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Touring Commerce Clause Jurisprudence: The Constitutionality of Prosecuting Non-Commercial Sexually Illicit Acts Under 18 U.S.C. § 2423(C)

Christine L. Hogan

NOTES

TOURING COMMERCE CLAUSE JURISPRUDENCE: THE CONSTITUTIONALITY OF PROSECUTING NON-COMMERCIAL SEXUALLY ILLICIT ACTS UNDER 18 U.S.C. § 2423(C)

CHRISTINE L. HOGAN†

INTRODUCTION

A man flies from California to Thailand on business for one week. He stays at an upscale hotel, eats at four-star restaurants, and buys souvenirs for his wife. In his free time, he seduces impoverished Thai children with the promise of chocolate and molests them.[1]

The United States Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[2] Although the Constitution is not explicit, courts have construed Congress's foreign commerce power as more expansive than its interstate commerce power.[3] Commerce "describes the commercial intercourse

† Editor-in-Chief, *St. John's Law Review*; St. John's University School of Law, Candidate for J.D., 2008; Boston College, B.A., 2003.

1 This hypothetical will be used throughout the Note.

2 U.S. CONST. art. I, § 8, cl. 3. The Framers intended that the Constitution grant separate and independent powers to Congress for foreign commerce, interstate commerce, and commerce with the Indian tribes. *See* Kenneth M. Casebeer, *The Power to Regulate "Commerce with Foreign Nations" in a Global Economy and the Future of American Democracy: An Essay*, 56 U. MIAMI L. REV. 25, 33 (2001) (basing this proposition on a textual analysis of the Commerce Clause).

3 *See, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979) ("[T]here is evidence that the Founders intended the scope of the foreign commerce power to be the greater."). *See generally* THE FEDERALIST NO. 42 (James Madison). First, there are no overarching federalism concerns involved in foreign commerce

between nations, and parts of nations, in all its branches."[4] The commerce power, however, is only limited by the broad boundaries set by the Constitution itself.[5] Consequently, courts have empowered Congress to regulate even non-commercial activities through the Commerce Clause, as long as those activities substantially affect commerce.[6]

Congress initially focused its Commerce Clause authority on regulating interstate, economic activity.[7] In the last century,

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regulation. *See Japan Line*, 441 U.S. at 448 n.13. Second, in terms of foreign commerce, the United States acts through Congress with one national voice. *See id.* (citing Bd. of Trustees v. United States, 289 U.S. 48, 59 (1933)). "In fact, the Supreme Court has *never* struck down an act of Congress as exceeding its powers to regulate foreign commerce." United States v. Clark, 435 F.3d 1100, 1113 (9th Cir. 2006) (emphasis added), *cert. denied*, 127 S. Ct. 2029 (2007).

[4] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189–90 (1824). This is a sweeping definition of commerce—it describes every possible type of commercial interaction between the United States and other countries. *See id.* at 193. Indeed, courts have interpreted the regulation of foreign commerce, under the Commerce Clause, to embrace activities that occur *entirely* in a foreign country. *See* Gen. Motors Corp. v. Ignacio Lopez de Arriortua, 948 F. Supp. 684, 690 (E.D. Mich. 1996) (stating that commerce that occurs entirely inside another country falls under the control of the Commerce Clause if it has a substantial effect on foreign commerce in general); *see also* Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 641 (2d Cir. 1956); *cf.* Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952) ("Where, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction."); Thomsen v. Cayser, 243 U.S. 66, 88 (1917) (stating that although the illegal action was formed in a foreign country, it was still within congressional power to regulate).

[5] *See Gibbons*, 22 U.S. at 196. The commerce power, "like all others vested in Congress, is complete in itself, [and] may be exercised to its utmost extent." *Id.*

[6] *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995); Wickard v. Filburn, 317 U.S. 111, 125 (1942) (stating that even non-commercial activities can be regulated by Congress if they substantially affect commerce); *see also* Gonzales v. Raich, 545 U.S. 1, 9 (2005) (holding that the Controlled Substances Act was a constitutionally permissible use of Commerce Clause authority when regulating homegrown marijuana that was not cultivated for economic purposes); *Wickard*, 317 U.S. at 125 (holding that the regulation of local wheat production, which was only grown for non-economic consumption, was constitutional). For further discussion of Congress's authority to regulate non-economic activities that substantially affect commerce, see *infra* Part III.B.1. Courts have also interpreted the Commerce Clause to authorize the regulation of channels of commerce being used for non-commercial purposes. *See* Caminetti v. United States, 242 U.S. 470, 484–86 (1917). For further discussion of Congress's authority to regulate non-commercial channels of commerce activity, see *infra* Part III.A.

[7] *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW 400 (3d ed. 1999) (stating that "[e]ven during periods when the Justices were debating whether to significantly restrict the congressional power to regulate intrastate activities under the commerce power, there was no serious advocacy of restrictions on the federal powers" in commerce with foreign countries and Indian

however, Congress has utilized the commerce power to enact criminal laws,[8] and more recently, laws that prohibit criminal acts on foreign soil.[9] One such law, 18 U.S.C. § 2423(c),[10] permits the government to prosecute a United States citizen, just like the businessman in the hypothetical,[11] "who travels in foreign commerce, *and* engages in any illicit sexual conduct with another person."[12] Although the Ninth Circuit has upheld the constitutionality of prosecuting commercial illicit sexual conduct under § 2423(c),[13] no court in this nation has determined the

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tribes); *c.f.* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (holding that provisions of the Live Poultry Code were unconstitutional because they regulated intrastate activities that only indirectly affected interstate commerce); Champion v. Ames (*Lottery Case*), 188 U.S. 321, 363–64 (1903) (holding that the Federal Lottery Act was constitutional because it regulated the interstate movement of lottery tickets); The Daniel Ball, 77 U.S. (10 Wall.) 557, 565 (1870) (finding a federal safety regulation constitutional as applied to a ship navigating in Michigan waters because the ship was involved in interstate commerce); *Gibbons*, 22 U.S. at 197 (holding that a federal statute, which regulated who obtained ferry licenses to travel from New York to New Jersey, was a constitutionally permissible exercise under the Commerce Clause).

[8] *See* Perez v. United States, 402 U.S. 146, 150 (1971) (authorizing Congress to utilize the Commerce Clause in the enactment of criminal laws); *cf.* 18 U.S.C. § 931 (2000) (criminalizing the intrastate possession of body armor by a felon); *id.* § 247 (criminalizing the destruction of religious property if it affects commerce); *id.* § 922(h)(2) (criminalizing possession of a firearm "which has been shipped or transported in interstate or foreign commerce").

[9] *See Lottery Case*, 188 U.S. at 327 (finding that Congress has the right not only to regulate commerce, but also to restrict it); *see also* 18 U.S.C. § 1204(a) (2000) (criminalizing the retention of a child in a foreign country "with intent to obstruct the lawful exercise of parental rights"); *infra* notes 10–12 and accompanying text; *cf.* JEREMY SEABROOK, NO HIDING PLACE: CHILD SEX TOURISM AND THE ROLE OF EXTRATERRITORIAL LEGISLATION, at x (2000) ("Extraterritorial legislation already exist[s] to cover certain offences, notably international agreements on terrorism, narcotics, arms-dealing and other serious crimes.").

[10] 18 U.S.C. § 2423(c) (Supp. III 2004).

[11] *See supra* text accompanying note 1.

[12] 18 U.S.C. § 2423(c) (emphasis added). The full text is as follows: "Engaging in Illicit Sexual Conduct in Foreign Places.—Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both." *Id.* "Under this provision the Government would . . . have to prove that the defendant engaged in illicit sexual conduct with a minor while they were in a foreign country." H.R. REP. NO. 107-525, at 5 (2002).

[13] United States v. Clark, 435 F.3d 1100, 1117 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2029 (2007). The defendant was caught molesting two young boys in Cambodia. The boys allowed him to do so because they needed money for food. *Id.* at 1103–04. Clark was indicted under 18 U.S.C. § 2423(c) and eventually pled guilty. *Id.* at 1104. Clark argued on appeal, however, that the statute was an impermissible

constitutionality of prosecuting non-commercial illicit sexual conduct under the statute: "Whether those aspects of the law have enough of a connection to foreign commerce to be constitutional remains an open question."[14]

Section 2423 splits "illicit sexual conduct" into two types: commercial and non-commercial.[15] The statute defines commercial sexual conduct as a commercial sex act with a person under 18 years old,[16] where a party exchanges something of value.[17] In contrast, the statute defines non-commercial sexual conduct as a sex act[18] "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."[19] This includes the following crimes: aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, abusive sexual contact, and sexual abuse offenses resulting in death.[20]

On its face, prosecuting non-commercial sex acts under § 2423(c) is a constitutionally permissible exercise of Congress's commerce power. Although the statute probably will not pass

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use of foreign commerce power. *Id.* at 1105. The Ninth Circuit did not agree. *Id.* at 1117. The court, using a "constitutionally tenable nexus with foreign commerce" analysis, held that "§ 2423(c)'s combination of requiring travel in foreign commerce, coupled with engagement in a commercial transaction while abroad, implicates foreign commerce to a constitutionally adequate degree." *Id.* at 1114.

[14] Josh Gerstein, *Sex Overseas May Fall Under U.S. Jurisdiction*, N.Y. SUN, Jan. 26, 2006, at 1.

[15] 18 U.S.C. § 2423(f) (Supp. III 2004).

[16] *See id.* § 2423(f)(2).

[17] *See* 18 U.S.C. § 1591(c)(1) (2000) ("[A]ny sex act, on account of which anything of value is given to or received by any person.").

[18] A "sexual act" is:

> (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;
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> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
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> (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
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> (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 . . . .

Id. § 2246(2).

[19] 18 U.S.C. § 2423(f)(1).

[20] *See* 18 U.S.C. §§ 2241–46 (2000) (stating the elements of the crimes listed above and the pertinent definitions).

muster under a channels of commerce analysis,[21] the aggregate economic effects of non-commercial sex offenders, as an indispensable part of a larger economic scheme to prevent child sex tourism, substantially affects foreign commerce.[22] With the argument strengthened by the application of the proper standard of review[23] and the overwhelming policy arguments in favor of the statute's constitutionality, this analysis cannot fail.

Part I of this Note will present an overview of child sex tourism. It will establish that child sex tourism is an international problem with far-reaching economic implications. It will then clarify the legislative history of 18 U.S.C. § 2423 and Congress's intent, to prevent sex tourism, in establishing both the predecessor statutes and current incarnation of 18 U.S.C. § 2423(c). Part II of this Note will lay out the relevant framework for analysis. It will argue that the three-category framework of *United States v. Lopez*,[24] although established in an interstate commerce context, is the best method of constitutional analysis. Finally, Part III of this Note will confirm the constitutionality of 18 U.S.C. § 2423(c). It will examine the statute through both a channels of commerce and substantial effects analysis, and demonstrate that both precedent and policy demand a finding of constitutionality.

I. THE ECONOMICS OF 18 U.S.C. § 2423(C)

A. *Child Sex Tourism Is a Widespread Economic Crisis*

Section 2423(c) exists to prevent child sex tourism, a social crisis with substantial economic implications. Child sex tourism describes a phenomenon where Western men travel to developing foreign countries[25] and sexually molest children.[26] The statistics

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

[22] *See infra* Part III.B.2.

[23] *See infra* Part III.B.3 (expounding on the rational basis test).

[24] 514 U.S. 549 (1995).

[25] *See* SEABROOK, *supra* note 9, at ix. The most popular countries for sex tourists include Thailand, the Philippines, Sri Lanka, and Taiwan. James Asa High, Jr., *The Basis for Jurisdiction over U.S. Sex Tourists: An Examination of the Case Against Michael Lewis Clark*, 11 U.C. DAVIS J. INT'L L. & POL'Y 343, 348 (2005).

[26] *See* SEABROOK, *supra* note 9, at ix. The molestation includes sex with child prostitutes, forcible rape, and everything in between. *See* Amy Messigian, *Love's Labour's Lost: Michael Lewis Clark's Constitutional Challenge of 18 U.S.C. 2423(c)*, 43 AM. CRIM. L. REV. 1241, 1243 (2006).

are troubling: One research study estimated that one-quarter of all child sex tourists depart from the United States.[27] These sex tourists target developing nations because of their lax police presence.[28] This loose enforcement has everything to do with economics:

> The authorities in the countries they visited, including those where legislation against child abuse was explicit, were often reluctant to pursue them, even when stories of their activities began to circulate. The foreign exchange they brought to impoverished regions of the world seems to have earned them a certain shield against scrutiny.... Corruption, too, allowed many offenders to get away with it—the authorities could sometimes be bought off by what, to well-to-do Westerners, was a small sum.[29]

Developing countries, in an effort to boost their economy, embrace mass tourism as a means to further their nations' interests.[30] A domino effect occurs: Poor economies make impoverished children easy targets for child sex tourists, while the countries' desire for healthier economies encourages continual lax enforcement against the tourists.[31]

In fact, child sex tourism is part of a multi-billion dollar business.[32] Although this figure also includes child prostitution,[33] commercial illicit sexual conduct is just one part of

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[27] *See* Messigian, *supra* note 26, at 1243.

[28] *See* SEABROOK, *supra* note 9, at ix. "Americans who have sex with children abroad are thought to number in the thousands, with hard-core pedophiles, casual tourists and business people taking advantage of lax enforcement...." Eric Lichtblau & James Dao, *U.S. Is Now Pursuing Americans Who Commit Sex Crimes Overseas*, N.Y. TIMES, June 8, 2004, at A1. This is not surprising since the sex tourists' prime motivation for leaving countries like the United States is to evade discovery and prosecution by better law enforcement. *See* High, Jr., *supra* note 25, at 347.

[29] SEABROOK, *supra* note 9, at ix.

[30] *See* Christine Beddoe, *Beachboys and Tourists: Links in the Chain of Child Prostitution in Sri Lanka*, *in* SEX TOURISM AND PROSTITUTION: ASPECTS OF LEISURE, RECREATION, AND WORK 42, 42 (Martin Oppermann ed., 1998); Martin Oppermann, *Introduction to* SEX TOURISM AND PROSTITUTION, *supra*, at 1, 1.

[31] *See* SEABROOK, *supra* note 9, at ix.

[32] *See* Messigian, *supra* note 26, at 1243. This figure includes child pornography, child prostitution, and all other types of child sex tourism. *Id.* "As of 1998, an estimated two to fourteen percent of the individual gross domestic product of Indonesia, Malaysia, the Philippines, and Thailand is attributable to sex tourism." Karen D. Breckenridge, *Justice Beyond Borders: A Comparison of Australian and U.S. Child-Sex Tourism Laws*, 13 PAC. RIM L. & POL'Y J. 405, 410 (2004).

[33] *See* Messigian, *supra* note 26, at 1243.

a larger, more complex industry.[34] Sex tourism is often "considered to be an economic (return) flow from the economic[ally] prosperous to the less well-off nations."[35] Obviously, the major economic element of sex tourism is tourism itself.[36] This includes multiple purchases: plane tickets, hotel accommodations, food and drink, and perhaps souvenirs, tours, and duty-free items. In addition, increased globalization and scientific advances give sex tourists many extra resources.[37] Not only does global expansion and technological innovation give way to "porous borders and the easy flow of capital,"[38] they also allow sex tourists to use the internet to research travel destinations, learn strategies to avoid detection, and plan their trips.[39] It is important to note, however, that a significant number of sex tourists do not intend to commit an illicit sex act before they leave the United States. Instead, they take advantage of the opportunity while abroad.[40] In both cases, however, intentional and opportunistic sex tourists alike substantially add to the foreign country's economy.

B. The Legislative History of 18 U.S.C. § 2423 Reflects an Economic Focus

Congress enacted 18 U.S.C. § 2423 as part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003.[41] The statute

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[34] *See* Oppermann, *supra* note 30, at 1. "The reduction of sex tourism to 'tourism whose main or major motivation is to consummate commercial sexual relations' would mean an oversimplification of the whole concept and . . . an exclusion of the majority of sex tourism cases and settings." *Id.* at 2 (citation omitted).

[35] *Id.* at 1. Therefore, the receiving country's poverty plays a large role in the growth of the sex tourism industry. *See supra* notes 29–31 and accompanying text; *see also* Amy Fraley, Note, *Child Sex Tourism Legislation Under the PROTECT Act: Does it Really Protect?*, 79 ST. JOHN'S L. REV. 445, 454 (2005).

[36] *See* Oppermann, *supra* note 30, at 2.

[37] *See* Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 511 (2006). These extra resources make the industry thrive. *Id.*

[38] *Id.* This also includes taking advantage of the vast income differential between the United States and developing counties. *See id.* at 513.

[39] *Id.* at 511. Sex tourists typically use the internet to plan independent vacations, although there are numerous organized sex tour operators that will set up a sex tour for a set rate. *See id.* at 513.

[40] *See* Oppermann, *supra* note 30, at 11. In a study done by Kleiber and Wilke, the percentages of German tourists who *intended* to engage in sex acts with local women in developing countries ranged from 55.5–72.4 percent. *Id.* at 11 tbl.1.2.

[41] Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of

represents a comprehensive scheme to prohibit sex tourism.[42] As part of the Violent Crime Control and Law Enforcement Act of 1994, Congress enacted § 2423(b), which made it illegal to "travel[] in foreign commerce, or conspire[] to do so, for the purpose of engaging in any [illicit] sexual act."[43] Due to lack of prosecutorial success, however, the PROTECT Act added subsection (c), which eliminated the intent requirement.[44] Since the enactment of this Act, "there have been approximately 55 indictments and 36 convictions, with more than 60 additional investigations currently underway."[45]

Although the PROTECT Act itself conveys very little legislative history that is relevant to § 2423(c), an almost identical statute was passed in the House (the Senate never voted) just one year prior, as part of the Sex Tourism Prohibition Improvement Act of 2002.[46] The congressional record illuminates

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42 U.S.C. and 18 U.S.C.). It descends from the Mann Act of 1910. *See* High Jr., *supra* note 25, at 349. The Mann Act criminalized the transportation of females through commerce for the purpose of prostitution or other immoral reasons. *Id.*

[42] *See* H.R. REP. NO. 107-525, at 3 (2002). Besides the subsection at issue, § 2423(c), it is important to note that the PROTECT Act also enacted subsections (d) and (e) in 2003, as part of a comprehensive scheme to prohibit sex tourism. *See id.* at 2. The subsections are as follows:

> (d) Ancillary Offenses.—Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, imprisoned not more than 30 years, or both.
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> (e) Attempt and Conspiracy.—Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.

18 U.S.C. § 2423(d)–(e) (Supp. III 2004). Subsection (d) essentially reaches sex tour operators and (e) is a catch-all section to cover everyone else who could potentially be involved in sex tourism. *See id.*

[43] 18 U.S.C. § 2423(b) (1994); *see also* United States v. Clark, 315 F. Supp. 2d 1127, 1129–30 (W.D. Wash. 2004), *aff'd*, 435 F.3d 1100 (9th Cir. 2006). This is now codified as 18 U.S.C.§ 2423(b) (Supp. III 2004), and remains as another part of Congress's comprehensive scheme to prohibit sex tourism. *See supra* note 42 and accompanying text.

[44] H.R. REP. NO. 107-525, at 3.

[45] *Online Child Pornography: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 7 (2006) (statement of Alice S. Fisher, Assistant Att'y Gen. Criminal Division of the United States), *available at* http://commerce.senate.gov/public/_files/AliceFisherTestimony.pdf.

[46] *See* H.R. REP. NO. 108-66, at 51–52 (2003) (Conf. Rep.) ("This section is similar to H.R. 4477, the 'Sex Tourism Prohibition Improvement Act of 2002,' which passed the House by 418 yeas to 8 nays on June 26, 2002."). The 2002 Act states: "ENGAGING IN ILLICIT SEXUAL CONDUCT IN FOREIGN PLACES.—Any United States

Congress's economic goals for this particular act. The House report, in the "Background and Need for Legislation" portion, states:

> [C]hild-sex tourism is a major component of the worldwide sexual exploitation of children and is increasing. . . . Because poor counties are often under economic pressure to develop tourism, those governments often turn a blind eye toward this devastating problem because of the income it produces. Children around the world have become trapped and exploited by the sex tourism industry. . . . This legislation will close significant loopholes in the law that persons who travel to foreign countries seeking sex with children are currently using to their advantage in order to avoid prosecution.[47]

The congressional record proves that Congress intended § 2423(c) to focus on the implications of sex tourism on foreign economies and to resolve a "gaping hole"[48] in their comprehensive scheme to prohibit sex tourism.

II. COURTS SHOULD APPLY THE *LOPEZ* FRAMEWORK TO ANALYZE THE CONSTITUTIONALITY OF 18 U.S.C. § 2423(C)

Although child sex tourism under 18 U.S.C. § 2423(c) involves foreign commerce, utilization of the interstate commerce framework is the best possible method for its constitutional analysis. The Supreme Court, over the last few decades, has avoided a facial constitutional analysis under the Foreign Commerce Clause. In addition, recent circuit court decisions have actually adopted the Court's Interstate Commerce Clause analysis to resolve foreign commerce constitutional issues.[49]

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citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 15 years, or both." H.R. REP. NO. 107-525, at 2.

[47] H.R. REP. NO. 107-525, at 2–3.

[48] Gonzales v. Raich, 545 U.S. 1, 22 (2005).

[49] Jeff Christensen, Comment, *Congressional Power to Regulate Noncommercial Activity Overseas: Interstate Commerce Clause Precedent Indicates Constitutional Limitations on Foreign Commerce Clause Authority*, 81 WASH. L. REV. 621, 622 (2006); *see also* United States v. Bredimus, 352 F.3d 200, 207–08 (5th Cir. 2003) (using the channels analysis of the *Lopez* framework to find 18 U.S.C. § 2423(b) (2000) constitutional); United States v. Cummings, 281 F.3d 1046, 1049 n.1 (9th Cir. 2002) (applying the *Lopez* framework to the constitutional analysis of the International Parental Kidnapping Crime Act); Nat'l Solid Wastes Mgmt. Ass'n v. Granholm, 344 F. Supp. 2d 559, 565 (E.D. Mich. 2004) ("Because the domestic and foreign aspects of the Commerce Clause are founded upon comparable principles, the

Therefore, this Note will adopt the framework set out in *United States v. Lopez*.[50] *Lopez* synthesized Commerce Clause jurisprudence and presented three distinct analytical categories of activities that Congress may regulate.[51] First, Congress has the power to regulate the channels of commerce.[52] Second, Congress has the power to protect the instrumentalities of commerce and persons or things in commerce.[53] Finally, Congress has the power to regulate activities that substantially affect commerce.[54]

III. 18 U.S.C. § 2423(C) IS CONSTITUTIONAL UNDER THE FOREIGN COMMERCE CLAUSE

The framework introduced above offers the perfect tool for scrutinizing the instant statute because it represents the most up-to-date jurisprudence on Commerce Clause analysis. The actual constitutional analysis of the statute, however, poses a few unusual issues. First, the statute does not contain an intent

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same analysis may be employed with respect to domestic and Foreign Commerce Clause challenges.").

The Ninth Circuit in *United States v. Clark*, 435 F.3d 1100, 1103 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2029 (2007), used a constitutionally tenable nexus test because applying the *Lopez* framework would be like "jamming a square peg in a round hole." The following analysis, however, demonstrates that this is not true. *Clark*'s "global, commonsense approach" is not supported by precedent. 435 F.3d at 1103. In fact, the Ninth Circuit is the only court that has applied the "tenable nexus" test. *See* Christensen, *supra*, at 634.

[50] 514 U.S. 549 (1995).

[51] *See id.* at 558–59. Although some lower courts have blurred the three categories together, "[t]he Supreme Court and other lower federal courts have found that these three bases of congressional authority are in fact analytically distinct." *Bredimus*, 352 F.3d 200, 206 (5th Cir. 2003) (citing United States v. Robertson, 514 U.S. 669, 671 (1995)).

[52] *Lopez*, 514 U.S. at 558; *see also* discussion *infra* Part III.A (explaining further the channels of commerce analysis).

[53] *Lopez*, 514 U.S. at 558. The second *Lopez* category, the instrumentalities of commerce, clearly does not apply here. Under this category, Congress may protect the instrumentalities of commerce (like planes or railroads), and persons or things in commerce. *See* United States v. Patton, 451 F.3d 615, 621 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 1247 (2007). The regulation of persons and things under this category, however, "involve things actually being moved in interstate commerce, not all people and things that have ever moved across state lines." *Id.* at 622. The statute at issue, instead, involves an activity that transpires after the movement in commerce has occurred. *See* 18 U.S.C. § 2423(c) (Supp. III 2004) (prohibiting illicit sexual conduct on foreign soil). Section 2423(c) does not protect the person actually traveling in commerce—it protects the child in the foreign country.

[54] *Lopez*, 514 U.S. at 558–59; *see* discussion *infra* Part III.B.1 (explaining further the substantial effects analysis).

requirement: A person must only travel in foreign commerce and, sometime thereafter, commit an illicit sexual act abroad, to be convicted under § 2423(c).[55] Does this lack of specific intent while traveling in foreign commerce affect the analysis?[56] Second, although a person must travel in foreign commerce, does the person also have to affect foreign commerce immediately while committing the illicit sexual act in order for the statute to be constitutional?[57] Finally, how does the proper standard of review, the rational basis test, affect the analysis?[58] These questions guide the subsequent channels of commerce and substantial effects analysis,[59] and lead to the inescapable conclusion that 18 U.S.C. § 2423(c) is a constitutionally permissible exercise of Congress's Commerce Clause authority.

A. *18 U.S.C. § 2423(c) Is Probably Not Constitutional Under the Channels of Commerce Analysis*

Congressional regulation of the channels of commerce addresses the misuse of the channels by restricting a class of goods or people.[60] The channels of commerce include those "transportation routes through which persons and goods move."[61] This is not an economic analysis; Congress need not have an economic purpose in order to regulate an activity that uses the channels of commerce.[62] Instead, Congress's regulation power focuses on "keep[ing] the channels . . . free from immoral and injurious uses."[63] Therefore, when Congress invokes the

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55 *See supra* note 12 and accompanying text.

56 *See infra* Part III.A.

57 *See infra* Part III.B.2.

58 *See infra* Part III.B.3.

59 See *supra* note 53 for an explication of why the second *Lopez* category does not apply here.

60 *See* Caminetti v. United States, 242 U.S. 470, 491–92 (1917); *see also* United States v. Lopez, 514 U.S. 549, 558 (1995); Perez v. United States, 402 U.S. 146, 150 (1971) (giving as examples "the shipment of stolen goods or of persons who have been kidnaped [sic]" (citations omitted)); Champion v. Ames (Lottery Case), 188 U.S. 321, 363–64 (1903) (holding that Congress has the power to prohibit the interstate transportation of lottery tickets).

61 United States v. Morrison, 529 U.S. 598, 613 n.5 (2000).

62 *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) ("Nor does it make any difference whether the transportation is commercial in character."); *see also* United States v. Patton, 451 F.3d 615, 621 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 1247 (2007).

63 *Caminetti*, 242 U.S. at 491. This does not mean that the actus reus of the crime must occur in the channels themselves. Instead, "[a]n act that promotes harm,

commerce power in order to prevent a person's misuse of the channels, criminal intent must be present at the time of travel.[64] If a person does not use the channels for immoral or injurious uses at the time of travel, the statute regulating that activity does not pass muster under the channels analysis.[65]

Section 2423(c) fails the channels of commerce analysis. It is true that the statute requires a person to "travel[] in foreign commerce" in order to be prosecuted.[66] The evil act, however, occurs after the travel is complete. This would not be troublesome for the channels analysis if the statute required a criminal intent or purpose while traveling through foreign commerce.[67] The PROTECT Act's addition of § 2423(c), however, eliminated the intent requirement in order to strengthen the statute's effectiveness.[68]

Therefore, the man who travels in foreign commerce for business and takes advantage of an opportunity to molest children[69] can still be charged and convicted under the statute. He does not have a criminal intent while traveling through the channels of commerce—he is simply taking a business trip—therefore, he does not injure the channel or use it for immoral purposes. The missing intent requirement in § 2423(c), consequently, is fatal. The statute is unlikely to be held constitutional under the channels of commerce analysis.

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not the harm itself, is all that must occur in commerce to permit congressional regulation." United States v. Ballinger, 395 F.3d 1218, 1227 (11th Cir. 2005).

[64] *See Caminetti*, 242 U.S. at 491–92 (upholding the constitutionality of an act that "seeks to reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited"). In analyzing *Caminetti*, the Tenth Circuit stated: "Although the statute upheld in that case does focus on the purpose of the transportation—prostitution—this must be the purpose at the time of transportation; the statute does not criminalize the transportation of persons who happen, after crossing state lines, to become prostitutes." *Patton*, 451 F.3d at 621 n.3.

[65] Hence, in *United States v. Maxwell*, 446 F.3d 1210, 1211–12 (11th Cir. 2006), a statute criminalizing the act of knowingly possessing any child pornography that was previously moved in interstate or foreign commerce was not examined under the channels analysis. Instead, the court moved right to the substantial effects analysis and determined that the statute was, in fact, constitutional. *Id.* at 1212, 1219.

[66] 18 U.S.C. § 2423(c) (Supp. III 2004).

[67] In *United States v. Bredimus*, 352 F.3d 200, 202 (5th Cir. 2003), petitioner challenged the constitutionality of the previous incarnation of the statute, which contained an intent element. As expected, the court upheld its constitutionality under the channels analysis. *See Bredimus*, 352 F.3d at 207–08.

[68] *See supra* note 44 and accompanying text.

[69] *See supra* text accompanying note 1.

B. *18 U.S.C. § 2423(c) Is Constitutional Under the Substantial Effects Analysis*

1. The Analysis's Requirements: *Lopez*'s Four Factors and *Raich*'s Regulatory Scheme Caveat

When analysis under the first two categories of the *Lopez* framework fails, the substantial effects analysis determines the statute's constitutionality.[70] This analysis breaks down into its own distinct analytical test. First, one must examine the statute to determine if the regulated activity is "economic," i.e. commercial, in nature.[71] "The best historical scholarship indicates that in addition to its primary sense of buying, selling, and transporting merchandise, the term 'commerce' was understood at the Founding to include the compensated provision of services as well as activities in preparation for selling property or services in the marketplace . . . ."[72] Indeed, if the activity is commercial in nature, it is practically dispositive to the constitutional analysis.[73] If, however, the activity is non-commercial, the strength of the next three factors determines the statute's constitutionality.[74]

The second factor asks whether the statute has a jurisdictional element.[75] This "ensure[s], through case-by-case inquiry,"[76] that the regulated activity affects commerce.[77] Not only does the express jurisdictional element ensure that the activity has a clear connection to commerce, it also confirms a

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[70] *See Maxwell*, 446 F.3d at 1212 (proceeding "[u]pon concluding that the regulation could be sustained, if at all, only as an exercise of *Lopez* 3 authority"); *see also* United States v. Tykarsky, 446 F.3d 458, 470 (3d Cir. 2006); United States v. Wilks, 58 F.3d 1518, 1520 (10th Cir. 1995).

[71] *See* United States v. Lopez, 514 U.S. 549, 560–61 (1995) (determining that the act in question was not economic in nature); *see also* United States v. Morrison, 529 U.S. 598, 610 (2000) (noting first that the statute in question was non-commercial, "however broadly one might define those terms"); United States v. Patton, 451 F.3d 615, 623 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 1247 (2007).

[72] *Patton*, 451 F.3d at 624.

[73] *See Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); *see also Patton*, 451 F.3d at 623.

[74] *Patton*, 451 F.3d at 624; *see Lopez*, 514 U.S. at 560–66 (analyzing the other factors of the substantial effects analysis even after determining that the act in question was non-economic in nature); *cf. supra* note 6 and accompanying text.

[75] *See Lopez*, 514 U.S. at 561; *see also Patton*, 451 F.3d at 623.

[76] *See Lopez*, 514 U.S. at 561.

[77] *Id.*

congressional intent to regulate commerce.[78] "The principle practical consequence of a jurisdictional hook is to make a facial constitutional challenge unlikely or impossible . . . ."[79] It also aids in the determination of whether the activity has a substantial affect on commerce.[80]

The third factor inquires into the legislative history of the statute, regarding the effects that the prohibited activity has on commerce.[81] Congress, of course, does not have to make particularized findings in order to pass a statute.[82] They are important, however, because "congressional findings would enable [the court] to evaluate the legislative judgment that the activity in question substantially affect[s] . . . commerce, even though no such substantial effect [is] visible to the naked eye."[83] It is important to give proper deference and respect to Congress.[84]

Finally, the fourth factor examines the link between the prohibited activity and its effect on commerce.[85] Congress may only regulate when "there are 'substantial' and not 'attenuated' effects" on commerce.[86] This analysis, therefore, is fact-specific to the pertinent activity and the statute that regulates it.[87] In

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[78] *See* United States v. Morrison, 529 U.S. 598, 611–12 (2000).

[79] *Patton*, 451 F.3d at 632 (citing Jones v. United States, 529 U.S. 848, 857 (2000)).

[80] *See id.*

[81] *See Lopez*, 514 U.S. at 562; *see also Patton*, 451 F.3d at 623. This includes both legislative and congressional committee findings. *See Lopez*, 514 U.S. at 562.

[82] *See Lopez*, 514 U.S. at 562; Perez v. United States, 402 U.S. 146, 156 (1971).

[83] *Lopez*, 514 U.S. at 563.

[84] *See Patton*, 451 F.3d at 630 (citing Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 n.12 (1985)); *see also* United States v. Harris, 106 U.S. 629, 635 (1883).

[85] *See Lopez*, 514 U.S. at 563–64 (examining the government's arguments as to why the activities controlled under the act in question substantially affect commerce); *see also Patton*, 451 F.3d at 623.

[86] *Patton*, 451 F.3d at 625 (citing United States v. Morrison, 529 U.S. 598, 614–16 (2000)).

[87] It is always beneficial to examine those cases where the Court did not find that the activity substantially affected commerce in order to determine what activities do substantially affect commerce. In *Lopez*, the act in question criminalized the knowing possession of a gun in a school zone. 514 U.S. at 551. The Court labeled the act as non-economic in nature and without connection to a larger regulatory scheme. *Id.* at 561. In addition, the statute did not contain a jurisdictional element or include any legislative history regarding the link between gun possession and interstate commerce. *Id.* at 561–62. Under the substantial effects analysis, the court found that gun possession, even in the aggregate, did not substantially affect interstate commerce. *Id.* at 567. The Court stated that the

addition, it is well-settled law that as long as *de minimis* instances, when taken in the aggregate, substantially affect commerce, a statute that regulates those instances is constitutional.[88] Overall, this factor is the most dispositive, with the second and third factors informing its analysis.[89]

The watershed case of *Gonzales v. Raich*[90] is essential to the present analysis because it is the most recent Supreme Court case dealing with the Commerce Clause. At issue in *Raich* was the federal Controlled Substances Act ("CSA"),[91] which criminalized the manufacture, distribution, dispensation, and possession of controlled substances.[92] Respondents did not

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government's argument that gun possession substantially affected commerce by causing costly violent crime, a decrease in willingness to travel to perceived unsafe areas, and a handicapped learning environment, went beyond acceptable constitutional limits. *Id.* at 563–64. Therefore, the Court held that the act was not a constitutionally permissible use of commerce power. *Id.* at 567.

In *United States v. Morrison*, the act in question criminalized violence based on gender. 529 U.S. at 605–06. The Court labeled the act as non-economic in nature and noted that the statute did not contain a jurisdictional element. *Id.* at 613. The statute, however, included legislative history on the economic result of gender violence, which included the effect on the victim's potential medical costs and business future and the country's national product. *Id.* at 615. Nevertheless, the Court held that the gender violence did not substantially affect commerce—"the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce" went beyond acceptable constitutional limits. *Id.* Therefore, the Court held that the act was not a constitutionally permissible use of commerce power. *Id.* at 617–19.

[88] *See* Gonzales v. Raich, 545 U.S. 1, 17 (2005); Perez v. United States, 402 U.S. 146, 154–55 (1971) ("In emphasis of our position that it was the class of activities regulated that was the measure, we acknowledged that Congress appropriately considered the 'total incidence' of the practice on commerce." (quoting Katzenbach v. McClung, 379 U.S. 294, 301 (1964))); Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968) (finding that when "a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence"); Westfall v. United States, 274 U.S. 256, 259 (1927).

[89] It is not essential to the analysis that there be a jurisdictional element. *See Patton*, 451 F.3d at 632 ("The ultimate inquiry is whether the prohibited activity has a substantial effect on interstate commerce, and the presence of a jurisdictional hook, though certainly helpful, is neither necessary nor sufficient."). Nor is it dispositive that there are not particularized legislative findings. *See Lopez*, 514 U.S. at 562 ("Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.").

[90] 545 U.S. 1 (2005). This case was decided in the interstate commerce context. *See supra* Part II (arguing that it is appropriate to look to interstate commerce cases when addressing foreign commerce questions).

[91] 21 U.S.C.A. §§ 801–904 (West 2007). The statutes at issue there were §§ 841(a)(1) and 844(a).

[92] *Raich*, 545 U.S. at 13.

challenge the Act as a whole; instead, they argued that congressional Commerce Clause authority did not extend to the intrastate manufacture and non-commercial possession of marijuana.[93] The court, after reviewing the three categories that Congress may regulate,[94] proceeded with the substantial effects analysis.[95]

First, the Court found that the statutes at issue did not have a jurisdictional element,[96] and although the CSA introductory sections stated why local activities were included under the authority of the statute, there were no particularized findings as to how these activities substantially affect commerce.[97] Next, the Court, in interpreting *Wickard v. Filburn*,[98] added a new caveat to the substantial effects analysis: "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[99] The Court found that although the intrastate possession of marijuana was non-economic, the CSA itself was economic in nature[100] and it was impossible to excise the intrastate possession of marijuana from the larger regulatory

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[93] *See id.* at 15. "Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress's commerce power in its entirety." *Id.* at 23. Since the issue involved the non-commercial portion of the Act, the Court moved directly to the last three factors of the substantial effects analysis.

[94] *See id.* at 16–17.

[95] *See id.* at 17.

[96] *See id.* at 17–18; *see also* §§ 841(a)(1), 844(a).

[97] *See Raich*, 545 U.S. at 20–21.

[98] 317 U.S. 111 (1942). In *Wickard*, the act in question regulated the interstate and foreign commerce of wheat. *Id.* at 115. The Court held that the act was constitutional even though it also controlled the intrastate, non-economic production of wheat for personal consumption. *Id.* at 127–28. Although the appellee's own wheat production for his personal use was trivial, the Court found that, in the aggregate, it substantially affected commerce: It was "not enough to remove him from the scope of federal regulation where . . . his contribution, taken together with that of many others similarly situated, [was] far from trivial." *Id.* at 127–28.

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

[100] *Id.* at 25. Therefore, the activities that the Act regulated substantially affect commerce. *See id.* at 25–26.

scheme.[101] Therefore, the Court held that the CSA was "a valid exercise" of Congress's commerce power.[102]

2. Non-Commercial Sex Acts, as Part of a Larger Regulatory Scheme, Substantially Affect Foreign Commerce

The four-part *Lopez* test guides the substantial effects analysis for 18 U.S.C. § 2423(c). The focus of this Note is the constitutionality of prosecuting *non-commercial* illicit sex acts; clearly, the prohibited activity is not economic and thus fails the first part of the *Lopez* test.[103] In addition, the instant statute requires that the person "travel in foreign commerce" in order to be prosecuted. Therefore, there is a jurisdictional basis: For every single application of § 2423(c), the person must travel through foreign commerce before committing the illicit sexual act.[104] The statute meets the second part of the *Lopez* test.

Furthermore, although there are no particularized congressional findings as to how non-commercial sex acts substantially affect commerce, there is a congressional report that clearly evinces Congress's judgment.[105] The report calls sex tourism an "industry" and focuses on the economic basis of the problem. Legislation is needed, according to the report, because

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[101] *See Raich*, 545 U.S. at 26–27. If the court were to excise that portion of the market, it would leave a huge hole in the enforcement of the Act's regulatory scheme. *See id.* at 22.

[102] *Id.* at 9. In *United States v. Maxwell*, 446 F.3d 1210, 1212 (11th Cir. 2006), the Eleventh Circuit used the *Raich* caveat in determining the constitutionality of a statute that criminalized the possession of child pornography after it moved in commerce. The court found that the statute in question was part of a comprehensive framework for regulating child pornography. *Maxwell*, 446 F.3d at 1216–17. The court noted that child pornography was a multi-million dollar industry that was economic in nature. *Id.* at 1217. In addition, although there were no particularized findings as to how possession of child pornography substantially affected commerce, the court recognized that Congress noted how the possession affected the market. *See id.* at 1217–18. The court concluded that Congress had a rational basis for determining that excising child pornography would leave a hole in the regulatory scheme, and therefore, the activity that the statute regulated substantially affected commerce. *Id.* at 1218. Consequently, the court upheld the statute. *Id.* at 1219.

[103] This determination, however, is not the true focus of the analysis under *Raich*. *See infra* notes 109–112 and accompanying text.

[104] At first glance, one might question the necessity of the jurisdictional element in this statute, since the criminal act is really the illicit sex act after the journey. The jurisdictional element, however, establishes the United States as the starting point of the journey, thereby guaranteeing through a "case-by-case inquiry" that the activity affects commerce between the United States and a foreign country. *See Lopez*, 514 U.S. at 561.

[105] *See supra* note 47 accompanying text.

third-world countries ignore child molestation in exchange for the income that sex tourism produces. Certainly, the statute is prohibiting the criminal act of sex tourism, but it is also restricting the economic flow from the United States to the foreign country. Although there are no findings that pertain to the prohibited activity's substantial effects on commerce, the report makes clear that Congress was concerned with the broad economic implications of sex tourism when writing the statute. It is logical, therefore, to believe that Congress understood sex tourism as substantially affecting foreign commerce, even though they did not couch the report in such terms.

Finally, there is a strong link between prohibiting non-commercial sex acts under § 2423(c) and its effect on foreign commerce. Although a non-commercial sex act is not economic, there are broader implications to the prohibited activity than just the act itself. For example, like the businessman in the hypothetical,[106] sex tourists who commit non-commercial sex acts add to the receiving country's economy through plane tickets, food, drink, and souvenir purchases. Although these purchases do not directly pay for sex or its equivalent, the sex tourists are transferring income from the United States to that foreign country through purchases associated with their trip. When taken in the aggregate, this substantially affects foreign commerce.

When examining non-commercial sex acts under 18 U.S.C. § 2423(c), it is clear that the *Lopez* test supports a finding of constitutionality. Although the statute fails the first part of the test because non-commercial sex acts are clearly not economic, the statute contains a jurisdictional element, has legislative history that demonstrates Congress's concern with sex tourism as an industry, and prohibits an activity that substantially affects foreign commerce.[107] The strength of the last three *Lopez*

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[106] *See supra* text accompanying note 1.

[107] The constitutional analysis of this statute is distinguishable from that in *Lopez* and *Morrison*. *See supra* note 87. Unlike the acts in *Lopez* and *Morrison*, § 2423(c) contains both a jurisdictional element and some legislative history, which evinces Congress's intent to regulate an economic industry. What makes the instant statute decidedly different from the foregoing cases, however, is the clear way that non-commercial sex acts substantially affect commerce. In *Lopez* and *Morrison*, the government's arguments were based on a substantial effects analysis that depended on inferences piled on inferences. Here, non-commercial sex acts committed in foreign countries always carry with them an economic transfer in foreign commerce

factors, combined with Congress's broad power under the Foreign Commerce Clause, confirms that 18 U.S.C. § 2423(c) is constitutional.[108]

Moreover, *Raich*'s caveat in the substantial effect analysis further strengthens the argument for § 2423(c)'s constitutionality. Although non-commercial sex acts are not economic, the overarching statutory regulation of sex tourism is economic in nature.[109] Like the drug industry in *Raich*, sex tourism is a multi-billion dollar industry. Every sex tourist transfers hundreds, if not thousands, of American dollars from the United States economy to the economy of the third-world nation of choice. In the aggregate, the economic consequences of sex tourism are simply astounding—over a billion dollars per year. Clearly, these activities substantially affect foreign commerce.

Furthermore, the prohibition of non-commercial sex acts is just one part of a larger regulatory scheme to restrict sex tourism.[110] The scheme also includes the prohibition of commercial sex acts, the criminalization of sex tour operations, and the catch-all crime of conspiracy to aid sex tourism. Like excising the regulation of non-commercial drug possession in *Raich*, excising the application of the § 2423(c) to non-commercial sex tourists would leave a gaping hole in the regulatory scheme. It would mean, for example, that the businessman in the hypothetical would avoid prosecution.[111] Not only are the social implications unimaginable, but it would also make a whole class of economic activity unreachable.[112]

In sum, 18 U.S.C. § 2423(c) prohibits activities that substantially affect commerce. Not only is there a jurisdictional element and legislative intent that the regulated activities are

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based on travel and accommodation costs. This is not an attenuated but a direct effect of the prohibited act.

[108] *See supra* note 3 accompanying text. Due to the lack of federalism concerns and the ability to act with one national voice, Congress's power to legislate is expansive. Therefore, Congress should be given even broader powers in enacting statutes such as § 2423(c) and be given more discretion from the courts reviewing their constitutionality.

[109] *See supra* Part I.B.

[110] *See supra* Part I.B.

[111] *See supra* text accompanying note 1.

[112] It is illogical for the government to be able to reach the economic effects of commercial sex tourists and not be able to reach the economic effects of non-commercial sex tourists.

economic in nature, but the instant statute's analysis is also indistinguishable from that of *Raich*.[113] Prosecuting non-commercial illicit sex acts is just a part of a larger regulatory scheme to prevent the increasing economic potential of the sex tourism industry. The Constitution grants Congress broad powers to regulate foreign commerce.[114] If future courts do not uphold the constitutionality of § 2423(c), there will be no other way to prosecute United States citizens who commit non-commercial sex acts with children in foreign countries. Both precedent and policy demand its constitutionality.

3. Rational Basis Review Guarantees the Constitutionality of § 2423(c)

If the above analysis is not completely persuasive, then the application of the judicial standard of review guarantees the constitutionality of 18 U.S.C. § 2423(c). The court's duty in determining the constitutionality of a statute under the Commerce Clause is not to determine whether the activity substantially affected commerce, but only whether Congress had a "rational basis" to believe so.[115] This is a less demanding and highly deferential standard, which finds its roots in the doctrines of judicial restraint and separation of powers.[116] Given the difficulties that attend separation of non-commercial sexually illicit acts from the rest of the economic regulatory scheme, and the clearly substantial connection between sex tourism and foreign commerce, it is not difficult to determine that Congress had a rational basis for believing that sex tourism substantially

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[113] The instant statute's analysis is also indistinguishable from that in *United States v. Maxwell*. *See supra* note 102. Like the possession of child pornography in *Maxwell*, non-commercial sex acts are not economic but part of a larger regulatory scheme restricting child sex tourism. Indeed, in both cases, there is a jurisdictional element, non-particularized findings about how the prohibited activity affected the general market, and a gaping hole in the regulatory scheme without that legislation regarding the prohibited activity. Like the statute at issue in *Maxwell*, § 2423(c) should be held constitutional.

[114] *See supra* note 3 and accompanying text.

[115] *See* Gonzales v. Raich, 545 U.S. 1, 22 (2005) (citing United States v. Lopez, 514 U.S. 549, 557 (1995)); *see also* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255 (1964).

[116] *See Lopez*, 514 U.S. at 604 (Souter, J., dissenting) ("In judicial review under the Commerce Clause, [the rational basis test] reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution . . . .").

affects foreign commerce. Section 2423(c), under this standard of review, passes constitutional muster with ease.

CONCLUSION

Section 2423(c) in Title 18 of the United States Code is a constitutional use of Congress's Foreign Commerce Clause authority. Although no court has yet reached this question, it is only a matter of time before a defendant will bring a constitutional challenge to the statute. This Note attempts to preempt that inevitable challenge with an argument in support of § 2423(c)'s constitutionality.

Considering the lack of recent precedent concerning Foreign Commerce Clause challenges, courts should look towards the *Lopez* framework in determining a statute's constitutionality. For the present statute, it is clear that although the channels analysis fails, *Lopez*'s substantial effects test combined with *Raich*'s caveat, under a rational basis standard, strongly supports the constitutionality of § 2423(c): Regulating non-commercial sexually illicit acts is just one part of a larger statutory scheme to prevent sex tourism. Let us hope that courts uphold the constitutionality of 18 U.S.C. § 2423(c) so that sex tourists, like the businessman in the hypothetical, feel the full force of United States law enforcement behind the statute.