.[95] Approximately twelve years later, in 1993, a New Jersey court found Pendleton guilty of engaging in sexual misconduct with a twelve-year-old boy.[96] This time, Pendleton went to prison for seven years.[97] In the 2000s—only three years after New Jersey released him from prison—Pendleton was caught committing child sex abuse for a third time.[98] The third time, however, Pendleton traveled to Latvia before sexually abusing two children.[99] Pendleton was prosecuted in *United States v. Pendleton* a little over a year after his release from a Latvian prison.[100]

Thus, the answer to stopping child exploitation cannot simply be stiffer laws regarding conduct within the United States, because child sex offenders may easily travel outside the United States to commit their offenses. Given that the United States has an interest in protecting the rights and welfare of children and an interest in empowering its citizens to lead lawful, productive lives, it should, therefore, deter its citizens from sexually abusing U.S. children abroad by criminalizing this harmful conduct. The PROTECT Act extends the United States' jurisdiction to prevent these pedophiles from evading United States laws and to ensure that American citizens will be punished for committing sex crimes regardless of where in the world they occur.

Along with all other countries, the United States has an interest in world health. A devastating consequence of child sexual exploitation is the spread of HIV/AIDS.[101] Offenders sometime fail to take measures to prevent the spread of disease because many believe that young victims are unlikely to have HIV/AIDS.[102] This belief, however, is often misguided. "One study estimates that 50% of the child prostitutes of Thailand are HIV positive."[103] Hence, the potential spread of HIV/AIDS can occur through the exploitation of underage prostitutes as much as

---

[94] United States v. Pendleton, 658 F.3d 299, 302 n.3 (3d Cir. 2011).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Pendleton*, 658 F.3d at 302 n.3.
[101] *State Department Facts* (2008), *supra* note 1; *see also* Delaney, *supra* note 3, at 5.
[102] *Case Study: Sex Tourism and Child Prostitution in the U.S. vs. Thailand*, VIRTUAL COLLABORATION: LEARNING FROM MULTIPLE PERSPECTIVES, http://www1.american.edu/ted/thai-child.htm (last visited on Mar. 2, 2014) (referencing *Asian Sex Tours Are An American Business, Too,* Business Week (June 16, 1996), http://www.businessweek.com/stories/1996-06-16/asian-sex-tours-are-an-american-business-too).
[103] *Id.*

adults spread it.[104] In sum, the PROTECT Act shields children not only from immediate and long-lasting emotional harm, but it also protects non-offending United States citizens from adverse health effects that can spread from the offender upon their return to the country.

III. CONGRESSIONAL AUTHORITY TO ENACT THE PROTECT ACT

In challenging the constitutionality of the PROTECT Act, defendants often argue that Congress does not have authority under the Foreign Commerce Clause to regulate crimes abroad because if it did, then nothing would be outside the bounds of Congress's power.[105] Article I, Section 8, Clause 3 of the United States Constitution provides Congress with power "[t]o regulate commerce with foreign nations, and among the several states, and with Indian tribes."[106] This text is the source of both the Foreign Commerce Clause and the Interstate Commerce Clause power. In *United States v. Lopez,*[107] the Supreme Court established a three-pronged test to evaluate whether Congress has the authority to enact a statute under the Interstate Commerce Clause.[108]

To be a valid exercise of congressional power under the *Lopez* analysis, the statute must: (1) "regulate the use of the channels of interstate commerce";[109] (2) "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities";[110] or (3) "regulate those activities having a substantial relation to interstate commerce."[111]

Although the Supreme Court developed a framework for assessing the constitutionality of a statute under the Interstate Commerce Clause, it has not yet established a framework governing Congress's use of its Foreign Commerce Clause power.[112] In *Japan Line, Ltd., v. County of Los Angeles*,[113] the Supreme Court stated that the Founders intended the Foreign Commerce Clause power to be more than that of the Interstate

---

104 *Id.*

105 *Pendleton*, 658 F.3d at 305; United States v. Bianchi, 386 Fed. App'x. 157 (3d Cir. 2010); United States v. Clark, 435 F.3d 1100, 1105 (9th Cir. 2006); United States v. Bredimus, 352 F.3d 200, 201 (5th Cir. 2003).

106 U.S. CONST. art. I, § 8, cl. 3.

107 514 U.S. 549 (1995).

108 *Id.* at 558.

109 *Id.*

110 *Id.*

111 *Id.* at 558–59.

112 United States v. Pendleton, 658 F.3d 299, 306 (3d Cir. 2011).

113 441 U.S. 434 (1979).

Commerce Clause.[114] Therefore, courts addressing the challenges associated with the Foreign Commerce Clause are attempting to determine whether the *Lopez* framework for interstate commerce applies to foreign commerce, or whether there must be a different standard to reflect the more expansive power. Part III.A discusses briefly the constitutional history of the Interstate Commerce Clause and Part III.B explains the history and evolution of the Foreign Commerce Clause and how courts interpret it today. Part III.C details federal circuit court decisions that have addressed the scope of the Foreign Commerce Clause power. Lastly, Part III.D assesses why courts cannot precisely apply the Interstate Commerce Clause framework to the Foreign Commerce Clause context.

A. History of the Interstate Commerce Clause

Throughout the Constitutional Convention, the Founders discussed the importance of creating a commerce clause.[115] Ultimately, the Founders granted Congress the power to regulate commerce within the Constitution in order to justify certain economic programs.[116] For example, the government's urgent need for revenue to pay off Revolutionary War debts lead many of the Founders to push for the Interstate Commerce Clause.[117]

The Founders also fervently debated how to define the term "commerce." During the Convention, James Madison understood the term "commerce" to mean trade and exchange, "distinct from the productive processes that made the things to be traded."[118] In *The Federalist Papers*, Alexander Hamilton also distinguished between commerce, trade, and the production of the item to be traded.[119]

---

[114] *Id.* at 448. *See generally* Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 434 (1932) ("[T]he power to regulate commerce is conferred by the same words of the commerce clause with respect to both foreign commerce and interstate commerce . . . the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce.").

[115] Calvin H. Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL OF RTS. J. 1, 2–4 (2004); *see also* AKILL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107 (2005).

[116] Johnson, *supra* note 115, at 4.

[117] Johnson, *supra* note 115*,* at 2; *see also*, AMAR, *supra* note 115, at 107.

[118] Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 115 (2001) (referring to JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 487 (W.W. Norton 1987)).

[119] Barnett, *supra* note 118, at 115 (referencing THE FEDERALIST NO. 11 (Alexander Hamilton), in Clinton Rossiter, ed, THE FEDERALIST PAPERS 89 (Penguin 1961)) ("States

Significantly, even "one hundred years after that superficially simple phrase [Regulation of Commerce] first appeared in the proposed national charter in 1787,"[120] Congress did not substantially use its authority under the Interstate Commerce Clause.[121] In 1824, the Supreme Court decided *Gibbons v. Ogden*,[122] which was the first case to define the scope of the Interstate Commerce Clause. Chief Justice Marshall interpreted the clause broadly, as "reaching all commercial matters affecting the states generally."[123] This history of the Interstate Commerce Clause certainly suggests that the Founders granted Congress expansive power within the U.S. borders, but it does not explain how the Interstate Commerce Clause is similar to the Foreign Commerce Clause.

B. Legislative History of the Foreign Commerce Clause

Unlike the Interstate Commerce Clause, one of the main purposes of the Foreign Commerce Clause was to create congressional authority in any area that affects or impacts the general interests of the United States.[124] For example, the Framers predicted that Congress would need to enact new legislation when "the States are separately incompetent, or [when] the Harmony of the United States may be interrupted by the Exercise of individual Legislation."[125] Hence, the Framers reasoned that if states enacted laws that concerned the whole of the nation, which would interfere with the country's interests, Congress must exercise its foreign commerce power to unite the country with one law and one voice to keep the United States in good standing with foreign nations.[126]

In 1787, the Founders' view of the Foreign Commerce Clause was limited to that time and purpose.[127] The Founders did not want foreign

---

themselves will advance the trade of each by an interchange of their respective productions . . . .").

[120] Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 645 (1946).

[121] *Id.*

[122] 22 U.S. 1 (1824).

[123] Stern, *supra* note 120, at 648 ("*Gibbons v. Ogden* was repeated, if not necessarily applied, in a number of leading cases between 1837 and 1913.").

[124] AMAR, *supra* note 115, at 107–08 (referencing *Farrand's Records*, 2:131–32).

[125] *Id.* at 108 n.*.

[126] *Id.* at 107-108 n.*. (The Founders recognized that a "single state acting on its own" was not best suited to handle issues arising with foreign governments because, if the state mishandled the problem, it "might lead to needless wars or otherwise compromise the interests of sister states.").

[127] The Founders' interest in regulating commerce also reflected their desire to implement restrictive mercantilist programs against foreign nations. Johnson, *supra* note 115, at 6. These programs consisted of retaliatory measures against the British, various navigation acts and port preferences. *Id.* In addition, the Founders wanted to retaliate

governments to disregard the United States, a new nation, as an unorganized and illegitimate.[128] Although the Founders created and initially used the Foreign Commerce Clause to develop programs addressing short-term concerns, the underlying purpose and spirit behind the Foreign Commerce Clause is relevant in determining the scope of Congress's power in a modernized United States.[129] Adjudicators must reimagine what commerce means for modern times. The term "commerce" must carry a broader meaning than it initially carried. As Akill Reed Amar noted, since 1787 commerce has retained "a broader meaning referring to all forms of intercourse in the affairs of life whether or not narrowly economic or mediated by explicit markets."[130] The Supreme Court has also interpreted the Foreign Commerce Clause as applying to economic interactions.[131]

Though hundreds of years have passed, Congress's use of the Foreign Commerce Clause today continues to further the Founders' intent: namely, to ensure that interactions and communications with foreign governments still serve the collective national interest. In enacting the PROTECT Act, Congress recognized that United States citizens engaging in sex tourism adversely affects foreign nations and, therefore, undermines the legitimacy of the United States and its interests.[132] Through the PROTECT Act, Congress recognized that the conduct of individual citizens could reflect poorly on the nation as a whole, thereby invoking one of the core policies underlying the Foreign Commerce Clause.[133]

C. Federal Circuit Court Interpretation of the PROTECT Act

The legitimacy of the United States government depends largely upon the judiciary's reasoned analysis and consistent application of the law. In order to maintain an unquestioned, legitimate system of government, therefore, the Foreign Commerce Clause needs one single

---

against the British by taxing their ships upon entry into American ports. *Id.* at 18 (referring to Letter from James Monroe to James Madison (Aug. 7, 1785), *in* 8 THE PAPERS OF JAMES MADISON 103, 329 (Robert A. Rutland & William M.E. Rachal eds., 1973)) (observing that Congress had proposed to grant itself the power to regulate commerce so to obtain reciprocity from other nations).

[128] *See generally* Brown v. Maryland, 25 U.S. 419, 445–47 (1827).

[129] Johnson, *supra* note 115, at 56.

[130] AMAR, *supra* note 115, at 107–08.

[131] *Id.* at 107 (citing United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 549 U.S. 598 (2000)).

[132] *See* Sex Tourism Prohibition Improvement Act of 2002, H.R. REP. NO. 107-525, at 3 (June 24, 2002).

[133] *See generally id.*

and straightforward framework to provide Congress and the courts with clear guidance regarding the proper exercise of this power. Recent circuit court cases have upheld the constitutionality of the PROTECT Act under a variety of rationales.[134] A uniform Foreign Commerce Clause analysis is vital in order for Congress to create laws that comply with the Constitution, and that will not be later overturned by the judiciary. The federal courts must agree on the scope of congressional authority in order to prevent a disarray of approaches and ensure that court decisions are reliable and predictable. A consistent and straightforward framework for evaluating a statute's constitutionality under the Foreign Commerce Clause will create stability and ensure that the legitimacy of the judicial branch is protected.

Several circuit courts, including the Second, Third, Fifth and Ninth Circuits, have found the PROTECT Act constitutional.[135] These courts have taken three different approaches in their analyses. Some courts analyzed whether there is a nexus between the United States and another country, some analyzed whether the Interstate Commerce Clause framework justifies Congress's action in the Foreign Commerce Clause context, and some have focused upon whether the statute bears a rational relationship between the United States and another country.[136] Yet, all of the circuit courts appear to agree that the Supreme Court's framework for analyzing Interstate Commerce Clause issues does not specifically apply to the Foreign Commerce Clause, because the Foreign Commerce Clause authorizes different activities and policies than its Interstate counterpart.[137]

1. The Second and Fifth Circuits' Interpretation of Section 2423(b)

The Second Circuit has developed a "nexus requirement approach" for interpreting the constitutionality of the PROTECT Act. In *United States v. Weingarten*,[138] the defendant argued that section 2423(b), criminalizing traveling aboard with the intent to engage in illicit sexual activity with a minor, was unconstitutional. The Second Circuit first

---

[134] *See generally Pendleton*, 658 F.3d 299; United States v. Weingarten, 632 F.3d 60 (2d Cir. 2011); United States v. Bianchi, 386 Fed. App'x. 156 (3d Cir. 2010); United States v. Clark, 435 F.3d 1100 (9th Cir. 2006); United States v. Bredimus, 352 F.3d 200 (5th Cir. 2003).

[135] *See Pendleton*, 658 F.3d 299; *Weingarten*, 632 F.3d 60; *Bianchi*, 386 Fed. App'x. 156; *Clark*, 435 F.3d 1100; *Bredimus,* 352 F.3d 200.

[136] *See infra* Section III.C.1–3.

[137] *See*, *e.g. Pendleton*, 658 F.3d at 306; *Clark,* 435 F.3d at 1103, 1111 (citing Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 448 (1979)); *Bredimus,* 352 F.3d at 205.

[138] 632 F.3d 60 (2d Cir. 2011).

grappled with the PROTECT Act's extraterritorial application and noted a presumption against extraterritoriality.[139] The court added, however, that a statute may be applied extraterritorially if there is evidence that Congress intended the statute to apply extraterritorially.[140] The court reasoned that section 2423(b) "expressly proscribes . . . such crimes when hatched abroad,"[141] and that denying extraterritorial application would undermine its effectiveness.[142] Therefore, the court concluded that the PROTECT Act overcame the presumption against extraterritorial application.[143]

Next, the Second Circuit reviewed whether the actions of the defendant, Weingarten, fell within the statute's scope and concluded that they did not.[144] Before committing the crime, Weingarten had traveled from Belgium to Israel, rather than from the United States to a foreign country.[145] The court, therefore, found it unnecessary to address the constitutionality of the PROTECT Act under the Foreign Commerce Clause, because the defendant's travel did not have "a territorial nexus to the United States," and thus was not within the meaning of section 2434(b).[146] The court held that for the PROTECT Act to apply to U.S. citizens' sexual crimes abroad the individual must have traveled directly from the United States to the country in which the sexual misconduct occurred.[147]

While the Second Circuit examined the PROTECT Act's constitutionality under the "nexus approach," the Fifth Circuit drew upon the Interstate Commerce Clause framework and applied it in the Foreign Commerce Clause context. The defendant in *United States v. Bredimus*, [148] like *Weingarten*, [149] argued that section 2423(b) was unconstitutional.[150] The *Bredimus* court relied upon a Second Circuit case, *United States v. Han*,[151] which involved Congress's authority under the Interstate Commerce Clause to criminalize the transportation of a minor for illicit sexual conduct within the boundaries of the United

---

[139] *Id.* at 64.
[140] *Id.*
[141] *Id.* at 66.
[142] *Id.*
[143] *Id.* at 67.
[144] *Weingarten*, 632 F.3d at 71.
[145] *Id.* at 61.
[146] *Id*.
[147] *Id.* at 71.
[148] 352 F.3d 200 (5th Cir. 2003).
[149] 632 F.3d 60 (2d Cir. 2011).
[150] *Bredimus,* 352 F.3d at 204.
[151] 230 F.3d 560 (2d Cir. 2000).

States.[152] The *Han* court concluded that the statute was constitutional and affirmed the defendant's conviction.[153] In *Bredimus*, the court justified its application of the *Lopez* interstate commerce framework to the Foreign Commerce Clause context because the latter clause gives Congress even greater authority.[154] The Fifth Circuit did not explain, however, why the Interstate Commerce Clause—which contemplates activities within the U.S. over which the courts undoubtedly have jurisdiction—and the Foreign Commerce Clause—which contemplates conduct outside U.S. territory—should be analyzed in an identical manner.

2. The Ninth Circuit's Interpretation of Section 2423(c) in *United States v. Clark*

In 2006, the Ninth Circuit adopted a "global, common sense approach" in addressing whether Congress had the authority to enact section 2423(c) under the Foreign Commerce Clause. *United States v. Clark* [155] was the first circuit court decision to address the constitutionality of section 2423(c) under the Foreign Commerce Clause. The Ninth Circuit concluded that *Lopez*'s framework for assessing Interstate Commerce Clause questions was not relevant to the Foreign Commerce Clause because the Founders intended the scope of the Foreign Commerce Clause to be greater.[156] Although the court considered "adapting the interstate commerce categories to foreign commerce in specific contexts,"[157] it ultimately chose not to, reasoning that a "'global, commonsense approach,' which considers 'whether the statute bears a rational relationship to Congress's authority under the Foreign Commerce Clause,'" was better suited to the foreign setting.[158]

In determining whether subsection (c) was a valid exercise of Congress's Foreign Commerce Clause power, the court first "look[ed] to the text of 2423(c) [and (f)(2)] to discern whether it has a constitutionally tenable nexus with foreign commerce."[159] In evaluating that question,

---

[152] *Id.* at 562–63. The defendant in *Han* was charged with traveling from New York to New Jersey in order to engage in illicit sexual conduct with a thirteen year old. *Id.*

[153] *Id*.

[154] *Bredimus,* 352 F.3d at 208.

[155] 435 F.3d 1100 (9th Cir. 2006).

[156] *Id.* at 1114.

[157] *Id.*

[158] *Id.* at 1118 (stating that taking an international flight traveling abroad cannot then mean that every other act is under the Foreign Commerce Clause).

[159] *Id.* at 1114; *see also* Jeff Christensen, *Congressional Power to Regulate Noncommercial Activity Overseas: Interstate Commerce Clause Precedent Indicates*

the court asked "whether the statute bears a rational relationship to Congress's authority under the Foreign Commerce Clause."[160] Subsection (c) requires travel in foreign commerce plus an "engagement in a commercial transaction abroad."[161] Thus, the court concluded that subsection (c) is constitutional because it "implicates foreign commerce to a constitutionally adequate degree."[162]

In *Clark,* the defendant, living primarily in Cambodia, molested young boys.[163] The defendant's sexual misconduct came to the attention of a non-governmental organization whose goal was to rescue boys who had already endured sexual abuse from non-Cambodians.[164] The defendant paid the young boys, in exchange for sexual acts, so they could buy food for their families.[165] Here, the court recognized that there were two separate definitions of what constituted an illicit sexual act: a commercial act and a non-commercial act.[166] The court noted that a non-commercial sex act "combined the definition of sexual act and aggravated sexual abuse, which included sex by force, threat, or sexual abuse of a minor."[167] On the other hand, a commercial sex act revolved around a value exchanged for the act.[168] The court reasoned that Congress was acting within its authority under the Foreign Commerce Clause to regulate *commercial* sex acts because the Supreme Court has viewed the Interstate Commerce Clause to grasp all types of commercial intercourse.[169] The court, however, declined to decide the constitutionality of section 2423(c) with respect to non-commercial sex acts.[170] Thus, the court left the constitutionality of federal regulation of non-commercial sex acts unanswered.

Constitutional Limitations on Foreign Commerce Clause Authority, 81 WASH. L. REV. 621, 635 (2006).

[160] *Clark*, 435 F.3d at 1114.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 1103.

[164] *Id.* at 1103.

[165] *Id.* at 1104.

[166] *Clark*, 435 F.3d at 1105.

[167] Julie Buffington, *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, 852 (2006).

[168] *Id.*

[169] *Clark*, 435 F.3d at 1114–15 (citing Gibbons v. Ogden, 22 U.S. 1, 193 (1824)).

[170] *Id.* at 1110 n.16 (noting that the court does not "decide the constitutionality of § 2423(c) with respect to the illicit sexual conduct covered by the non-commercial prong of the statute, such as sex acts accomplished by use of force or threat").

3. *United States v. Pendleton*: The Third Circuit Interpretation of Section 2423(c) and the Non-Commercial Prong

Contrary to the *Clark* court's "global, common sense approach,"[171] the Third Circuit in *United States v. Pendleton*[172] used the three-pronged Interstate Commerce Clause framework to address the constitutionality of the PROTECT Act, specifically addressing the non-commercial prong within the Foreign Commerce context. The court addressed whether the PROTECT Act's criminalization of "noncommercial illicit sexual conduct outside the United States" was a valid exercise of Congress's power under the Foreign Commerce Clause, an issue of first impression within that circuit.[173] *Pendleton*, however, was not the first case in which the Third Circuit decided issues regarding section 2423(c). In *United States v. Bianchi*,[174] the Third Circuit addressed the constitutionality of section 2423(f)(2), which pertains to commercial sex acts.[175] In contrast, the defendant in *Pendleton* engaged in illicit sexual conduct that was non-commercial, triggering the application of both sections 2423(c) and (f)(1).[176]

In *Pendleton*, the defendant flew from New York to Germany.[177] After six months in Germany, Pendleton sexually molested a fifteen-year-old boy.[178] German authorities arrested Pendleton and placed him on trial.[179] The German court found him guilty and sentenced him to nineteen months in German prison.[180] Upon his return to the United States, federal authorities took Pendleton into custody and charged him under the non-commercial sexual conduct provision of the PROTECT Act, section 2423(f)(1).[181] After he was convicted, the court sentenced Pendleton to thirty years in prison, which he appealed.[182]

In addressing the constitutionality of PROTECT Act's criminalization of non-commercial sex acts arising abroad, the court first

---

171 *Id.* at 1103.
172 658 F.3d 299 (3d Cir. 2011).
173 *Id.* at 301.
174 386 Fed. App'x. 156 (3d Cir. 2010).
175 *Id.* at 157 (noting that defendant exchanged money to the victim child and family for the sexual acts he committed on the boy).
176 *Pendleton,* 658 F.3d at 301.
177 *Id.* at 303.
178 *Id.* at 301.
179 *Id.*
180 *Id.*
181 *Id.* at 302.
182 *Pendleton,* 658 F.3d at 304–05.

adopted the *Lopez* three-pronged framework,[183] even though the Supreme Court has never addressed whether it applies to the Foreign Commerce Clause context. The court determined that the *Lopez* framework was nevertheless the best method to apply to this case.[184] Because Congress's Foreign Commerce Clause power is greater than its Interstate Commerce Clause Power, the court reasoned that if the Act met the Interstate Commerce Clause standards it would necessarily satisfy the Foreign Commerce Clause standards as well.[185]

Although the court noted that other circuit courts had held that "the Foreign Commerce Clause requires a jurisdictional nexus 'with' the United States," it acknowledged there is scant case law directing courts on how to establish this link.[186] The court reasoned that the first prong of *Lopez*, whether the subject matter being regulated uses channels of interstate commerce, best fit with the facts before it.[187] The court explained that Congress enacted section 2423(c) "to regulate persons who use the channels of commerce to circumvent local laws that criminalize child abuse and molestation,"[188] and that no intent requirement is needed for the first prong of *Lopez*.[189] Therefore, the Third Circuit concluded that the statute was constitutional in this context because the travel between the United States and Germany was the "express connection" to channels of foreign commerce.[190] Since the court found sections 2423(c) and (f)(1) constitutional under the first prong of *Lopez*, the court did not address Pendleton's argument that his actions did not meet the third prong of the *Lopez* standard, in other words, whether his activities substantially affected commerce.[191]

---

[183] *Id.* at 306 (finding a statute must fit into one of three categories: "[T]o regulate the use of channels of interstate commerce"; "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; or "to regulate those activities having a substantial relation to interstate commerce" (citing United States v. Lopez, 514 U.S. 549, 558–59 (1995)).

[184] *Id.* at 308.

[185] *Id.* at 307 (citing Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 448 (1979)).

[186] *Id.* at 307.

[187] *Id.* at 311.

[188] *Pendleton*, 658 F.3d at 311.

[189] *Id.* at 309.

[190] *Id.* at 311.

[191] *Id.* at 311 n.7.

D. The Interstate Commerce Clause Framework Needs to be Revised in Order to Correspond with the Foreign Commerce Clause Context

"[F]orcing foreign commerce cases into the domestic commerce rubric is a bit like one of the stepsisters trying to don Cinderella's glass slipper . . . ."[192] The Foreign Commerce Clause authority is even more powerful than the Interstate Commerce Clause because it can manage activities beyond United States borders.[193] Currently, the Supreme Court has yet to decide if courts should apply the *Lopez* Interstate Commerce standard when assessing congressional authority under the Foreign Commerce Clause.[194] In addition, the *Pendleton* court recognized that the Supreme Court, in early opinions, suggested that lower courts should interpret the three parts of the Commerce Clause similarly. [195] Conversely, the *Pendleton* court also articulated, "the three subclauses of Article I, §8, cl. 3 have acquired markedly different meanings over time." [196] Although the circuit courts have not agreed upon what framework to apply to the Foreign Commerce Clause, the circuit courts all acknowledge that the Foreign Commerce Clause carries greater power because it can reach beyond United States territory. This extraterritorial reach makes the Foreign Commerce Clause fundamentally different than the Interstate Commerce Clause.

Over the years, the Supreme Court has recognized the various meanings and purposes of the sub-clauses in the Commerce Clause: regulating commerce with foreign nations, among the several states, and with Indian tribes.[197] In *Bowman v. Chicago and Northwestern Railway Company*,[198] the Court stated that laws dealing with "exterior relations" between the United States and foreign nations should come exclusively from Congress.[199] Later, in *Japan Line*, the Supreme Court reaffirmed this principle and explained that state laws could potentially "restrict the federal government's ability to 'speak with one voice' in foreign affairs,"[200] and that the "purpose of the Foreign Commerce Clause was to

---

[192] United States v. Clark, 435 F.3d 1100, 1116 (9th Cir. 2006).
[193] *Pendleton,* 658 F.3d at 307 (citing Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 448 (1979)).
[194] *Id.* at 306.
[195] *Id.* (citing Gibbons v. Ogden, 22 U.S. 1, 194 (1824)).
[196] *Id.*
[197] U.S. CONST. art. I, § 8, cl. 3; *Pendleton,* 658 F.3d at 306.
[198] 125 U.S. 465 (1888).
[199] *Id.* at 482.
[200] *Pendleton,* 658 F.3d at 307 (quoting Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 448 (1979)).

establish national uniformity over commerce with foreign nations."[201] Thus, the Supreme Court explained that the various differences suggested "the Founders intended the scope of the foreign commerce power to be greater."[202]

In sum, Congress derives greater power from the Foreign Commerce Clause than the Interstate Commerce Clause. Though a state may have a particular interest in its citizens who either commit violations of the PROTECT Act abroad or who are victims of conduct prohibited by the Act, it cannot properly address this interest through its own criminal laws because the Constitution does not extend this power to the states individually. Rather, the Constitution reserves this power for the federal government. Foreign affairs are an interest of the United States as a whole. The Foreign Commerce Clause embodies the idea that the United States must have one cohesive position and not fifty individual state positions when dealing with foreign governments. Ultimately, the Foreign Commerce Clause is the most appropriate vehicle for curtailing child-sex tourism, because the Supreme Court has recognized that the Foreign Commerce Clause gives Congress authority that applies more directly to the interests implicated by foreign affairs.

IV. THE CONSTITUTIONALITY OF THE PROTECT ACT SHOULD BE EVALUATED UNDER AN ECONOMIC EFFECTS THEORY OF THE FOREIGN COMMERCE CLAUSE

A. The Foreign Commerce Clause is the Appropriate Source of Congressional Authority to Regulate Criminal Exploitation of Children Abroad.

The Foreign Commerce Clause provides a clearer source of the United States' power to criminalize child sex tourism abroad than the Interstate Commerce Clause. Under a Foreign Commerce Clause analysis, the conduct or regulation in question must involve commerce

---

[201] *Japan Line, Ltd.*, 441 U.S. at 448 (citing Board of Trustees v. United States, 289 U.S. 48, 59 (1933) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.")).

[202] *Japan Line, Ltd.*, 441 U.S. at 448 (citing THE FEDERALIST NO. 42, pp. 279–83 (James Madison); 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 478 (1911) (Madison); Albert S. Able, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 465–75 (1941) (concluding that "there is no tenable reason for believing that anywhere nearly so large a range of action was given over commerce 'among the several states' as over that 'with foreign nations'" (quoting U.S. CONST. art. I, § 8, cl. 3))).

between the United States and a foreign nation.[203] The PROTECT Act satisfies this analysis, because commercial child sex tourism presents an economic nexus between a foreign nation and the United States. Sex tourism's revenue in nations like Cambodia demonstrates its fiscal character and thus implicates the PROTECT Act's commercial prong, section 2423(f)(2). Even non-commercial child sex tourism provides an economic nexus between a foreign nation and the United States under an economic effects theory.[204]

The PROTECT Act's non-commercial prong, section 2423(f)(1), is constitutional because Congress's Foreign Commerce Clause authority is far-reaching; it can transcend the traditional view of commerce as strictly regulating commercial goods by reaching non-commercial activities that travel through interstate and foreign commerce.[205] These non-economic activities include "racial discrimination or growing wheat for personal consumption," or any other activities which "affect, impede, or utilize the channels of commerce."[206] As the Supreme Court stated in *Lopez*, Congress can enact a statute that surpasses the regulation of commercial goods and regulates non-commercial activities,[207] as long as a statute falls within one of the delineated categories under Congress's commerce power.[208] Thus, Congress has authority to regulate the non-commercial sexual exploitation of children abroad because it has economic consequences.

1. The Economic Nexus Between the United States and a Foreign Nation When U.S. Actors Engage in Non-Commercial Sex Abuse Abroad and the Economic Effects it has on the U.S.

Child sex abuse under sections 2423(c) and (f)(1) economically affects the foreign nation and the United States alike. For instance, offenders who are also United States citizens can spend their money in a foreign nation to engage in child sex abuse instead of consuming other services within the United States' borders. Put another way, theses citizen-offenders take money out of the U.S. economy and, instead, use it in foreign economies to sexually exploit children.[209]

---

[203] United States v. Cummings, 281 F.3d 1046, 1049 (9th Cir. 2002).

[204] *See infra* Section IV.A.1.

[205] *Cummings*, 281 F.3d at 1048 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964) and Wickard v. Filburn, 317 U.S. 111, 128–29 (1942)).

[206] *Id.* at 1048 (citing United States v. Lopez, 514 U.S. 549, 558–59 (1995)).

[207] 514 U.S. 549, 553 (1995).

[208] *Id.* at 558.

[209] *Cf.* Michael A. Zuckerman, *The Offshoring of American Government*, 94 CORNELL L. REV. 165, 167–68 (2008) (stating that state and local government outsourcing, the

Purchasing airline tickets to go abroad is an example of travel that impacts the economy of the nations where the offenders purchased their tickets. If the United States citizen-offender bought a plane ticket from a company located in the United States, the U.S. company essentially profits from the offender's decision to sexually exploit children while abroad. The exact moment that the intent is formulated to sexually abuse children is irrelevant.[210] There is nevertheless an economic exchange that facilitates the offense: American airline companies profit financially regardless of whether offenders have the intent to have sex with minors abroad upon purchasing their tickets or they only decide to sexually abuse children after their arrival. The same is true for United States citizen-offenders who purchase their tickets from airline companies based in foreign nations; there is still be an economic impact because the offenders are participating in child sex tourism with United States revenue. Therefore, this type of economic activity ties non-commercial sex abuse to the Foreign Commerce Clause.

B. Adopting a Foreign Commerce Clause Standard

The Supreme Court does not have to develop a novel framework in order to create a cohesive and uniform test for determining the constitutionality of the PROTECT Act and legislation like it under the Foreign Commerce Clause. Although no court has adapted the three-prong *Lopez* test in finding Foreign Commerce Clause authority for the PROTECT Act, courts addressing other statutes have suggested that it might be feasible to adapt and apply it to all statutes enacted under the Foreign Commerce Clause.[211] Since the courts apply the *Lopez* standard "among the several States,"[212] in order to create a workable Foreign Commerce Clause standard, the foreign standard needs to reflect a nexus with foreign commerce in order to qualify as the regulation of "commerce with foreign Nations."[213] This nexus requirement grants Congress the authority to regulate commerce when it is related to the United States.

---

process of contracting a foreign party to provide goods or services, has taken "nearly $ 12 billion and is expected to grow to $ 20 billion by 2011" out of the United States, bringing it offshore.) "The flow of value between states and state contractors or subcontractors engaged in offshore operations constitutes foreign commerce." *Id.* at 185.

[210] *See* 148 CONG. REC. 3884, 3885 (daily ed. June 25, 2002) (statement of Rep. Flake).

[211] *Cummings,* 281 F.3d at 1049 n.1.

[212] U.S. CONST. art. I, § 8, cl. 3.

[213] Colangelo, *supra* note 49, at 970.

In analyzing the constitutionality of the PROTECT Act, which regulates child sex tourism, under the Foreign Commerce Clause, courts should adopt the approach the Ninth Circuit alluded to in *United States v. Cummings*.[214] Under this approach, courts would apply the *Lopez* test to the requirement that Congress's regulation affects foreign commerce.[215] In *Cummings*, the court found the International Parental Kidnapping Crime Act (IPKCA) constitutional.[216] IPKCA allows for the prosecution of any parents who (1) do not have sole custody of their children, and (2) travel to a foreign country to withhold their children from another parent in violation of the other parent's parental rights.[217] The Ninth Circuit used the "regulating the channels of commerce" test from *Lopez* but applied it to situations where something or someone travels from the United States to a foreign nation, thereby incorporating a nexus to foreign commerce.[218] Several scholars have agreed that it is logical to use the *Lopez* framework paired with a nexus requirement in a Foreign Commerce Clause analysis because, without a nexus requirement, the Foreign Commerce Clause is not implicated.[219]

The test that courts should apply when analyzing the constitutionality of statutes under the Foreign Commerce Clause should reflect this approach from *Cummings*, which essentially combines the *Lopez* analytical framework in the foreign commerce context with the *Weingarten* nexus requirement.[220] Modeled upon *Lopez*, the three-part inquiry under the Foreign Commerce Clause should be as follows: Congress has authority to enact legislation under its Foreign Commerce Clause power in order to (1) regulate the use of the channels of foreign commerce when there is a nexus connecting the United States; (2) regulate and protect the instrumentalities of foreign commerce when there is a nexus to the United States, even though the threat may come only from activities within the foreign nation; and (3) regulate activities that have a substantial relation to foreign commerce and a nexus connecting the United States.[221] This framework provides a coherent justification for any statute purportedly authorized under Congress's

---

[214] 281 F.3d at 1048–49.
[215] *Id.* at 1049 n.1.
[216] 18 U.S.C. § 1204(a).
[217] *Cummings,* 281 F.3d at 1048.
[218] *See id.* at 1049.
[219] *See, e.g.,* Colangelo, *supra* note 49, at 971.
[220] United States v. Weingarten, 632 F.3d 60, 61 (2d Cir. 2011).
[221] I rely primarily on the categories hypothesized by Colangeo, but also integrate the Supreme Court's discussion from *Cummings.* *See Cummings,* 281 F.3d at 1049 n.1; Colangelo, *supra* note 49, at 985–86 (forming a test similar to that in *Cummings*).

Foreign Commerce Clause powers, instead of a direct reliance upon the *Lopez* framework as a means of analyzing Congress's authority to regulate and punish the conduct of its citizens abroad.[222]

C. Congress May Criminalize the Sexual Abuse of Minors Abroad Where it has a Substantial Economic Effect and Nexus to the United States

Although the Third Circuit in *United States v. Pendleton* found that Congress's criminalization of non-commercial child sexual abuse abroad was a valid exercise of constitutional authority, even where the perpetrator did not possess a criminal intent prior to traveling abroad, the way in which the court reached its conclusion was misguided. The Third Circuit used the first prong of the *Lopez* Interstate Commerce Clause test, which regulates the use of the channels of interstate commerce, even after recognizing that the Foreign Commerce Clause could be implemented similar to the Interstate Commerce Clause with a nexus requirement—like in *Cummings*—but chose not to use this approach.[223] Instead, the Third Circuit should have analyzed sections 2423(c) and (f)(1) of the PROTECT Act by determining if the activities have a substantial relation to foreign commerce and a nexus to the United States.[224]

In order to determine whether an offender's action in a foreign nation substantially affects the United States, the court should have considered the United States' ratification of the Optional Protocol.[225] When the United States violates a treaty, like the Optional Protocol, there is inevitably a substantial effect on the United States because America has become a party to the Optional Protocol, a joint effort to ensure that children are not exploited. Thus, if one travels in foreign commerce and engages in illicit sexual conduct as defined in section 2423(c), then a

---

[222] Scholars have also argued that the PROTECT Act overreaches into the sovereignty of a nation, violating principles of international law and thus represents an overextension of Congress's authority under the Foreign Commerce Clause. *See Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006); Colangelo, *supra* note 49, 971–72. The United States, however, is not overstepping its boundaries with this Act. The presumption against extraterritoriality arose from the United States' fear of irritating foreign nations, but if foreign nations are in agreement with the Optional Protocol and are one of the hundred that have signed on it, then discord between nations is unlikely. The PROTECT Act is simply a statute that requires a nexus between the United States and a foreign nation. The United States government is merely enforcing the Act when its citizens are back within the bounds of the country and is not attempting to mandate foreign nations to stop United States citizens when they are abroad. *See* Optional Protocol, *supra* note 75.

[223] *Pendleton*, 658 F.3d at 307–08; *cf. Lopez*, 514 U.S. at 558.

[224] *See generally Cummings,* 281 F.3d at 1049 n.1; *Weingarten*, 632 F.3d at 61.

[225] Optional Protocol, *supra* note 75.

connection of substantial effect on the United States is established because the United States is a party to the Optional Protocol and is responsible for implementing it.

Furthermore, scholars and the Supreme Court alike seem to agree that the Foreign Commerce Clause analysis should focus on whether the conduct being regulated has a substantial effect on foreign commerce and a nexus to the United States. For example, the Supreme Court in *Hartford Fire Insurance Company v. California* suggested that the "substantial effect" prong is the appropriate standard to assess statutes under the Foreign Commerce Clause and stated: "Congress has broad power under Article I §8, cl. 3 'to regulate Commerce with foreign Nations,' and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected."[226] Although the Supreme Court decided *Hartford Fire* prior to *Lopez*, the earlier decision might have served as a precursor to the focus in *Lopez*'s third-prong on the "substantial effect" on foreign commerce.

In analyzing the *Clark*[227] decision, legal scholar Anthony Colangelo suggested that even though there are limitations, commercial sexual activity abroad does in fact substantially affect the United States by virtue of the offender's U.S. citizenship.[228] Colangelo described how the court in *Clark* rationalized a substantial effect analysis "so long as the effect of Clark's conduct on foreign commerce with the United States would authorize extraterritorial jurisdiction under current international law, that effect should be constitutionally sufficient to permit regulation under the Clause." [229] Prior to the *Pendleton* decision, however, Colangelo also argued that Congress's criminalization of non-commercial sexual abuse of children abroad does not constitute the regulation of economic activity. [230] Colangelo was skeptical that "Congress could regulate noneconomic activity abroad under the Foreign Commerce Clause."[231] Although this argument has merit in light of the Supreme Court's statement in *United States v. Morrison*,[232] that gender

---

[226] 509 U.S. 764, 813–14 (1993) (citation omitted).
[227] *Clark,* 435 F.3d 1100.
[228] Colangelo, *supra* note 49, at 1035.
[229] *Id.* at 1034–35.
[230] *Id.* at 1031–32.
[231] *Id.* at 1039. *See generally*, Notebaert, *supra* note 49, at 950 (arguing that the Foreign Commerce Clause is not the appropriate authority for Congress to pass the noncommercial prong of §2423(c)).
[232] 529 U.S. 598 (2000).

motivated crimes were not economic,[233] the Court made that statement in the context of analyzing whether Congress had authority to caste a wide net and encompass a "purely intrastate, body of violent crime"[234] under the Interstate Commerce Clause. That reasoning does not apply when Congress seeks to punish individuals, who, after traveling abroad (not *intra*state), place United States money into a foreign economy in order to have the means and privacy to sexually abuse a child.

Morrison did not involve the Optional Protocol and did not address a matter dealing so directly with foreign nations such as the application of a multilateral treaty.[235] In contrast, the PROTECT Act, which was based upon the Optional Protocol, a treaty governing how the United States and other nations treat child sex abuse crimes, substantially affects commerce between nations. In these circumstances, courts are evaluating how foreign commerce affects other nations. Thus, although gender-motivated crimes may have been deemed non-economic crimes when occurring within the United States that does not preclude a determination that child sexual abuse in the realm of foreign commerce cannot constitute an economic crime. As courts have determined, the Optional Protocol [236] provides Congress with even more powerful authority under the Foreign Commerce Clause because it can manage activities beyond U.S. borders.[237]

Congress's criminalization of U.S. citizens' non-commercial sexual abuse of minors while abroad, where the perpetrator lacks a prior intent to commit the act before traveling abroad, passes constitutional muster based upon Congress's authority in the Foreign Commerce Clause power to regulate activities that have a substantial relation to foreign commerce and a nexus connecting the United States.[238] First, the United States has the authority to regulate this non-commercial activity in relation to the substantial effects connecting the U.S. and the foreign nation. For example, in *Pendleton,* how the defendant abused the victim in Germany illustrates "substantial" economic effects. Specifically, Pendleton, while

---

[233] *Id.* at 613.

[234] *Id.*

[235] *See* discussion *supra* Section II B.

[236] Optional Protocol, *supra* note 75.

[237] *See* Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 448 (1979). *See generally* Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 434 (1932) ("[T]he power to regulate commerce is conferred by the same words of the commerce clause with respect to both foreign commerce and interstate commerce . . . the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce.").

[238] *Cummings*, 281 F.3d at 1049 n.1; *see* Colangelo, *supra* note 49, at 985–86 (forming a test similar to the one described in *Cummings*).

in Germany, developed a friendship and rapport with his victim, a fourteen-year-old boy who lived in an orphanage.[239] After several months of getting to know the victim, Pendleton arranged to bring him on an overnight bike trip in Germany.[240] While on the biking trip, the young boy woke up in the campsite they were staying to Pendleton "fondling him."[241] The fact that Pendleton used money from the United States to purchase the bike trip and campsite lodging in Germany, which allowed him to victimize the young boy, demonstrates an economic effect on foreign commerce. Pendleton did not exchange money with the boy for the sexual act; however, by virtue of a U.S. citizen being abroad, a similar exchange of resources is always at issue when sexual abuse of minors occurs abroad.

V. CONCLUSION

Child sex tourism is an industry where offenders exploit children globally. The men and women who sexually abuse children feed the industry. The United States government has attempted to address this issue by implementing the PROTECT Act. Since its enactment, circuit courts have gone to great lengths to find the PROTECT Act constitutional, leading to a variety of different approaches among the courts. Congress had authority to enact the PROTECT Act based on the Foreign Commerce Clause, not the Interstate Commerce Clause, and the Supreme Court's framework in *Lopez* for evaluating questions arising under the Interstate Commerce Clause does not logically apply to a Foreign Commerce Clause analysis. An appropriate analysis under the Foreign Commerce Clause might be similar to the *Lopez* framework but should include a nexus requirement between the United States and the foreign nation in order to reflect the greater authority to manage activities beyond United States borders so long as there is an economic connection. Under this proposed framework, Congress has authority to criminalize child sex abuse that takes place abroad even if the offender does not have prior intent at the time of travel. A substantial economic nexus is present when the illicit child sexual abuse is occurring in another country and the United States citizen is the abuser. Ultimately, Congress may regulate activities that are substantially related to foreign

---

[239] *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*, ICE NEWS RELEASES (Feb. 4, 2010), http://www.ice.gov/news/releases/1002/100204wilmington.htm.

[240] *Id.*

[241] *Id.*

commerce with the United States, and this is satisfied by an economic effects theory of non-commercial activity.