

ARTICLES

THE FOREIGN COMMERCE CLAUSE

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The Congress shall have Power . . . To regulate Commerce with foreign Nations[†]

It is not so much that the contours of the Foreign Commerce Clause are crystal clear, but rather that their scope has yet to be subjected to judicial scrutiny.^{††}

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[†] U.S. Const. art. I, § 8, cl. 3.

^{††} *United States v. Clark*, 435 F.3d 1100, 1102 (9th Cir. 2006).

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INTRODUCTION

CONGRESS’S power “[t]o regulate Commerce with foreign Nations,”¹ known as the Constitution’s Foreign Commerce Clause,² underlies a tremendously broad and varied array of U.S. legislation.³ Yet unlike its Article I, Section 8 sibling, the Interstate Commerce Clause,⁴ which has been scrutinized by generations of lawyers, scholars, and judges, the Foreign Commerce Clause has received little sustained analytical attention.⁵

¹ U.S. Const. art. I, § 8, cl. 3.

² See *Itel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 71 (1993); *Kraft Gen. Foods v. Iowa Dep’t of Revenue & Fin.*, 505 U.S. 71, 73 & n.3 (1992).

³ Among the statutes discussed below are the Sherman Antitrust Act, 15 U.S.C. § 1 (2006); the Foreign Trade Antitrust Improvements Act (FTAIA) of 1982 § 402, 15 U.S.C. § 6a (2006); the Aircraft Sabotage Act § 2013(b), 18 U.S.C. § 32 (2006); the Computer Fraud and Abuse Act § 2, 18 U.S.C. § 1030 (2006); the Child Pornography Prevention Act of 1996 § 121, 18 U.S.C. § 2252A (2006); and the Protection of Children Against Sexual Exploitation (PROTECT) Act § 105, 18 U.S.C. § 2423 (2006).

⁴ U.S. Const. art. I, § 8, cl. 3.

⁵ See *United States v. Clark*, 435 F.3d 1100, 1102 (9th Cir. 2006). Recent uses of the Clause, in particular § 2423(c) of the 2003 PROTECT Act, discussed *infra* Subsections II.B.1, 3, have, however, been the subject of a number of student notes and comments since the *Clark* decision. See Daniel Bolia, Comment, Policing Americans Abroad: The PROTECT Act, the Case Against Michael Lewis Clark, and the Use of the Foreign Commerce Clause in an Increasingly Flat World, 48 S. Tex. L. Rev. 797 (2007); Julie Buffington, Comment, Taking the Ball and Running with It: *U.S. v. Clark* and Congress’s Unlimited Power Under the Foreign Commerce Clause, 75 U. Cin. L. Rev. 841 (2006); Jeff Christensen, Note, Congressional Power to Regulate Noncommercial Activity Overseas: Interstate Commerce Clause Precedent Indicates Constitutional Limitations on Foreign Commerce Clause Authority, 81 Wash. L. Rev. 621 (2006); Amy Messigian, Note, Love’s Labour’s Lost: Michael Lewis Clark’s Constitutional Challenge of 18 U.S.C. 2423(c), 43 Am. Crim. L. Rev. 1241 (2006); Recent

That is about to change. As foreign commerce in our globalized economy reaches deeper inside state boundaries to touch local activity, and as the United States more aggressively projects a wide assortment of public and private laws to activity outside U.S. borders, defendants are increasingly challenging the constitutionality of federal law under the Clause.⁶ These challenges have, in turn, provoked new and complex constitutional puzzles for lower courts:⁷ Are there any limits on Congress's ability under the Clause to project U.S. law abroad, or can Congress regulate any commercial activity, anywhere on the planet? Must the activity exhibit some connection to the United States? If so, what connection counts? Does Congress enjoy the same broad regulatory power over commerce inside foreign nations as it does inside the several U.S. states? For example, can Congress reach local foreign conduct through the imposition of comprehensive global regulatory schemes over worldwide markets, or prevent so-called "races to the bottom" among the nations of the world? If not, why not? These questions are far from simple; indeed, they are intriguingly multilayered. And while lower courts have struggled mightily to answer them, their efforts so far have largely been theoretically unsound, and in many cases even constitutionally backward.⁸

This Article comprehensively addresses Congress's powers under the Foreign Commerce Clause.⁹ It seeks to coherently frame and, at certain levels, solve these increasingly important constitutional puzzles. The Article's implications are far reaching. Despite the mounting significance of the Clause for modern U.S. regulatory

Case, Ninth Circuit Holds That Congress Can Regulate Sex Crimes Committed by U.S. Citizens Abroad—*United States v. Clark*, 119 Harv. L. Rev. 2612 (2006).

⁶ See *infra* Section II.B.

⁷ *Clark*, 435 F.3d at 1102.

⁸ See *infra* Subsections II.B.1, 3.

⁹ Some articles discuss the Foreign Commerce Clause, but tend to limit their focus to the power to regulate domestically. See, e.g., 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, 43 (2001) (analyzing the Clause as a matter of democratic political theory and popular sovereignty by U.S. citizens, and arguing that "[u]nder the Foreign Commerce Clause, Congress must be able to extend power to intrastate activities by definition, and the judiciary becomes lawless and renegade" if it imposes any structural limits on the power); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 Ark. L. Rev. 1149, 1165–72 (2003).

regimes at home and abroad, it remains an incredibly under-analyzed source of congressional power. What follows not only offers doctrinal coherence in an area where courts are groping unsuccessfully for principled answers, but also engages broader questions about the power of the United States to project U.S. law around the globe. Indeed, at stake is nothing less than how the Constitution envisages Congress's power to impose U.S. law inside foreign nations.

The Foreign Commerce Clause is crucial because it does not depend upon the consent of foreign nations, either for its authorization or for how Congress chooses to exercise it over a potentially vast subject matter of foreign activity. In this sense, it is a unilateral basis of extraterritorial legislative power. Other commonly used enumerated sources¹⁰ of extraterritorial legislation do contemplate a degree of foreign consent for their authorization, which in turn limits the subject matter of the resultant law. These bases are, in this sense, multilateral. Congress cannot, for example, enact a law implementing an international treaty if no treaty exists.¹¹ And any implementing legislation is limited by the subject matter of the treaty.¹² Similarly, Congress cannot "define and punish . . . [an] Offence[] against the Law of Nations"¹³ if no offense exists in international law.¹⁴ Here too, the subject matter of the U.S. law is limited

¹⁰ I bracket discussion of extra-constitutional sources like the foreign affairs power. See, e.g., *United States v. Bin Laden*, 92 F. Supp. 2d 189, 220–21 (S.D.N.Y. 2000) (suggesting in dicta that Congress may have an extra-constitutional power to enact "foreign affairs legislation" over conduct abroad). For critiques of this power see Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 *Wm. & Mary L. Rev.* 379, 409 (2000); Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 *Ark. L. Rev.* 1175, 1176–77 (2003) ("The important objection to [an unenumerated foreign affairs power] is that postulating an unenumerated foreign-affairs power makes entirely redundant not only the foreign commerce clause, but also all the other foreign-affairs powers as well."); see also Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 *U. Chi. Legal F.* 323, 334–35 (2001). In any event, as the bulk of this Article's analysis demonstrates, see *infra* Section II.B, Congress is actively phrasing extraterritorial legislation, and courts are actively addressing the constitutionality of that legislation, under the Foreign Commerce Clause.

¹¹ See *infra* notes 327–34 and accompanying text discussing Congress's necessary and proper power to effectuate treaties.

¹² See *id.*

¹³ U.S. Const. art. I, § 8, cl. 10.

¹⁴ See Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 *Harv. Int'l L.J.* 121, 137–42 (2007); Eugene Kontorovich, *Beyond the Article I Horizon: Congress's*

by the subject matter of the international offense.¹⁵ These bases of legislative power tend by their nature to reduce conflicts with foreign law and ease concerns about unfairly subjecting defendants abroad to laws of which they had no notice. The Foreign Commerce Clause, by contrast, raises not only novel and pressing doctrinal questions, but also serious normative issues that habitually attend the unilateral projection of domestic law abroad by escalating the potential for both international friction and unfairness to individuals.¹⁶

In the main, the Article draws and substantiates a fundamental distinction between the power to regulate domestically under the Foreign Commerce Clause, which I refer to as the “inward-looking” foreign commerce power, and the power to regulate extraterritorially,¹⁷ which I refer to as the “outward-looking” foreign commerce power. When Congress exercises its inward-looking foreign commerce power to regulate inside U.S. territory—that is, inside the territories of the several U.S. states—Congress’s regulatory authority can be fairly robust, and in some respects even more robust than its authority to regulate under the Interstate Com-

Enumerated Powers and Universal Jurisdiction over Drug Crimes, 93 *Minn. L. Rev.* 1191, 1219–23 (2009).

¹⁵ *Supra* note 14.

¹⁶ For example, courts have held that extraterritorial application of federal law must not be “arbitrary or fundamentally unfair” under the Fifth Amendment’s Due Process Clause. Colangelo, *supra* note 14, at 162 (analyzing cases and proposing a test). A major consideration in this due process analysis is whether the defendant had adequate notice of the legal prohibition, *id.* at 162–76, and multilateral sources often guarantee notice better than unilateral sources because the prohibition is more likely to apply under foreign as well as U.S. law.

¹⁷ The adverb “extraterritorially” is not without difficulty. See Hannah L. Buxbaum, Territory, Territoriality, and the Resolution of Jurisdictional Conflict, 57 *Am. J. Comp. L.* 631, 635 (2009) (noting that “[t]erritoriality” and “extraterritoriality” . . . are legal constructs. They are claims of authority, or of resistance to authority, that are made by particular actors with particular substantive interests to promote.”). By its use, I mean that at least one relevant act occurs outside the United States and that the United States seeks to regulate that act. See Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 *Harv. L. Rev.* 1217, 1218 & n.3 (1992) (explaining that “[t]here is no fixed meaning for the term ‘extraterritoriality’” but using the term where “at least one relevant event occurs in another nation”). To this extent, and as will become apparent throughout the Article, I would view a claim of what conventionally is referred to by international lawyers as “objective territoriality” over activity abroad as a claim to regulate extraterritorially. See Buxbaum, *supra* at 635.

merce Clause. This is because the foreign commerce power implicates foreign affairs and thus more easily overrides state sovereignty.¹⁸ But when Congress exercises its outward-looking foreign commerce power to regulate outside U.S. territory—and inside the territories of foreign nations—Congress’s regulatory powers are geographically circumscribed, and are in some respects weaker than its powers to regulate domestically under either the Interstate or Foreign Commerce Clause. Because the latter, outward-looking power is currently raising acute and vexing questions for lower courts, it comprises the balance of this Article’s analysis.

The distinction between Congress’s inward- and outward-looking foreign commerce power centers principally on the text of the Commerce Clause itself. Specifically, the Constitution uses the word “with” to describe the federal relationship to “foreign Nations,” but uses the word “among” to describe the federal relationship to the “several States.”¹⁹ I argue that this textual difference, along with constitutional structure and history, imposes two key limits on Congress’s outward-looking foreign commerce power.

The first is the nexus requirement, which derives from the Constitution’s grant of power only to regulate commerce “with foreign Nations,”²⁰ not a general, global power to regulate commerce “among foreign Nations.” Foreign commerce that is the subject of federal regulation therefore must be not only “with” foreign nations, but also “with” the United States. That is, there must be a U.S. nexus.²¹

The second limit I refer to as the foreign sovereignty concern, which largely reduces to what may seem like a modest constraint until one reads the cases: Congress has no more power to regulate inside foreign nations under the Foreign Commerce Clause than it has to regulate inside the several U.S. states under the Interstate Commerce Clause. As we will see, even limiting the foreign commerce power in this modest way upsets a swath of lower-court decisions. I also argue (and, given the above, perhaps more controversially still) that in some contexts Congress has less regulatory power abroad than it has at home. For example, Congress may not

¹⁸ See *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979).

¹⁹ U.S. Const. art. I, § 8, cl. 3.

²⁰ *Id.*

²¹ See *infra* Subsection II.A.1.

regulate local, intra-national foreign conduct that is claimed to “substantially affect” commerce with the United States solely because it threatens to undercut a “comprehensive [global] regulatory scheme”²² or instigate a race to the bottom among the nations of the world,²³ because Congress lacks the power to create such global schemes or prevent such international races to the bottom “among foreign Nations” in the first instance.

Other constitutional provisions, as well as constitutional structure, buttress the limits inherent in the text of the Foreign Commerce Clause. The Supremacy Clause has an explicitly territorial scope covering only “the Land” of the United States, not the planet; and indeed, specifically addresses only the states.²⁴ Unlike U.S. states, foreign nations have never ceded a portion of their sovereignty to the federal government.²⁵ Also unlike the states, foreign nations are unprotected from federal encroachment by political mechanisms inherent in the federal law-making process.²⁶ In sum, I intend to show that the major textual and structural reasons traditionally advanced for Congress’s extensive commerce powers to regulate inside the several U.S. states simply do not apply when it comes to regulating inside foreign nations.

After articulating and substantiating these limits, I recast the Supreme Court’s three-category Commerce Clause framework²⁷ for the Foreign Commerce Clause to evaluate federal laws that purport to regulate activity abroad on a foreign commerce rationale:²⁸ laws like recent legislation regarding child-sex tourism,²⁹

²² See *infra* Subsection II.B.3.a.

²³ *Id.*

²⁴ U.S. Const. art. VI, cl. 2; see also Subsection II.A.2.b.

²⁵ See *United States v. Yunis (Yunis I)*, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988); see also Subsection II.A.2.b.

²⁶ See Subsection II.A.2.b.

²⁷ *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (“First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.”) (internal citation omitted).

²⁸ See *infra* Section II.B.

²⁹ PROTECT Act, 18 U.S.C. § 2423 (2006).

aircraft bombing,³⁰ cybercrime,³¹ firearms offenses,³² and antitrust,³³ as well as actual cases brought under these laws. The analysis also informs the cutting edge of Interstate Commerce Clause jurisprudence by examining new and controversial techniques to reach conduct by using prior travel in interstate or foreign commerce by *persons*³⁴—as opposed to things, like firearms³⁵ or body armor³⁶—as “jurisdictional hooks” to Congress’s commerce power.³⁷ Unlike previous statutes regulating movement by persons across state or international lines,³⁸ these new statutes require no improper intent or purpose during the travel itself.³⁹ This raises a series of fresh constitutional questions that the Supreme Court may address soon.⁴⁰ I conclude that while some courts have reached the right results on the right Foreign Commerce Clause theory, many courts to have considered Congress’s extraterritorial reach under the Clause get it wrong.

To be sure, lower courts have detected a distinction between Congress’s regulatory power at home and its regulatory power abroad under the Commerce Clause. But they have turned that dis-

³⁰ Aircraft Sabotage Act § 2013(b), 18 U.S.C. § 32 (2006).

³¹ Fraud and Related Activity in Connection with Computers Act, 18 U.S.C. § 1030 (2006).

³² Firearms Owners’ Protection Act § 104, 18 U.S.C. § 924(c) (2006).

³³ Sherman Antitrust Act, 15 U.S.C. § 1 (2006); Foreign Trade Antitrust Improvements Act (“FTAIA”) of 1982 § 402, 15 U.S.C. § 6a (2006).

³⁴ See, e.g., PROTECT Act, 18 U.S.C. § 2423 (2006).

³⁵ 18 U.S.C. § 922(g)(1) (2006).

³⁶ 18 U.S.C. § 931(a) (2006). See also *United States v. Patton*, 451 F.3d 615, 634–36 (10th Cir. 2006) (holding that for Congress to regulate felon possession of body armor under the Commerce Clause in 18 U.S.C. § 931(a) (2006), the body armor must have traveled in interstate commerce).

³⁷ See *infra* Subsection II.B.1.

³⁸ See, e.g., White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2423(a), (b) (2006)); *United States v. Gamache*, 156 F.3d 1, 8 (1st Cir. 1998) (explaining that under the statute the government must “prove that the crossing [of state lines] was made with the intent to engage in the proscribed conduct”).

³⁹ See, e.g., PROTECT Act, 18 U.S.C. § 2423; Sex Offender Registration and Notification Act (“SORNA”), 18 U.S.C. § 2250(a)(2)(B) (2006).

⁴⁰ The Court has been able to avoid the issue so far. See *Carr v. United States*, 130 S. Ct. 2229, 2235 (2010) (interpreting SORNA as a statutory matter, and observing that “[a] sequential reading [of the statute], the parties recognize, helps to assure a nexus between a defendant’s interstate travel and his failure to register as a sex offender”); see also *id.* at 2248 (Alito, J., dissenting) (noting “that a broader construction would mean that Congress exceeded its authority under the Commerce Clause”).

inction completely on its head. Instead of viewing U.S. federalism's distinctive power allocation between federal and state as a reason to think the federal government has more power to regulate inside the "quasi-sovereign" U.S. states,⁴¹ as opposed to inside wholly sovereign foreign nations, lower courts have seized upon the lack of federalism concerns in the foreign commerce context and from there have concluded that Congress must have a larger power to project U.S. law inside foreign nations. By cherry-picking Supreme Court statements from the inward-looking context and unreflectively transplanting them to the outward-looking context, lower courts have systematically misapprehended—and reversed—a crucial distinction between regulating at home and regulating abroad under the Clause. Such cherry-picking also contradicts the very Supreme Court cases from which the statements are plucked, where the Court indicated that federal power over commerce inside foreign nations is less than inside the several states. The result is a backward lower-court jurisprudence governing the ambit of U.S. law abroad, which licenses Congress with a sweeping and intrusive international police power—directly contrary to the text, structure, and history of the Foreign Commerce Clause. The power to regulate commerce "with foreign Nations"⁴² has, in short, been transformed into the power to regulate those nations.

While this Article's framework is conceptually clean and identifies areas of regulation most susceptible to Foreign Commerce Clause challenge, it also tends to invite fact-specific resolutions. Discretion may be the better part of valor. The meat of the analysis applying the framework in fact focuses on real challenges in real cases arising under the Clause.⁴³ I discuss where and how lower courts have gone wrong in these cases, develop what I consider to

⁴¹ *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936).

⁴² U.S. Const. art. I, § 8, cl. 3.

⁴³ Also for this reason, the discussion deals largely (though not exclusively, see, e.g., *infra* Subsection II.B.1 (discussing 18 U.S.C. § 2423(c))) with as-applied as opposed to facial challenges to extraterritorial legislation. The Supreme Court has considered both types of challenges to Interstate Commerce Clause legislation. Compare *Gonzales v. Raich*, 545 U.S. 1, 15 (2005) (as-applied challenge) with *United States v. Lopez*, 514 U.S. 549 (1995) (facial challenge), and *United States v. Morrison*, 529 U.S. 598 (2000) (same). See also *Raich*, 545 U.S. at 23 ("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' commerce power in its entirety.").

be a better approach, and apply it to reveal a coherent and constitutionally sound interpretation of the Clause.

By way of quick introduction, I propose a “minimum triggering facts inquiry”⁴⁴ to evaluate Congress’s power to regulate channels and instrumentalities of foreign commerce with the United States. Under this inquiry, courts would gauge whether the minimum facts purporting to establish a U.S. nexus portend a global regulatory power over the channel or instrumentality in question. If the facts do, the nexus is presumptively insufficient since it would de facto erase an inherent limitation in the Clause, effectively rewriting it to grant Congress global regulatory power over commerce “among foreign Nations.”

As to whether activity “substantially affects” foreign commerce with the United States, I offer a way to fold that constitutional question into a statutory question courts are already resolving: whether the extraterritorial application of U.S. law comports with international law.⁴⁵ While this analysis may not determine the outer limits of what effect on U.S. commerce is *necessary* to trigger Congress’s foreign commerce power, I contend that it does a good job of determining what effect is *sufficient* if the substantive conduct otherwise qualifies for Commerce Clause regulation. I explain that answering the question in this way has the immense practical benefit of resolving the vast majority of challenges to extraterritorial regulation on a “substantially affects” foreign commerce theory since, in the vast majority of cases, the application of U.S. law will comport with international law by virtue of either judicial construction or the terms of the U.S. law itself. The analysis also suggests ways to modify conventional commerce rationales for the international, as opposed to the national, system of states. Although Congress cannot unilaterally create comprehensive global regulatory schemes and, by extension, reach local foreign conduct that undercuts those schemes, Congress can regulate local conduct abroad that undermines international comprehensive regulatory schemes created jointly “with foreign Nations.”⁴⁶

⁴⁴ See *infra* Subsection II.B.1.

⁴⁵ What “substantial effect” on the United States authorizes the extraterritorial application of U.S. law has been a much-discussed statutory question. See *infra* Subsection II.B.3.b.

⁴⁶ U.S. Const. art. I, § 8, cl. 3.

I. THE INWARD-LOOKING FOREIGN COMMERCE POWER

The scope of Congress's inward-looking foreign commerce power raises a host of intriguing questions involving U.S. federalism, separation of powers, and foreign affairs. What qualifies activity as foreign, as opposed to interstate, commerce?⁴⁷ Is the foreign commerce power to legislate inside the United States larger or smaller than the interstate commerce power? Do the interstate and foreign commerce powers relate or overlap?⁴⁸ And which branch of government wields primary power over commerce with foreign nations? The Constitution specifically grants Congress this power,⁴⁹ yet the Executive is traditionally viewed as the main actor in foreign affairs.⁵⁰ Could this specific grant to Congress cast doubt on or

⁴⁷ See *Veazie v. Moor*, 55 U.S. (14 How.) 568, 573 (1852) ("Commerce with foreign nations, must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extraterritorial."); *Lord v. Steamship Co.*, 102 U.S. (12 Otto) 541, 544 (1880) (quoting the language in *Veazie*).

⁴⁸ A major objective of the Foreign Commerce Clause is to facilitate commerce inside the United States. See *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976) ("[A] compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles [of Confederation] essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased. Before 1787 it was commonplace for seaboard States with port facilities to derive revenue to defray the costs of state and local governments by imposing taxes on imported goods destined for customers in other States."). James Madison's Preface to Debates in the Convention of 1787 explains that the

source of dissatisfaction was the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was carried on. New Jersey, placed between Phila. & N. York, was likened to a Cask tapped at both ends: and N. Carolina between Virga. & S. Carolina to a patient bleeding at both Arms.

3 Records of the Federal Convention of 1787, at 542 (Max Farrand ed., 1911) [hereinafter Madison, Preface to the Debates of the Federal Convention of 1787].

⁴⁹ U.S. Const. art. I, § 8, cl. 3; *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994) ("The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'"); see also *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 85 (1993) (Blackmun, J., dissenting) ("The constitutional power over foreign affairs is shared by Congress and the President, . . . but the power to regulate commerce with foreign nations is textually delegated to Congress alone, Art. I, § 8, cl. 3. 'It is well established that *Congress* may authorize States to engage in regulation that the Commerce Clause would otherwise forbid,' . . . but the President may not authorize such regulation by the filing of an *amicus* brief.") (internal citations omitted).

⁵⁰ See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936).

affect conventional foreign affairs preemption analysis, which holds that the President enjoys independent power to trump certain state laws regulating commercial activity that touches U.S. foreign relations?⁵¹

Because this Part serves primarily as a foil for the next Part's analysis of Congress's outward-looking power, I limit myself to two brief descriptive inquiries: what has the Supreme Court said about the scope of the inward-looking foreign commerce power in comparison to the interstate commerce power, and why has the Court said what it has? Though the scope of the inward-looking power has yet to be fully explicated, unlike the outward-looking power the Court has addressed it. The inward-looking power is also not being litigated to the same extent, and is not causing the same jurisprudential headaches for lower courts, as the outward-looking power. Hence this Article's focus on the latter.

Yet to understand why lower courts rule the way they do on the outward-looking power, and how they are reversing a key Commerce Clause distinction between regulating at home and regulating abroad, we need to consider Supreme Court decisions on the domestic scope of the Foreign Commerce Clause. Here the Court has indicated that the foreign commerce power is greater than the interstate commerce power.⁵² The reason for this greater power is to establish national uniformity in U.S. commercial dealings with foreign nations.⁵³ The greater power, in other words, is to override the states. The Court's statements in this regard are consistent with, and rely upon, the original intent behind the Foreign Commerce Clause.⁵⁴ They are also context-specific. That is to say, they relate specifically to Congress's greater power vis-à-vis the states, not foreign nations. In fact, recent dormant Foreign Commerce Clause jurisprudence suggests that Congress has greater control over foreign commerce inside the United States precisely because the federal government has *less* control over foreign commerce in-

⁵¹ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003). The Court's recent decision in *Medellin v. Texas*, 552 U.S. 491 (2008), effectively may have limited this power to settling international claims disputes pursuant to executive agreement, *id.* at 530–32 (requiring a “particularly longstanding practice” of congressional acquiescence” to find foreign affairs preemption) (quoting *Garamendi*, 539 U.S. at 415).

⁵² See *infra* notes 59–60.

⁵³ See *infra* notes 61–62.

⁵⁴ See *infra* notes 63–78.

side foreign nations.⁵⁵ Lower-court reliance on Supreme Court statements that Congress has greater power over foreign commerce in the inapposite, outward-looking context therefore looks sloppy at best, and may even contradict the very cases from which the statements are plucked.

A. Greater Power over the States

It has been clear since at least the Supreme Court's decision in *Gibbons v. Ogden* that Congress may regulate inside the United States under the Foreign Commerce Clause.⁵⁶ Chief Justice Marshall explained that "in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the Several States. It would be a very useless power, if it could not pass those lines."⁵⁷ Rather, Congress's power over foreign commerce follows that commerce into the states.⁵⁸

The Court has made equally clear that "[a]lthough the Constitution, Art. I § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."⁵⁹ Thus, while "the 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."⁶⁰ The reason, according to the Court, is that "[f]oreign commerce is pre-eminently a matter of national concern. '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.'"⁶¹ In this respect, the

⁵⁵ See *infra* notes 106–09.

⁵⁶ 22 U.S. (9 Wheat.) 1, 195 (1824).

⁵⁷ *Id.*

⁵⁸ *Id.* Three years later, Marshall reaffirmed this reading of the Clause, explaining that "[t]he power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445–46 (1827).

⁵⁹ *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979).

⁶⁰ *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 434 (1932).

⁶¹ *Japan Line*, 441 U.S. at 448 (quoting *Bd. of Trustees v. United States*, 289 U.S. 48, 59 (1933)).

Court has consistently abided “the Framers’ overriding concern that ‘the Federal Government must speak with one voice when regulating commercial relations with foreign governments.’”⁶²

The overriding concern that the federal government speak with one voice when regulating foreign commerce has led to an overriding power to preempt and crowd out state law over foreign commerce. The Court has flatly observed that “[t]he principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.”⁶³ Rather, “[l]aws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation.”⁶⁴ Thus while states enjoy concurrent power to regulate interstate commerce,⁶⁵ “[t]he organization of our state and Federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties.”⁶⁶ Congress’s power over Foreign Commerce is therefore “exclusive and plenary.”⁶⁷ Or, stated with Marshall’s characteristic eloquence, “[t]he commerce of the United States with foreign nations, is that of the whole United States.”⁶⁸

As can be gleaned from these statements, the reason the Court views the foreign commerce power as “greater”⁶⁹ than the inter-

⁶² Id. at 449 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)). In fact, “[e]ven a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned.” Id. at 456.

⁶³ *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 57 (1933).

⁶⁴ *Bowman v. Chi. & N.W. Ry. Co.*, 125 U.S. 465, 482 (1888).

⁶⁵ See id. at 482–83 (“The same necessity [to exclusively regulate foreign commerce] perhaps does not exist equally in reference to commerce among the States. The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. . . . And yet in respect to commerce among the States . . . the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations.”).

⁶⁶ Id. at 482 (citing *Henderson v. Mayor of N.Y.*, 92 U.S. (2 Otto) 259, 273 (1875)). See also Casebeer, *supra* note 9, at 36 (“[T]he international legal powers of government have universally been restricted to the Nation.”).

⁶⁷ *Bd. of Trustees*, 289 U.S. at 56.

⁶⁸ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

⁶⁹ *Supra* note 59 and accompanying text.

state commerce power is that Congress must have broad power to represent the United States as a single economic unit in its relations with foreign nations. The Clause was designed to overcome a basic “collective action problem” among the states under the Articles of Confederation:⁷⁰ without national uniformity over foreign commerce, the United States would be both an unattractive international commercial partner and a weak player on the world stage.⁷¹ It would be unattractive because the federal government could not effectively make agreements with foreign nations if the states could undermine those agreements by following their own commercial policies.⁷² And it would be weak because the federal government would be unable to effectively act against foreign nations for the very same reason.⁷³ In fact, lack of federal control over foreign commerce was a major incentive for abandoning the Articles of Confederation.⁷⁴

The Founders’ intent is plain. James Madison’s draft resolution of January 21, 1786, which led to the adoption of the Foreign Commerce Clause,⁷⁵ argues that

the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations, as the

⁷⁰ Robert J. Delahunty, *Federalism Beyond the Water’s Edge: State Procurement Sanctions and Foreign Affairs*, 37 *Stan. J. Int’l L.* 1, 17 (2001).

⁷¹ See *id.* at 16–26 (setting forth history and rationale behind the Clause).

⁷² See *infra* notes 74–84 and accompanying text.

⁷³ *Id.*

⁷⁴ See *United States v. The William*, 28 F. Cas. 614, 620 (D. Mass. 1808) (No. 16,700) (“It is contended, that congress is not invested with powers, by the constitution, to enact laws, so general and so unlimited, relative to commercial intercourse with foreign nations, as those now under consideration. It is well understood, that the depressed state of American commerce, and complete experience of the inefficiency of state regulations, to apply a remedy, were among the great, procuring causes of the federal constitution.”); see also *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283–86 (1976) (“One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased.”) (citing Madison, *Preface to the Debates of the Federal Convention of 1787*, *supra* note 48, at 542); Delahunty, *supra* note 70, at 17 (“Courts and legal scholars have long recognized the desire for an effective national authority to regulate foreign commerce—more specifically, an authority that would enable the states to take concerted action to resist and retaliate against exclusionary British trade practices—was one of the primary causes of the agitation for the Constitution of 1787.”).

⁷⁵ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 225 (1824) (Johnson, J., concurring).

only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States⁷⁶

Other materials from the Founding support this view as well.⁷⁷ Even the dissenting minority at the Pennsylvania Ratifying Convention admitted the problem under the Articles of Confederation that “Congress could make treaties of commerce, but could not enforce the observance of them. We were suffering from the restrictions of foreign nations, who have shackled our commerce, while we were unable to retaliate”⁷⁸

Early Supreme Court opinions recite this reasoning in strong terms. Citing Madison’s resolution, Justice Johnson made the point powerfully in concurrence in *Gibbons* that while “[p]ower to regulate foreign commerce, is given in the same words, and in the same breath, as it were, with that over the commerce of the States”⁷⁹ the foreign commerce power is “necessarily exclusive” since

⁷⁶ 1 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 114 (Jonathan Elliot ed., 2d ed. 1836).

⁷⁷ For instance, St. George Tucker complained that after the Revolutionary War, [t]he conduct of Great-Britain in declining any commercial treaty with America, at that time, was unquestionably dictated at first by a knowledge of the inability of congress to extort terms of reciprocity from her; and of that want of unanimity among the states, which, under the existing confederation, was a perpetual bar to any restriction upon her commerce with the whole of the states; and any partial restriction would be sure to fail of effect.

St. George Tucker, 1 Blackstone’s Commentaries app. 248–54 (1803). In a 1785 letter to James Monroe, Madison also stated:

Viewing in the abstract the question whether the power of regulating trade, to a certain degree at least, ought to be vested in Congress, it appears to me not to admit of a doubt, but that it should be decided in the affirmative. If it be necessary to regulate trade at all, it surely is necessary to lodge the power, where trade can be regulated in effect; and experience has confirmed what reason foresaw, that it can never be so regulated by the States acting in their separate capacities. They can no more exercise this power separately, than they could separately carry on war, or separately form treaties of alliance or Commerce.

Letter from James Madison to James Monroe (Aug. 7, 1785), in 2 The Writings of James Madison 156 (Gaillard Hunt ed., 1900).

⁷⁸ The Address and Reasons of Dissent of the Minority of the Convention, of the State of Pennsylvania, to Their Constituents (Dec. 12, 1787), reprinted in 2 The Documentary History of the Ratification of the Constitution 619–20 (Merrill Jensen ed., 1976).

⁷⁹ *Gibbons*, 22 U.S. (9 Wheat.) at 228 (Johnson, J., concurring).

the States are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them, and all other regulations, but those which Congress has imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity.⁸⁰

Marshall echoed these sentiments three years later, noting “[t]he oppressed and degraded state of commerce previous to the adoption of the constitution” which “was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination.”⁸¹ The United States needed to speak with one voice in its external commercial affairs, otherwise:

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce.⁸²

Thus the major incentive behind the Foreign Commerce Clause was to establish national uniformity over U.S. commerce with foreign nations so that the United States could act as a single economic unit.⁸³ The Supreme Court has used this reasoning ever since

⁸⁰ Id. at 228–29.

⁸¹ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445–46 (1827).

⁸² Id. at 447.

⁸³ In this respect, the Clause may contemplate greater flexibility in regulating commerce with foreign nations than among the states. For example, “[i]n the regulation of foreign commerce an embargo is admissible; but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states.” *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 434 (1932). But again, this power is directed toward unifying U.S. economic policy, not regulating directly commercial activity inside foreign nations.

to cast the foreign commerce power as greater than the interstate commerce power.⁸⁴

B. Limited Power over Foreign Nations

The scope of the Foreign Commerce Clause vis-à-vis the states has arisen most recently in the context of the “dormant Foreign Commerce Clause.”⁸⁵ The Supreme Court imposes tighter restrictions on state legislation under the dormant Foreign Commerce Clause than under the dormant Interstate Commerce Clause.⁸⁶ This case law is relevant for two reasons. First, the Court has used the national uniformity rationale to invalidate state law under the dormant Foreign Commerce Clause where the same law would have survived a dormant Interstate Commerce Clause analysis.⁸⁷ Hence the “greater” power of the Foreign Commerce Clause kicks in when state action threatens national uniformity. Second, the Court has suggested that a reason the Foreign Commerce Clause imposes tighter restrictions on state law is that the federal government has less power to regulate commerce inside foreign nations than inside the states.

The first case to use the dormant Foreign Commerce Clause to strike down state law, and the most instructive because it elabo-

⁸⁴ *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979); see also *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904) (describing power of Congress over foreign commerce as “plenary,” “exclusive and absolute,” and “complete”); *Bowman v. Chi. & N.W. Ry. Co.*, 125 U.S. 465, 482 (1888) (“It may be argued [that] the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation.”); *Henderson v. Mayor of N.Y.*, 92 U.S. (2 Otto) 259, 273 (1875) (regulation “must of necessity be national in its character” when it affects “a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected”).

⁸⁵ Although the Supreme Court has used this rationale to strike down state regulation since its 1979 decision in *Japan Line*, 441 U.S. at 449 (observing “the negative implications of Congress’ power ‘to regulate Commerce with foreign Nations’”), the first time the Court actually used the phrase “dormant Foreign Commerce Clause” appears to have been in *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 320 (1994).

⁸⁶ See *Japan Line*, 441 U.S. at 434.

⁸⁷ See *infra* Section II.B.

rates the scope of the foreign commerce power compared to the interstate commerce power, is *Japan Line, Ltd. v. County of Los Angeles*.⁸⁸ It is also the case most relied upon by lower courts to uphold outward-looking foreign commerce legislation over conduct abroad on the theory that Congress's power to regulate foreign commerce is "greater" than the power to regulate interstate commerce.⁸⁹ A brief look at the decision reveals just how misguided lower courts are to rely upon it for the proposition that Congress has a larger foreign commerce power to regulate inside foreign nations than inside the several states.

The case involved a California *ad valorem* property tax on cargo containers on Japanese ships docked temporarily in California.⁹⁰ It was stipulated that "[t]he containers engage in no intrastate or interstate transportation of cargo except as continuations of international voyages," and they were taxed in Japan.⁹¹ The Court held application of the California tax unconstitutional under the dormant Foreign Commerce Clause.⁹² To so hold, the Court had to fashion a different, heightened test for measuring the constitutionality of state tax under the Foreign Commerce Clause as opposed to the Interstate Commerce Clause. The California tax would have been constitutional under the reigning interstate test because of the "fair apportionment" rule,⁹³ which held that "instrumentalities of commerce may be taxed, on a properly apportioned basis, by the nondomiciliary States through which they travel."⁹⁴ The rule was designed to avoid multiple taxation, which would offend the Commerce Clause.⁹⁵

In fashioning its new Foreign Commerce Clause test, the Court explained that "[w]hen a State seeks to tax the instrumentalities of

⁸⁸ 441 U.S. 434 (1979).

⁸⁹ Id. at 448; see *infra* Section II.B (discussing lower-court cases).

⁹⁰ *Japan Line*, 441 U.S. at 436–37.

⁹¹ Id. at 436–37.

⁹² Id. at 451.

⁹³ Id. at 442, 445 ("We may assume that, if the containers at issue here were instrumentalities of purely interstate commerce, [the fair apportionment rule] would apply and be satisfied, and our Commerce Clause inquiry would be at an end.").

⁹⁴ Id. at 442.

⁹⁵ Id. at 446–47. This prohibition on multiple taxation was "effectively modified, for purposes of *income* taxation" of companies (as opposed to property tax) in *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 187–89 (1983). *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 319 n.18 (1994).

foreign commerce, two additional considerations . . . come into play.”⁹⁶ One, by now unsurprising, was that “a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential.”⁹⁷ That is, there is a danger the tax might betray “the Framers’ overriding concern that the Federal Government must speak with one voice when regulating commercial relations with foreign governments.”⁹⁸ Therefore, “[t]he need for federal uniformity is . . . paramount in ascertaining the negative implications of Congress’ power to ‘regulate Commerce with foreign Nations.’”⁹⁹ It was in *this* context—the need for national uniformity and the power to override state law—that the Court indicated Congress’s foreign commerce power is “greater” than the interstate commerce power.¹⁰⁰ Transposing this statement to Congress’s ability to regulate inside foreign nations is therefore inapposite at best. And it may be worse.

The other additional consideration the Court articulated for gauging state tax of foreign commerce differently was the need to avoid multiple taxation. As noted, in the interstate context, the fair apportionment rule would have allowed California to tax containers from another U.S. state.¹⁰¹ The problem in *Japan Line* was that the containers were not from another U.S. state, but a foreign nation. And that foreign nation had already taxed them in full,¹⁰² leaving no fair apportionment for California and invariably producing multiple taxation should the state tax apply.¹⁰³

The Court’s reasoning here is instructive. The fair apportionment rule could not save California’s tax because “the basis for this Court’s approval of apportioned property taxation . . . has been its ability to enforce full apportionment by all potential taxing bodies.”¹⁰⁴ But while the federal government has power to fairly apportion taxes among the states, it cannot fairly apportion when the

⁹⁶ *Japan Line*, 441 U.S. at 446.

⁹⁷ *Id.* at 448.

⁹⁸ *Id.* at 449 (internal quotation marks omitted).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 448.

¹⁰¹ See *supra* note 93.

¹⁰² *Japan Line*, 441 U.S. at 452 n.17.

¹⁰³ *Id.* at 446–47.

¹⁰⁴ *Id.* at 447.

other taxing body is a foreign nation.¹⁰⁵ The Court could not have been clearer: “Yet neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign.”¹⁰⁶ Rather, the foreign nation “may have the right, consistently with the custom of nations, to impose a tax on its full value.”¹⁰⁷ And because “Japan has the right and the power to tax appellants’ containers at their full value,”¹⁰⁸ the Court concluded that the California tax led to multiple taxation and offended the Commerce Clause.¹⁰⁹

According to *Japan Line* then, a major reason the Foreign Commerce Clause exerts greater power to invalidate state law than the Interstate Commerce Clause is that the federal government has less power to regulate commerce inside foreign nations than inside the states. This reasoning would seem to devastate or, at the very least, raise serious tensions with the contrary idea that Congress has more power to regulate commerce inside foreign nations than inside the several states. Yet paradoxically, that is exactly what lower courts have used *Japan Line* to hold.¹¹⁰ The remainder of this Article builds and applies a sound approach to the Foreign Commerce Clause. Along the way, it also dismantles leading lower-court decisions on the Clause.

II. THE OUTWARD-LOOKING FOREIGN COMMERCE POWER

This Part identifies two key limits on Congress’s outward-looking foreign commerce power to legislate inside foreign nations. First, the nexus requirement insists that the conduct that is the subject of federal regulation exhibits a nexus with the United States. Second, the foreign sovereignty concern holds that Congress has no more power to legislate inside the territories of foreign nations, and in some contexts has less power, than inside the territories of U.S. states under the Interstate Commerce Clause.

¹⁰⁵ *Id.* (“[W]hereas the fact of apportionment in interstate commerce means that ‘multiple burdens logically cannot occur,’ . . . the same conclusion, as to foreign commerce, logically cannot be drawn.”).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 454.

¹⁰⁹ *Id.* at 454–55.

¹¹⁰ See *infra* Section II.B.

Section A argues that these limits derive from constitutional text, structure, and history. In light of these limits, Section B reformats the Supreme Court's current three-category Commerce Clause framework for the Foreign Commerce Clause. In so doing, it sketches out the contours of the foreign commerce power in more detail than has previously been done, and in ways that hold potentially far-reaching implications for present and future exercises of U.S. extraterritorial jurisdiction. To illustrate its argument, it analyzes a variety of U.S. laws presently on the books that expand aggressively—and in some cases, in constitutionally extravagant ways—U.S. jurisdiction over activity outside the United States.

A. Limiting Principles

1. The Nexus Requirement

The first limit on Congress's power to extend U.S. law to activity abroad under the Foreign Commerce Clause is the nexus requirement, which requires that the regulated activity exhibit a nexus with the United States. The Clause's phrase "with foreign Nations"¹¹¹ indicates that the commerce must have a U.S. connection. "[W]ith" denotes two sides to the "Commerce" in the Clause. One side is "foreign Nations," for they are mentioned explicitly, and although implicit, the other side of the "intercourse"¹¹² must be the United States.¹¹³ As Marshall stated in the "seminal"¹¹⁴ commerce case, *Gibbons v. Ogden*, the words of the Foreign Commerce Clause "comprehend every species of commercial intercourse *between the United States* and foreign nations."¹¹⁵ Thus, for Congress to regulate, the foreign commerce not only must be "with" foreign nations, but also "with" the United States. Put another way, the Constitution does not give Congress the power to regulate com-

¹¹¹ U.S. Const. art. I, § 8, cl. 3.

¹¹² *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90 (1824) ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.").

¹¹³ Colangelo, *supra* note 14, at 147.

¹¹⁴ *United States v. Morrison*, 529 U.S. 598, 641 (2000) (Souter, J., dissenting); Norman R. Williams, *Gibbons*, 79 N.Y.U. L. Rev. 1398, 1398 (2004).

¹¹⁵ *Gibbons*, 22 U.S. (9 Wheat.) at 193 (emphasis added).

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merce “among foreign Nations” unconnected with the United States.

The nexus requirement is therefore a “limitation[] on the commerce power . . . inherent in the very language of the Commerce Clause.”¹¹⁶ To continue with Marshall’s exegesis in *Gibbons*, reiterated ever since,¹¹⁷ the commerce power “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the constitution.*”¹¹⁸ The Constitution does, however, prescribe limitations. In the interstate context, Marshall explained that

Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.¹¹⁹

In the foreign commerce context, the relevant word is “with,” and it is restricted to commerce “with” not only foreign nations but also “with” the United States.¹²⁰ It too presupposes something not enumerated: namely, the exclusively internal commerce of foreign nations, or among foreign nations but not with the United States. Thus without a U.S. nexus, Congress’s foreign commerce power is not constitutionally triggered. What a constitutionally adequate nexus is, and how it applies to current laws of extraterritorial operation, is the subject of Section B.

2. *The Foreign Sovereignty Concern*

The second limit on the outward-looking foreign commerce power is that Congress has at least no more authority to legislate inside “foreign Nations” under the Foreign Commerce Clause than it has inside the “several States” under the Interstate Commerce Clause.¹²¹ The key textual reason behind this limit is again that the

¹¹⁶ *United States v. Lopez*, 514 U.S. 549, 553 (1995).

¹¹⁷ See *id.*

¹¹⁸ *Gibbons*, 22 U.S. (9 Wheat.) at 196 (emphasis added).

¹¹⁹ *Id.* at 194–95.

¹²⁰ U.S. Const. art. I, § 8, cl. 3; see *infra* Subsection II.A.2.a.

¹²¹ U.S. Const. art. I, § 8, cl. 3.

Foreign Commerce Clause does not give Congress general global authority to regulate “among” foreign nations, unlike the general national authority to regulate “among” the states in the Interstate Commerce Clause.¹²² The limit also finds support in “background principle[s]”¹²³ of territorial jurisdiction and sovereign noninterference at the time of the Founding. This is not to say that such principles on their own restrict Congress’s power or remain frozen in time. Rather, they help inform the Clause’s particular textual grant in relation to foreign sovereigns as compared to the states, over which Congress enjoys territorial jurisdiction. Finally, all other major constitutional rationales traditionally advanced for Congress’s extensive powers to regulate commerce domestically do not apply when Congress seeks to regulate inside foreign nations. Thus, to the extent conventional Commerce Clause analysis relies on these rationales to justify broad regulatory power at home, that reasoning is inapposite to the foreign commerce power to regulate abroad.

a. Text and History

“among” v. “with.” The difference between the words “among” in the Interstate Commerce Clause and “with” in the Foreign Commerce Clause indicates that Congress has no more, and in some respects may have less, power to regulate commerce inside foreign nations under the Foreign Commerce Clause than inside the states under the Interstate Commerce Clause. As Marshall explained in *Gibbons*, “[t]he word ‘among’ means intermingled with. A thing which is among others is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”¹²⁴ This power to regulate commerce “among the several States”¹²⁵ authorizes Congress to create comprehensive or closed national regula-

¹²² *Id.*

¹²³ Sarah H. Cleveland, *Our International Constitution*, 31 *Yale J. Int’l L.* 1, 33 (2006); Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 *Nw. U. L. Rev.* 149, 156–59 (2009); see also Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 *Colum. L. Rev.* 1, 46, 58, 66–67 (2009).

¹²⁴ *Gibbons*, 22 U.S. (9 Wheat.) at 194 (1824).

¹²⁵ U.S. Const. art. I, § 8, cl. 3.

tory schemes that encompass the domestic system of states.¹²⁶ To effectuate these schemes, Congress may target purely intrastate conduct under the Necessary and Proper Clause.¹²⁷

It was precisely this general, national regulatory power that saved application of the federal Controlled Substances Act (“CSA”) to homegrown medical-use marijuana in the Court’s 2005 decision *Gonzales v. Raich*,¹²⁸ and that has constitutionally justified numerous federal laws designed to prevent various races to the bottom “among” the states.¹²⁹ The Foreign Commerce Clause contains no equivalent, globally-encompassing authority to regulate “among” foreign nations, only the power to regulate commerce “with” them.¹³⁰ The difference between the power to regulate among members of the domestic system, but only with members of the international system, suggests that Congress has no more power to regulate inside foreign nations than it has inside the several states.¹³¹ Indeed, as Section B explains in more depth—and

¹²⁶ *Gonzales v. Raich*, 545 U.S. 1, 13, 22 (2005).

¹²⁷ *Id.* See also U.S. Const. art. I, § 8, cl. 18 (granting Congress power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

¹²⁸ 545 U.S. 1, 9 (2005). For expanded analysis, see *infra* Subsection II.B.3.a.

¹²⁹ See *United States v. Darby*, 312 U.S. 100, 114–15 (1941); see also Deborah Jones Merritt, *Commerce!*, 94 Mich. L. Rev. 674, 706 (1995); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210, 1211 (1992).

¹³⁰ See U.S. Const. art. I, § 8, cl. 3.

¹³¹ One could question this interpretation in light of Congress’s plenary power over the Indian tribes. At least at some points in Supreme Court history, this power has drawn partial sustenance—along with the Treaty Clause—from the Indian Commerce Clause, which grants Congress the power to regulate commerce “with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. Initially, the Court explicitly rejected the Indian Commerce Clause as the source of plenary power over the Indian tribes, finding such power “would be a very strained construction of th[e] clause,” *United States v. Kagama*, 118 U.S. 375, 378–79 (1886), and the historical record suggests the Clause was not used in this way in early U.S. history. See Nathan Speed, Note, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. Rev. 467, 472–78 (2007) (examining early statutes governing Indian tribes and concluding that “when Congress attempted to regulate internal tribal matters, it did so solely through treaties”). Absent treaties, for most of U.S. history plenary federal power was justified on the theory that the Indian tribes were “wards” of the nation. *Kagama*, 118 U.S. at 383–84. Later opinions have, however, located plenary power in the Indian Commerce Clause. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Yet in its most recent decision on the matter, *United States v. Lara*,

contrary to leading lower-court decisions—this textual difference actually deprives Congress of some of the more sweeping regulatory powers abroad that it enjoys at home.¹³² To preview the argument, Congress cannot independently create comprehensive global regulatory schemes over international markets or prevent races to the bottom among the world's nations the same way it can create comprehensive national regulatory schemes over domestic markets and prevent races to the bottom among the states. Because Congress lacks primary authority to create such global schemes, it cannot claim a derivative authority under the Necessary and Proper Clause to reach local foreign conduct that threatens to undercut those schemes the same way it can reach local intrastate conduct to

541 U.S. 193, 200–01 (2004), the Court seemed if not explicitly to move away from this textual justification, certainly to downplay it, leading one commentator to observe that “the Court blithely repeated these claims [that the Treaty Clause and Indian Commerce Clause grant plenary power] without pausing to make sense of them.” Saikrishna Prakash, *Against Tribal Fungibility*, 89 *Cornell L. Rev.* 1069, 1079 (2004). While the Court noted in *Lara* that it “has traditionally identified the Indian Commerce Clause . . . and the Treaty Clause . . . as sources of [federal] power,” 541 U.S. at 200, it then went on to justify plenary power on a theory of “preconstitutional powers necessarily inherent in any Federal Government.” *Id.* at 201. Hence it is not entirely clear whether the Court still views the Indian Commerce Clause as a source of plenary power over the Indian tribes. Of course, even if it did, one might contend with some force that the Court is wrong. See *id.* at 215 (Thomas, J., concurring) (“I cannot locate such congressional authority in the Treaty Clause . . . or the Indian Commerce Clause . . .”); see also Prakash, *supra* at 1081 (“The Commerce Clause does not confer upon Congress complete power over Indian tribes.”).

More to the point for our purposes—which, again, look to measure the status of “foreign Nations” within the Commerce Clause—there also exist plain textual and practical differences between “foreign Nations” and “Indian Tribes,” which the Court in *Kagama* highlighted, and which lead to the conclusion that Indian tribes do not enjoy the same sovereign status as foreign nations. 118 U.S. at 379 (“The commerce with foreign nations is distinctly stated as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes. . . . But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two.”). Indeed, *Lara* repeatedly referred to Indian tribes as “dependent sovereigns,” 541 U.S. at 203–04, echoing Marshall’s early description of them as “domestic dependent nations” which “reside within the acknowledged boundaries of the United States [and] . . . occupy a territory to which we assert a title independent of their will,” and thus cannot “with strict accuracy, be denominated foreign nations.” *Cherokee Nation v. Georgia*, 30 (5 Pet.) U.S. 1, 17 (1831).

¹³² See *infra* Subsection II.B.3.

effectuate regulation “among the several States.”¹³³ Rather, for Congress to regulate local foreign conduct pursuant to a comprehensive international regulatory scheme, that scheme must be created “with foreign Nations.”¹³⁴ In this sense, the word “with” contemplates agreement or cooperation with foreign nations in establishing the scheme, without which Congress cannot extend U.S. law over local foreign conduct to effectuate that scheme.

Background principles at the Founding. Jurisdictional rules at the Founding also support the foreign sovereignty concern. These principles provide relevant constitutional data about the Foreign Commerce Clause’s scope,¹³⁵ and point in the same direction as arguments already made from the text. One need not commit to originalism¹³⁶ to use such beliefs as a basis on which to make arguments about constitutional meaning—“[a]ll major interpretive approaches place great weight on the views of the Constitution’s authors, adopters, and early interpreters.”¹³⁷ And, as a matter of practice, “[m]ore often than not, the Court relies on a variety of interpretive techniques in reaching its decision[, including] . . . text, original understanding, structure, precedent, and doctrine in order to reach a particular result. As such, the holding is essentially a result of the sum of these parts.”¹³⁸ In this vein, this Article does not purport to adopt any one method of constitutional interpretation; instead, it aims to provide as well-rounded an argument as possible about the meaning and scope of the Foreign Commerce Clause. The Founders’ understandings are part of that argument.

Jurisdictional principles at the Founding derived from international law, or what was then called the law of nations. Yet it is well-

¹³³ U.S. Const. art. I, § 8, cl. 3.

¹³⁴ *Id.*

¹³⁵ I do not suggest that these principles reach unmodified into the present to govern congressional power. If they did, any exercise of extraterritorial jurisdiction would be constitutionally suspect since jurisdictional rules at the time were rigidly territorial.

¹³⁶ Originalism “most often refers to the normative constitutional interpretive theory that instructs judges faced with indeterminate textual guidance to look primarily to the original understanding of a particular clause’s ratifying generation.” Jamal Greene, *Selling Originalism*, 97 *Geo. L.J.* 657, 662 (2009).

¹³⁷ Kontorovich, *supra* note 123, at 156.

¹³⁸ Lackland H. Bloom, Jr., *Methods of Interpretation: How the Supreme Court Reads the Constitution* xviii–xix (2009).

settled that Congress may override international law,¹³⁹ and therefore these principles cannot on their own bind Congress. Thus it is important to emphasize that using the Founders' beliefs regarding international rules of sovereignty and jurisdiction to inform the analysis is not to argue that international law trumps Congress. The enterprise, instead, is figuring out what the Constitution says about the scope of Congress's power under the Foreign Commerce Clause compared with the Interstate Commerce Clause. To the extent international law at the Founding furnishes data about what the Constitution was intended and understood to mean and authorize, it is useful and constitutionally relevant.¹⁴⁰ Here one need only look to Justice Johnson's concurrence in *Gibbons*, where he announced that "[t]he definition and limits of that power [to regulate commerce] are to be sought among the features of international law."¹⁴¹

Additionally, throughout history "[b]ackground international rules regarding territorial jurisdiction have heavily influenced the Court's constitutional jurisprudence."¹⁴² In an extensive study of how international law has factored into Supreme Court decision-making, Sarah Cleveland concludes that "[w]hen application of the Constitution implicates questions of territorial jurisdiction and extraterritoriality, international rules have been injected to determine the geographic scope of either a constitutional prohibition or governmental power."¹⁴³ Failure to consult these views therefore would render the present argument both theoretically and doctrinally incomplete.

Marshall's views on the subject were emblematic of the time: "No principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."¹⁴⁴ Or, put somewhat more strongly by Marshall elsewhere,

¹³⁹ Restatement (Third) of Foreign Relations Law of the United States § 115 (1987); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 600 (1889).

¹⁴⁰ Kontorovich, *supra* note 123, at 174.

¹⁴¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 227 (1824) (Johnson, J., concurring).

¹⁴² Cleveland, *supra* note 123, at 33.

¹⁴³ *Id.* at 34; see also Bellia & Clark, *supra* note 123, at 46, 58.

¹⁴⁴ *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty [Consequently] [t]his full and absolute territorial jurisdiction being alike the attribute of every sovereign, . . . [is] incapable of conferring extra-territorial power¹⁴⁵

It is no leap from this seemingly absolute prohibition on extra-territorial legislation to the conclusion that the Founders likely did not contemplate Congress aggressively projecting U.S. law into the sovereign territories of other nations under the Foreign Commerce Clause. Rather, their notions of jurisdictional noninterference strongly oppose Congress disparaging the sovereignties of foreign nations by purporting to “impose a rule *on*”¹⁴⁶ them via a Clause that permits only the power to regulate commerce “*with*” them.¹⁴⁷

Alexander Hamilton made this point forcefully and specifically about Congress’s foreign commerce power. He explained that while a nation’s legislative power “acts compulsively” within its own territory, “it can have no obligatory action whatsoever upon a foreign nation, or upon any person or thing within the jurisdiction of a foreign nation.”¹⁴⁸ Rather, the external regulation of commerce by the United States could occur only by international treaty, as an “*agreement, convention, or compact*, to establish rules binding upon two or more nations, their respective citizens and property.”¹⁴⁹

¹⁴⁵ *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812). This rule prevailed through the nineteenth and into the twentieth century. See *Pennoyer v. Neff*, 95 U.S. 714, 722–23 (1877); see also *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (“[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.”).

¹⁴⁶ *The Antelope*, 23 U.S. (10 Wheat.) at 122–23 (emphasis added).

¹⁴⁷ U.S. Const. art. I, § 8, cl. 3 (emphasis added).

¹⁴⁸ Alexander Hamilton, *Camillus* No. XXXVI (1796), reprinted in VI *The Works of Alexander Hamilton* 167 (Henry Cabot Lodge ed., Constitutional ed., N.Y., G.P. Putnam’s Sons 1904).

¹⁴⁹ *Id.* at 168.

Hamilton's exposition is powerful and unambiguous, and strongly supports the foreign sovereignty concern:

Congress (to pursue still the case of regulating trade) may regulate, by law, our own trade and that which foreigners come to carry on with us; but they cannot regulate the trade which we may go to carry on *in foreign* countries; they can give to us no rights, no privileges, there. This must depend on the will and regulations of those countries; and, consequently, it is the province of the power of treaty to establish the rules of commercial intercourse *between* foreign nations and the United States. The legislative may regulate our own trade, but treaty only can regulate the national trade between our own and another country.¹⁵⁰

This is not to argue that these principles govern today. Indeed, international law itself has evolved quite significantly, and I use its modern jurisdictional rules—including rules derived from treaty—later in the Article to help analyze Congress's power over activity abroad that “substantially affects” foreign commerce with the United States.¹⁵¹ My point here is only that the founding generation's beliefs point in the same direction as the text to indicate that Congress has no more, and in some contexts may have less, power to legislate inside foreign nations than inside the states. I now show that all other major constitutional rationales traditionally advanced for Congress's broad authority to regulate commerce inside the United States do not apply to justify broad authority inside foreign nations.

b. Inapplicability of Other Commerce Rationales

Supreme Law of “the Land” of the United States. The Supremacy Clause obviously provides a crucial justification for extensive federal power to regulate commerce domestically. Federal commerce legislation overrides state law because the Clause makes federal law “the supreme Law of the Land.”¹⁵² There is every reason to believe that “the Land” here refers to, and only to, the land of the United States—not the entire globe. To be sure, immediately after

¹⁵⁰ Id. at 168–69.

¹⁵¹ See *infra* Subsection II.B.3.b.

¹⁵² U.S. Const. art. VI, cl. 2.

declaring federal law supreme, the Clause specifically addresses the states.¹⁵³ This territorial reading of the Clause aligns strongly with the Founders' beliefs regarding sovereignty and jurisdiction in the international context, beliefs that stand in sharp contradistinction to the federal-state "dual sovereignty"¹⁵⁴ relationship in the domestic context. Thus while the Clause makes federal law the supreme law of "the Land" of the United States, preemptively blanketing the territories of the states, the Constitution does not declare U.S. law to be the supreme law of the world, preemptively blanketing the territories of foreign nations. There is, in other words, no International Supremacy Clause.

The Clause accordingly does not grant Congress power to trump foreign law abroad. The Court in *Raich* was unconcerned about Congress interfering with California's state sovereignty through the intrusive reach of the CSA because "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."¹⁵⁵ Yet because the Clause does not extend beyond U.S. territory, it does not resolve conflicts between federal and *foreign* law when the regulated conduct is outside the United States.¹⁵⁶ While "federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,'"¹⁵⁷ this rationale does not follow from the Clause when federal power is compared with the power of foreign nations to provide for the welfare or necessities of their own inhabitants in their own lands.

No delegation of foreign sovereignty. Next, "[u]nlike the states, foreign nations have never submitted to the sovereignty of the

¹⁵³ *Id.*; cf. *EEOC v. Arabian Am. Oil*, 499 U.S. 244, 255–56 (1991) (rejecting application of Title VII to conduct in foreign nations and observing that "[w]hile Title VII consistently speaks in terms of 'States' and state proceedings, it fails even to mention foreign nations or foreign proceedings").

¹⁵⁴ *Gonzales v. Raich*, 545 U.S. 1, 48 (2005) (O'Connor, J., dissenting) (stating that "fundamental structural concerns about dual sovereignty animate our Commerce Clause cases"); see *United States v. Lopez*, 514 U.S. 549, 557 (1995) (referencing the U.S. "dual system of government"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (same).

¹⁵⁵ *Raich*, 545 U.S. at 29. For potential limits on federal supremacy, see Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 *Vand. L. Rev.* 1421, 1445–50 (2009).

¹⁵⁶ See *supra* Subsection II.A.2.

¹⁵⁷ *Raich*, 545 U.S. at 29 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)).

United States government nor ceded their regulatory powers to the United States.”¹⁵⁸ By contrast, federal regulation inside U.S. territory has been repeatedly and continually justified since the earliest days of the Republic on the theory—inherent in the delegated nature of Congress’s Article I powers—that the states surrendered a portion of their sovereignty to the federal government.¹⁵⁹ Foreign nations, of course, have not.

The Supreme Court has specifically justified the federal commerce power to infringe state sovereignty on the ground that “the states are not sovereign in the true sense of that term, but only *quasi*-sovereign . . . since every addition to the national legislative power to some extent detracts from or invades the power of the states.”¹⁶⁰ As a result, “the sovereignty of the States is limited by the Constitution itself.”¹⁶¹ Article I, Section 8 “works a[] . . . sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation.”¹⁶² Because foreign nations never surrendered their sovereignty to the federal government, however, Congress has no delegated authority over them and thus arguably has less power to displace their laws within their own territories. Again, what the contours of this regulatory power inside foreign nations are or should be, and how that power differs from Congress’s power to regulate inside the states, will be the subject of Section B.

No procedural protections for foreign sovereigns. Another reason traditionally given in favor of broad federal power over commerce that disappears when that power is exercised inside foreign nations is the intrinsic procedural protection states enjoy in the federal lawmaking process. The Court has reasoned in the domestic context that “the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in fed-

¹⁵⁸ *United States v. Yunis (Yunis I)*, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988).

¹⁵⁹ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548–49 (1985); *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 423 (1793).

¹⁶⁰ *Carter*, 298 U.S. at 294.

¹⁶¹ *Garcia*, 469 U.S. at 548.

¹⁶² *Id.*

eral governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.”¹⁶³

Under this rationale, because states have a hand in federal law-making, “[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system,”¹⁶⁴ through “political checks that would generally curb Congress’ power to enact a broad [law]”¹⁶⁵ that intrudes upon state sovereignty. The Court has even declared that “the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process.”¹⁶⁶

Unlike the states, foreign nations have no built-in political checks against congressional overreach which threatens intrusion into their sovereignties. These sovereigns have no inherent role in federal lawmaking. Thus, to the extent extensive federal regulation into the sovereign domains of states is justifiable because these sovereigns are, as a result of our constitutional scheme, represented in the federal law-making process, that justification vanishes when Congress legislates in respect of foreign nations under the Foreign Commerce Clause.

Now, one might object to these structural arguments by noting that while the Constitution secures the sovereignty of the states in the Tenth Amendment,¹⁶⁷ no similar protection exists, at least explicitly, for foreign sovereigns. That is to say, just because the delegated nature of Congress’s lawmaking powers, and the procedural protections inherent in the exercise of those powers, augur in favor of broad authority over the states,¹⁶⁸ the absence of these features in relation to foreign sovereigns does not necessarily imply a lesser authority over them. Indeed, the Framers simply may not have cared enough about foreign sovereigns to protect them in the Constitution from congressional overreach, and thus neither should we.

¹⁶³ *Id.* at 556.

¹⁶⁴ *Id.* at 552.

¹⁶⁵ *Gonzales v. Raich*, 545 U.S. 1, 25 n.34 (2005).

¹⁶⁶ *Garcia*, 469 U.S. at 554.

¹⁶⁷ U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹⁶⁸ See *supra* notes 158–62 and accompanying text.

If the objection is that arguments about delegated sovereignty and procedural protections are inapposite when Congress regulates inside foreign nations, the objection is misplaced, since that is precisely my point. If on the other hand the objection goes further to argue that, because there is no explicit constitutional protection for foreign nations, Congress should have more power under the Commerce Clause to regulate inside their territories than inside the states, it is ultimately unpersuasive.

As an initial matter, it fails to address the textual limits in the Constitution itself—limits which, for a government of limited and enumerated powers,¹⁶⁹ stand on their own independent and irrespective of any additional, explicit protection of foreign sovereigns. As Curtis Bradley notes, “[T]he Supreme Court has repeatedly emphasized that the national government has only ‘limited and enumerated powers,’ and it has given no indication that foreign affairs activities are exempt from this proposition.”¹⁷⁰ The Court has in fact made plain that “[t]he restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.”¹⁷¹ Accordingly, regardless of explicit constitutional protection of foreign sovereigns, the Foreign Commerce Clause still requires a nexus “with” U.S. commerce, and the relationship that that word creates with foreign nations grants Congress a comparatively lesser power than the general authority to regulate “among” the national system of U.S. states.

Furthermore, the absence of explicit protection for foreign sovereigns would seem to make sense given the Supremacy Clause does not, by its own terms,¹⁷² extend into foreign nations to trump foreign laws. Thus there is no need to affirmatively protect foreign sovereigns in an international equivalent of the Tenth Amendment.

¹⁶⁹ *United States v. Morrison*, 529 US 598, 610 (2000). Again, I do not engage here the possibility of an un-enumerated foreign affairs power. See *supra* note 10.

¹⁷⁰ Bradley, *supra* note 10, at 335.

¹⁷¹ *Perez v. Brownell*, 356 U.S. 44, 58 (1958); see also *Ex Parte Quirin*, 317 U.S. 1, 25 (1942) (“Congress and the President, like the courts, possess no power not derived from the Constitution.”).

¹⁷² See *supra* Subsection II.A.2.b.

Finally, as we know, the Framers did care about foreign nations and the “universally acknowledged” rule quoted above by Marshall: “the perfect equality of nations,” which prescribed “that no one [nation] can rightfully impose a rule on another,”¹⁷³ leading to the “full and absolute territorial jurisdiction being alike the attribute of every sovereign, . . . incapable of conferring extra-territorial power.”¹⁷⁴ These historical beliefs fit neatly with constitutional text and structure to make a coherent constitutional composite.

In sum, every constitutional sign points toward a limited congressional power to legislate inside foreign nations under the Commerce Clause when compared with the power to legislate inside the United States. The next Section’s project is to discern, in light of the limiting principles articulated thus far, the appropriate contours of Congress’s power to legislate abroad; to show where lower courts have gone wrong in actual cases; and to offer constitutionally sound alternative inquiries under the Clause.

B. The Outward-Looking Framework

The Supreme Court has “mechanically recited” three broad categories of activity over which Congress may exercise regulatory power pursuant to the Commerce Clause.¹⁷⁵ Congress has power, first, to “regulate the use of the channels of interstate commerce,”¹⁷⁶ second, “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,”¹⁷⁷ and third, “to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.”¹⁷⁸ The Court has not ruled on how this framework applies to measure congressional power under the Foreign Commerce Clause,¹⁷⁹ and lower courts have expressed confusion about its precise application to U.S. legislation operating

¹⁷³ *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

¹⁷⁴ *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812); see also cases cited *supra* note 145.

¹⁷⁵ See, e.g., *Raich*, 545 U.S. at 33–34 (2005) (Scalia, J., concurring).

¹⁷⁶ *United States v. Lopez*, 514 U.S. 549, 558 (1995).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 558–59 (citation omitted).

¹⁷⁹ *Prakash*, *supra* note 9, at 1166.

abroad.¹⁸⁰ I use it here as a guide mainly for determining what kind of activity qualifies as commerce and reformat the categories for the Foreign Commerce Clause to gauge Congress's regulatory power when that activity occurs inside foreign nations.

Used this way, the framework offers a good analytical starting point for a number of reasons. To begin with, there is little reason to think that the meaning of "commerce" should change across clauses. Rather, what kind of activity constitutes commerce seems appropriately subject to what Saikrishna Prakash calls a presumption of intrasentence uniformity: "[w]hatever the meaning of 'commerce,' it presumably has the same meaning whether that commerce takes place 'among the states' or occurs 'with foreign nations.'"¹⁸¹ This is consistent with Marshall's statement in *Gibbons* that

commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term [I]n its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.¹⁸²

On the other hand, the power "[t]o regulate" that commerce "with foreign Nations," as opposed to "among the several States,"¹⁸³ is a different story—for all the reasons or "cause[s]"¹⁸⁴ elaborated in the previous section¹⁸⁵ (including Marshall's own nearby exegesis in *Gibbons*).¹⁸⁶ As we will see, it is here that the framework will undergo major revision.

¹⁸⁰ *United States v. Clark*, 435 F.3d 1100, 1116 (9th Cir. 2006).

¹⁸¹ Prakash, *supra* note 9, at 1149 (quoting U.S. Const. art. I, § 8, cl. 3).

¹⁸² *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824).

¹⁸³ U.S. Const. art. I, § 8, cl. 3.

¹⁸⁴ *Gibbons*, 22 U.S. (9 Wheat.) at 194.

¹⁸⁵ These reasons supply both textual and historical evidence to overcome a presumption of uniformity regarding the "[p]ower [t]o . . . regulate Commerce with foreign Nations" as opposed to the "[p]ower [t]o . . . regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. See Prakash, *supra* note 9, at 1156 (noting that to overcome the presumption, one would need textual or historical evidence).

¹⁸⁶ Immediately after ascertaining the meaning of commerce, Marshall defined "[t]he word 'among'" in the Interstate Commerce Clause as "intermingled with" to conclude that the word authorized regulation inside state borders. *Gibbons*, 22 U.S. (9 Wheat.) at 194.

Further, the idea that what qualifies as commerce remains largely constant throughout the clauses, but that the power to regulate it shifts depending on the particular clause used, is consistent with how the Supreme Court has viewed the foreign commerce power in the inward-looking context. The Court's classification of activity as commerce corresponds with the interstate categories, but the power to regulate expands or contracts depending on whether the regulatory authority stems from the Interstate or Foreign Commerce Clause.¹⁸⁷

Finally, as an empirical matter, all lower-court decisions evaluating Congress's extraterritorial power under the Clause have either adopted the framework without modification¹⁸⁸ or have used it as "a guide"¹⁸⁹ or "relevant starting point."¹⁹⁰ While some courts have properly transitioned the framework to the foreign commerce context, many have not. It therefore provides a good place to start for the added reason that the analysis offers concrete guidance for courts actually faced with these cases and fits with the Article's aim to be not only theoretically sound but also practically useful.

Before delving into each of the three categories of activity, we will need to reformulate them for the Foreign Commerce Clause. It may be tempting to just replace the words "interstate commerce" in each category with the words "foreign commerce." For example, one might start out by rewording the first category, as applied to the Foreign Commerce Clause, to grant Congress the power to "regulate the use of the channels of [foreign] commerce."¹⁹¹ But that rewording would miss a significant limitation, and would portend a broader power than the text of the Clause contemplates. The appropriate rewording, instead, is that Congress has power "to regulate the use of channels of foreign commerce *with the United States.*"

The reason the latter wording is correct, and the former incorrect, is that the term "interstate commerce" in each of the frame-

¹⁸⁷ See *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 446–48 (1979).

¹⁸⁸ *United States v. Bredimus*, 352 F.3d 200, 205–06 (5th Cir. 2003); *United States v. Cummings*, 281 F.3d 1046, 1049 & n.1 (9th Cir. 2002).

¹⁸⁹ *United States v. Clark*, 435 F.3d 1100, 1116 (9th Cir. 2006); see also Buffington, *supra* note 5, at 846 & n.38 (citing cases).

¹⁹⁰ *United States v. Martinez*, 599 F. Supp. 2d 784, 805 (W.D. Tex. 2009).

¹⁹¹ Cf. *United States v. Lopez*, 514 U.S. 549, 558 (1995).

work's three categories of domestic activity tends to fully capture the Constitution's textual grant to regulate commerce "among the several States."¹⁹² That is, the term "interstate commerce" is merely another way of saying, "Commerce among the several States." Each of these two linguistic formulations is synonymous with, and means no more, nor less, than the other. Not so with the term "foreign commerce." To say that Congress has power "to regulate the channels of foreign commerce," and stop there, implies—incorrectly—that Congress may regulate *any* channel of foreign commerce *anywhere*. But that would contradict the textual limitation inherent in the Clause requiring that the commerce in question be not only "with" foreign nations, but also "with" the United States.¹⁹³

Accordingly, recast in light of the Foreign Commerce Clause, the three-category framework provides Congress with power:

to regulate the use of the channels of foreign commerce *with the United States*;

to regulate and protect the instrumentalities of foreign commerce *with the United States*, or persons or things in foreign commerce *with the United States*, even though the threat may come only from intra-national activities; and

to regulate those activities having a substantial relation to foreign commerce *with the United States*, *i.e.*, those activities that substantially affect foreign commerce *with the United States*.

The next challenges are determining for each category what nexus constitutionally counts and whether Congress impermissibly exercises more regulatory power inside foreign nations than it does inside the United States.

1. Channels of Foreign Commerce with the United States

As indicated, Congress may not regulate any channel of foreign commerce anywhere. Rather, the channel of foreign commerce must be "with" the United States. Thus while Congress may have broad power to regulate travel coming to or going from the United States, it does not have general power to regulate travel between

¹⁹² U.S. Const. art. I, § 8, cl. 3.

¹⁹³ See *supra* Subsection II.A.2.a.

India and Pakistan, or, for that matter, travel entirely inside India with no U.S. connection.¹⁹⁴

The central challenge for both the foreign channels and instrumentalities rationales, therefore, is discerning whether the channel or instrumentality is “with the United States.” It is one thing to say that in theory there must be a U.S. nexus, and quite another to try to apply that nexus requirement in fact. For instance, what nexus is enough to constitutionally qualify a foreign aircraft as an instrumentality of commerce with the United States? Surely foreign aircraft departing from or arriving in the United States would be covered by the Foreign Commerce Clause, but beyond that, how does one draw the proper constitutional line? Does the fact that the Internet is “an international network of interconnected computers”¹⁹⁵ by definition mean that any foreign hacker¹⁹⁶ or Internet prescription-drug advertiser operating abroad¹⁹⁷ may be subject to U.S. law? What if that foreign hacker or online prescription-drug advertiser targets only foreign computers? Would it make a difference to know that because the Internet is “a system that is inexorably intertwined with interstate commerce”¹⁹⁸ downloading purely *intrastate* materials¹⁹⁹ or hacking into an employer’s computer

¹⁹⁴ See Colangelo, *supra* note 14, at 147.

¹⁹⁵ *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

¹⁹⁶ The United States has prosecuted foreign hackers operating abroad who have targeted computer systems in the United States. See, e.g., *United States v. Ivanov*, 175 F. Supp. 2d 367, 369–70, 373 (D. Conn. 2001).

¹⁹⁷ This is not far-fetched. See William W. Vodra, Nathan G. Cortez & David E. Korn, *The Food and Drug Administration’s Evolving Regulation of Press Releases: Limits and Challenges*, 61 *Food & Drug L.J.* 623, 628 (2006) (summarizing the extra-territorial application of FDA Rules and concluding that “it should not be surprising for FDA to assert jurisdiction over foreign-issued press releases posted on the Internet if accessible in the United States”). In 2000, the FDA began issuing “cyber” letters—letters sent electronically via the Internet—to web sites whose online sales of prescription drugs may be illegal under FDA regulations. See *Cyber Letters*, <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/CyberLetters/default.htm> (last visited Jan. 1, 2010). The U.S. government has also prosecuted physicians under the CSA for distributing drugs illegally via an Internet pharmacy. See *United States v. Quinones*, 536 F. Supp. 2d 267, 268–69 (E.D.N.Y. 2008).

¹⁹⁸ *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (citing *United States v. MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006)).

¹⁹⁹ See *MacEwan*, 445 F.3d at 244–45; cf. *United States v. Kimler*, 335 F.3d 1132, 1138 n.7 (10th Cir. 2003) (holding images of child pornography had to have traveled across state lines as they were transmitted via the Internet).

across town²⁰⁰ are acts properly subject to federal regulation under the Interstate Commerce Clause?

As these questions suggest, a certain circularity tends to afflict the nexus requirement: the facts must show a U.S. nexus, but what constitutes a U.S. nexus depends upon how one defines a U.S. nexus. To break this circularity courts need some type of guiding principle for discerning how to tell whether a nexus is constitutionally adequate to begin with. Otherwise, the nexus requirement will almost always reduce to a tautology since how a court chooses to define the nexus will determine whether it exists on a given set of facts.

Once again, Marshall's analysis in *Gibbons* holds a clue. Discussing the text of the Interstate Commerce Clause, Marshall explained that the "enumeration [of the power to regulate commerce 'among' the several states] presupposes something not enumerated": namely, the internal commerce of a state.²⁰¹ The text of the Foreign Commerce Clause also presupposes something not enumerated: namely, commerce that is not "with" both foreign nations and the United States.²⁰² That is, it presupposes the exclusion of commerce internal to foreign nations and commerce "among foreign Nations" unconnected to the United States. The Foreign Commerce Clause, in other words, specifically does *not* grant Congress a global regulatory power over foreign commerce. This reading is reinforced by the Supremacy Clause's territorial circumscription, constitutional structure, and historical evidence of the founding generation's views concerning territorial jurisdiction and sovereign noninterference.²⁰³

This leads to an initial inquiry or guiding principle for discerning whether a purported U.S. nexus constitutionally establishes a channel or instrumentality of foreign commerce "with" the United States under the Foreign Commerce Clause. I raise it now even though, as we will see, its real-world case impact has been felt more

²⁰⁰ *Trotter*, 478 F.3d at 920–21 (upholding Congress's power to regulate computer sabotage where both hacker and computers were located in the same state because "[w]ith a connection to the Internet, the . . . computers were part of 'a system that is inexorably intertwined with interstate commerce' and thus properly within the realm of Congress's Commerce Clause power").

²⁰¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–95 (1824).

²⁰² U.S. Const. art. I, § 8, cl. 3; see *supra* Section II.A.

²⁰³ See *supra* Subsection II.A.2.

in relation to Congress's power to regulate instrumentalities of foreign commerce abroad.²⁰⁴

The inquiry is: if the minimum facts purporting to establish the U.S. nexus would portend a global regulatory power over that channel or instrumentality, the nexus is presumptively insufficient since, to hold otherwise, would gut the text of the Clause by emptying the word "with" of all practical meaning. Put another way, if the minimum facts triggering the foreign commerce power bring into the sweep of Congress's authority every such channel or instrumentality around the world, the nexus excludes nothing, contrary to the limits inherent in the Clause. I will refer to this analysis as the "minimum triggering facts inquiry."

One might raise a couple of objections to this inquiry at the outset. One is that the inquiry is not very predictable since it relies heavily on specific facts connecting the channel or instrumentality with the United States, and these facts are likely to vary with each case that arises. I agree, but view this as a strength, not a weakness. Extraterritorial jurisdiction rarely lends itself to bright-line rules without producing absurd results,²⁰⁵ and the extraterritorial jurisdiction of Congress under the Foreign Commerce Clause is no exception. Moreover, a contextual, fact-driven approach seems especially appropriate right now given the Supreme Court's very recent use of a "functional approach"²⁰⁶ to gauge the reach of other constitutional provisions abroad—an approach that purposely takes account of "practical" concerns.²⁰⁷ The objective here is to craft a principled approach to the nexus requirement, if not an absolutely predictable one. And the guiding principle, derived from the text, structure and history of the Foreign Commerce Clause, is that

²⁰⁴ See *infra* Subsection II.B.2.

²⁰⁵ Take the doctrine of personal jurisdiction. The struggle to adapt initial, bright-line rules to changing social and commercial reality forced major jurisprudential shifts throughout U.S. history. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1878). This is not to say that the doctrine has succeeded in coherently adapting. See, e.g., *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 577 (2d Cir. 1996) (Walker, J., dissenting) (describing the doctrine as a "legal garden in disarray"); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. Chi. L. Rev. 617, 618 (2006) (describing a "confuse[d] and complicate[d]" doctrine).

²⁰⁶ *Boumediene v. Bush*, 128 S. Ct. 2229, 2258 (2008).

²⁰⁷ *Id.*

Congress does not have a global regulatory power over foreign commerce.

One might also object to this inquiry by observing that because we live in a globalized economy, it may be that everything that happens in or on a certain channel or instrumentality of foreign commerce is “with” the United States in one way or another. It is not Congress, but economic and commercial reality that will have gutted the limitation inherent in the language of the Clause by rendering it otiose. I would not discount this possibility; it may happen or may already have happened with respect to some channels or instrumentalities of global commerce. But that is a serious constitutional conversation courts need to have based on the nature of the particular channel or instrumentality as demonstrated by particular facts of particular cases. Predicting how courts would come out on hypothesized facts in such an under-litigated area is beyond the prescience of this author. My purpose here is simply to articulate the relevant lines of constitutional inquiry and evaluate whether they have been followed so far.

In conducting this inquiry, courts should be aware of the limits inherent in the Foreign Commerce Clause and skeptical of stretching constitutional language so far as to render those limits functionally vacuous. At the least, the minimum triggering facts inquiry ensures that courts recognize when they make the leap to a global regulatory power; such a leap erases limits inherent in the text of the Clause; and the leap therefore must be factually and analytically justified. As we will see in the instrumentalities section, faced with precisely this question under the Aircraft Sabotage Act, at least one district court, correctly in my view, refused to take the leap.²⁰⁸

Courts using a channels theory have largely emphasized a U.S. nexus to uphold statutes of extraterritorial reach under the Foreign Commerce Clause. In *United States v. Cummings*, the Ninth Circuit ruled constitutional application abroad of the International Parental Kidnapping Crime Act on a channels theory because “the statute criminalizes the actions of one who ‘removes a child from the United States [. . .] or retains a child (who has been in the United

²⁰⁸ *United States v. Yunis (Yunis I)*, 681 F. Supp. 896, 907 (D.D.C. 1988).

States) outside the United States.”²⁰⁹ The court explained that “[t]he parenthetical clause ensures that prosecution under the statute occurs only if the child has first been moved *from* the United States *to* another country.”²¹⁰ Moreover, the court found that by wrongfully retaining the child in a foreign country, the defendant parent impeded proper use of the channels of foreign commerce back to the United States, since the child “cannot freely use the channels of commerce to return.”²¹¹ The channels theory underpins other extraterritorial legislation with the United States as well, such as the prohibition on transporting minors in foreign commerce to or from the United States with the intent to engage in illegal sexual activity with them.²¹²

The second limit on Congress’s power to regulate channels of foreign commerce with the United States is that Congress may not use a channels theory to regulate inside the sovereign territories of foreign nations in ways that would exceed its regulatory powers inside the several U.S. states. How Congress might try to do so—and how some courts have mistakenly held Congress can and has done so—will become apparent in examining perhaps the most expansive and controversial piece of recent U.S. legislation regulating conduct abroad: the 2003 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, or PROTECT Act, which is designed to combat international child-sex tourism.²¹³

The PROTECT Act. The number of cases brought under the PROTECT Act has jumped in recent years, with many defendants specifically objecting to Congress’s power to reach their conduct

²⁰⁹ 281 F.3d 1046, 1049 (9th Cir. 2002) (quoting 18 U.S.C. § 1204(a) (2006)) (internal parentheses in original).

²¹⁰ *Id.* at 1051; see also *id.* at 1049 (“By its terms, [the statute requires that] a child retained in a foreign country has to have been taken *from* the United States to another country.”).

²¹¹ *Id.* at 1050.

²¹² *United States v. Clark*, 435 F.3d 1100, 1118–19 (9th Cir. 2006) (Ferguson, J., dissenting). For cases upholding convictions under this statute, see *United States v. Hersh*, 297 F.3d 1233, 1239, 1248, 1255 (11th Cir. 2002); *United States v. Johnson*, 132 F.3d 1279, 1287 (9th Cir. 1997).

²¹³ Pub. L. No. 108-21, 117 Stat. 650 (2003); see also H.R. Rep. No. 108-66, at 51 (2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr066.108.pdf.

abroad under the Foreign Commerce Clause.²¹⁴ Lower courts have responded by upholding the Act, often on a channels-of-foreign-commerce theory.²¹⁵ Two categories of principal conduct outlawed by the Act have come under consistent challenge as outside Congress's foreign commerce power: Section 2423(b), which criminalizes "travel[ing] in foreign commerce, for the purpose of engaging in any illicit sexual conduct,"²¹⁶ and Section 2423(c), which criminalizes "travel[ing] in foreign commerce, and engag[ing] in any illicit sexual conduct."²¹⁷ The Act defines "illicit sexual conduct" by reference,²¹⁸ to include as separate offenses, *inter alia*, sexual abuse of a minor, and engaging in a commercial sex act with a minor.²¹⁹ I evaluate each provision under a channels-of-foreign-commerce theory and conclude that while Section 2423(b) can constitutionally stand on a channels theory, Section 2423(c) fails to obey both the nexus and foreign sovereignty limits on Congress's ability to regulate channels of foreign commerce with the United States.

²¹⁴ See, e.g., *United States v. Jackson*, 480 F.3d 1014, 1016 (9th Cir. 2007); *Clark*, 435 F.3d at 1105; *United States v. Martinez*, 599 F. Supp. 2d 784, 795 (W.D. Tex. 2009); *United States v. Pendleton*, No. 08-111, 2009 WL 330965, at *2 (D. Del. Feb. 11, 2009); *United States v. Shutts*, No. 07-20816, 2008 WL 162662, at *4 (S.D. Fla. Jan. 16, 2008); *United States v. Bianchi*, No. 06-19, 2007 WL 1521123, at *4 (E.D. Pa. May 22, 2007); *United States v. Frank*, 486 F. Supp. 2d 1353, 1355 (S.D. Fla. 2007).

²¹⁵ See, e.g., *Clark*, 435 F.3d at 1106; *United States v. Tykarsky*, 446 F.3d 458, 470 (3d Cir. 2006); *United States v. Bredimus*, 352 F.3d 200, 205-07 (5th Cir. 2003); *United States v. Han*, 230 F.3d 560, 563-64 (2d Cir. 2000); *Martinez*, 599 F. Supp. 2d at 805; *Shutts*, 2008 WL 162662, at *8; *United States v. Kaechele*, 466 F. Supp. 2d 868, 897-99 (E.D. Mich. 2006); *United States v. Clark*, 315 F. Supp. 2d 1127, 1135-36 (W.D. Wash. 2004).

²¹⁶ 18 U.S.C. § 2423(b) (2006); see *United States v. Hawkins*, 513 F.3d 59, 61 (2d Cir. 2008) (per curiam); *Tykarsky*, 446 F.3d at 470; *United States v. Buttrick*, 432 F.3d 373, 374 (1st Cir. 2005); *United States v. Bredimus*, 352 F.3d 200, 205-207 (5th Cir. 2003); *Martinez*, 599 F. Supp. 2d at 795; *Pendleton*, 2009 WL 330965, at *1; *Shutts*, 2008 WL 162662, at *1; *Bianchi*, 2007 WL 1521123, at *1; *Kaechele*, 466 F. Supp. 2d at 897-99.

²¹⁷ 18 U.S.C. § 2423(c) (2006); see *Jackson*, 480 F.3d at 1016; *Clark*, 435 F.3d at 1116-17; *Pendleton*, 2009 WL 330965, at *4; *Martinez*, 599 F. Supp. 2d at 808; *Frank*, 486 F. Supp. 2d at 1355. The Act also criminalizes transporting minors in interstate or foreign commerce with the intent that the minor engage in prostitution or in any sexual activity for which any person can be charged with a criminal offense, 18 U.S.C. § 2423(a) (2006), as well as facilitating the travel of minors in interstate or foreign commerce for the purpose of engaging in illicit sexual conduct, *id.* § 2423(d), and attempting or conspiring to violate Sections (a)-(d) of the Act, *id.* § 2423(e).

²¹⁸ 18 U.S.C. § 2423(f) (2006).

²¹⁹ *Id.*

Section 2423(b). Section 2423(b), which criminalizes travel abroad for the purpose of engaging in illicit sexual activity, constitutes a fairly straightforward exercise of Congress's power to regulate channels of foreign commerce. Congress has long had the authority "to keep the channels of interstate commerce free from immoral and injurious uses."²²⁰ And indeed, pursuant to this authority, Congress also prohibited in Section 2423(b) *interstate* travel for the purpose of engaging in criminal sex acts with a minor.²²¹ Courts have historically rejected Commerce Clause challenges to this interstate prohibition, upholding convictions on the rationale that such legislation "regulates the use of the channels of interstate commerce"²²² themselves, but only if the government can "prove that the crossing [of state lines] was made with the intent to engage in the proscribed conduct."²²³

This interstate channels-of-commerce rationale extends seamlessly to channels of foreign commerce with the United States. In *United States v. Bredimus*, the defendant challenged his Section 2423(b) conviction by arguing that the statute was not within Congress's powers under the third category of the three-category framework, that is, the authority to regulate activity that "substantially affects" commerce.²²⁴ Specifically, *Bredimus* argued that "Congress exceeded its authority under the Commerce Clause, because . . . there is no 'substantial relationship' between the proscribed conduct (the crime of sexual exploitation of minors) and foreign commerce (travel by U.S. citizens abroad)."²²⁵

The Fifth Circuit, correctly in my view, rejected this challenge, explaining that the statute was not an exercise of the third category

²²⁰ *Caminetti v. United States*, 242 U.S. 470, 491 (1917) (upholding convictions under Mann Act for transporting women across state lines for immoral purposes); see also *White-Slave Traffic (Mann) Act*, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–24 (2006)).

²²¹ 18 U.S.C. § 2423 (2006).

²²² *United States v. Tykarsky*, 446 F.3d 458, 470 (3d Cir. 2006); see also *United States v. Hawkins*, 513 F.3d 59, 61 (2d Cir. 2008) (per curiam); *United States v. Buttrick*, 432 F.3d 373, 374 (1st Cir. 2005); *United States v. Han*, 230 F.3d 560, 563 (2d Cir. 2000); *United States v. Gamache*, 156 F.3d 1, 8 (1st Cir. 1998); *United States v. Kaechele*, 466 F. Supp. 2d 868, 897–99 (E.D. Mich. 2006).

²²³ *Gamache*, 156 F.3d at 8; see also *Tykarsky*, 446 F.3d at 471 ("The travel must be for the purpose of engaging in the unlawful sexual act.").

²²⁴ 352 F.3d 200, 204–06 (5th Cir. 2003).

²²⁵ *Id.* at 204.

at all: “in contrast Section 2423(b) deals with the use of the channels” of commerce,²²⁶ since “[it] punishes the travel with the intent to commit [the prohibited] act itself.”²²⁷ Other courts applying Section 2423(b) to foreign travel similarly have observed that “the statute fits comfortably within Congress’s Commerce Clause power”²²⁸ to prevent the improper use of channels of commerce because “[S]ection 2423(b) does not simply prohibit traveling with an immoral thought, or even with an amorphous intent to engage in sexual activity with a minor, but instead outlaws travel . . . *for the purpose* of engaging in the unlawful sexual act.”²²⁹ Thus, just as Congress may regulate domestically the improper use of channels of interstate commerce by regulating the channels themselves—that is, traveling in the channels with an improper purpose—Congress may also regulate the improper use of channels of foreign commerce.

Of course, under the nexus requirement these channels must be “with” not only foreign nations but also “with” the United States.²³⁰ By its own terms Section 2423(b) seems largely to satisfy this criterion. It requires that a defendant either “travels into the United States”²³¹ or is “a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce.”²³² The requirement that a foreign nonresident defendant “travels into the United States”²³³ establishes that the channel of foreign commerce carrying that person is “with” the United States.²³⁴ Likewise, the requirement that any other person prosecuted under the provision be either a U.S. citizen or permanent resident suggests that these individuals depart from or return to the United States, ensuring that the channel connects “with” the

²²⁶ Id. at 205.

²²⁷ Id. at 208.

²²⁸ *United States v. Kaechele*, 466 F. Supp. 2d 868, 898 (E.D. Mich. 2006).

²²⁹ Id. (quoting *United States v. Tykarsky*, 446 F.3d 458, 471 (3d Cir. 2006)); cf. Sara K. Andrews, U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation, 94 J. Crim. L. & Criminology 415, 431 (2004).

²³⁰ See *supra* Subsection II.A.1.

²³¹ 18 U.S.C. § 2423(b) (2006).

²³² Id.

²³³ Id.

²³⁴ See *supra* Subsection II.A.2.a.

United States.²³⁵ Read this way, Section 2423(b) constitutionally regulates the improper use of channels of foreign commerce “with” the United States, thus satisfying the nexus requirement. And because Congress exerts no more power to do so than the power used to regulate the improper use of channels of commerce among the states, the statute satisfies the foreign sovereignty concern. Section 2423(b) therefore falls within Congress’s Foreign Commerce Clause authority under this Article’s framework.

Section 2423(c). Section 2423(c) presents a more difficult constitutional question. As noted, this provision criminalizes “travel[ing] in foreign commerce, and engag[ing] in any illicit sexual conduct,”²³⁶ with “illicit sexual conduct” capable of meaning either noncommercial sexual abuse of a minor or a commercial sex act with a minor.²³⁷ The major innovation wrought by Section 2423(c) in the PROTECT Act’s statutory scheme is to do away with the improper purpose requirement tied to the travel.²³⁸ That is, it is

²³⁵ It is conceivable that § 2423(b) could be applied to a U.S. citizen living abroad for engaging in purely foreign travel between foreign nations or within a single foreign nation, perhaps even to a U.S. citizen who has never set foot in the United States. The question then becomes whether citizenship alone would establish a constitutionally adequate nexus to the United States such that the channel of foreign commerce is “with the United States.” While citizenship or nationality might create a constitutionally adequate nexus in other respects to allow application of U.S. law abroad, see Colangelo, *supra* note 14, at 166–70 (arguing that jurisdictional principles of international law should be incorporated into Fifth Amendment due process evaluations of extraterritorial jurisdiction), it seems awkward as a basis for transforming a channel of purely foreign commerce into a channel of commerce “with the United States” where the journey neither began nor ended in, nor even passed through, the United States. Any such challenge would need to be as applied in the rare case the United States ever attempts to actually prosecute on these facts, since the vast majority of situations contemplated by § 2423(b) would involve persons departing from or arriving on U.S. territory. See *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190–91 (2008) (“[A] plaintiff can only succeed in a facial challenge by ‘establish[ing] that no set of circumstances exists under which the Act would be valid,’ i.e., that the law is unconstitutional in all of its applications. While some Members of the Court have criticized th[is] formulation, all agree that a facial challenge must fail where the statute has a ‘plainly legitimate sweep.’”) (internal citation omitted); see also *N.Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 11 (1988) (recognizing that a successful facial challenge generally requires a showing “that the challenged law . . . could never be applied in a valid manner”) (internal quotation marks and citation omitted).

²³⁶ 18 U.S.C. § 2423(c), (f) (2006).

²³⁷ *Id.*

²³⁸ *United States v. Clark*, 435 F.3d 1100, 1108 (9th Cir. 2006) (quoting in part H.R. Conf. Rep. No. 108–66, at 51 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 686).

enough under Section 2423(c) simply to travel in foreign commerce, and then, at some later point, engage in illicit activity abroad.²³⁹

Tellingly, and unlike Section 2423(b)'s foreign travel prohibition (which is paired with an analogous interstate travel prohibition),²⁴⁰ there is no domestic counterpart to Section 2423(c)'s extraterritorial prohibition on illicit conduct.²⁴¹ Section 2423(c) in other words contains no parallel prohibition on traveling in *interstate*—as opposed to foreign—commerce, and then engaging in illicit sexual activity. And none is justifiable on a channels-of-commerce theory. The reason is obvious: if Congress could regulate “illicit sexual conduct” based solely on the fact that an individual had—at some previous point—crossed state lines, Congress could regulate literally everything done by anyone who had ever traveled in interstate commerce. Indeed, as the definition of “illicit sexual conduct” itself demonstrates,²⁴² a channels theory captures both commercial and noncommercial conduct.²⁴³ What is more, courts have explicitly found “a lapse in time between a defendant’s travel and his sex act will ordinarily not preclude prosecution under the statute.”²⁴⁴ In the domestic context, such a comprehensive regulatory power over the vast majority of people in the United States would threaten to unconstitutionally “obliterate the distinction between what is national and what is local and create a completely centralized government.”²⁴⁵

This hypothetically comprehensive, yet syllogistically unavoidable power in the domestic context throws into sharp relief why Section 2423(c) is not really a regulation of channels of commerce at all, but is rather an attempt to “hook” subsequent conduct by

²³⁹ *Id.*; see also *id.* at 1119–20 (Ferguson, J., dissenting).

²⁴⁰ 18 U.S.C. § 2423(b) (2006).

²⁴¹ *Id.* § 2423(c).

²⁴² *Id.* § 2423(f); see also *Clark*, 435 F.3d at 1105.

²⁴³ See *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *United States v. Patton*, 451 F.3d 615, 621–22 (10th Cir. 2006) (surveying channels of commerce cases and explaining that “Congress’s authority is not confined to regulations with a narrowly economic purpose or impact”).

²⁴⁴ *United States v. Jackson*, 480 F.3d 1014, 1024 (9th Cir. 2007); see also *Clark*, 435 F.3d at 1107–08 & n.11.

²⁴⁵ *United States v. Lopez*, 514 U.S. 549, 557 (1995); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *United States v. Bredimus*, 352 F.3d 200, 208 n.10 (5th Cir. 2003); see also *United States v. Morrison*, 529 U.S. 598, 615 (2000).

defendants to Congress's foreign commerce authority by tying the conduct to some previous foreign travel.²⁴⁶ Unlike Section 2423(c), but like Section 2423(b), statutes regulating *channels* of commerce by persons who subsequently engage in illicit conduct require an illicit intent or "purpose at the time of transportation."²⁴⁷ Section 2423(c) does not require any improper purpose; in fact, disposing of the purpose requirement was the objective of the statute.²⁴⁸

But because there is nothing inherently wrong with foreign travel itself, "§ 2423(c) neither punishes the act of traveling in foreign commerce, [n]or the wrongful use or impediment of use of the channels of foreign commerce."²⁴⁹ It is not the travel, but "engaging

²⁴⁶ *Clark*, 435 F.3d at 1116 ("Congress legitimately exercises its authority to regulate the channels of commerce where a crime committed on foreign soil is necessarily tied to travel in foreign commerce, even where the actual use of the channels has ceased.").

²⁴⁷ *Patton*, 451 F.3d at 621 & n.3 (describing the channels of commerce theory and drawing support from the Supreme Court's decision in *Caminetti*, 242 U.S. at 491, which upheld the White-Slave Traffic (Mann) Act as a regulation of channels of interstate commerce). As *Patton* noted, under the Mann Act, "prostitution . . . 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." 451 F.3d at 621 & n.3; see also 18 U.S.C. § 1958 (2006) (murder for hire statute prohibiting "travel[ing] in or caus[ing] another (including the intended victim) to travel in interstate or foreign commerce . . . with intent that a murder be committed"); Violence Against Women Act of 1994 § 40221(a), 18 U.S.C. § 2261 (2006) (interstate domestic violence statute prohibiting "travel[ing] in interstate or foreign commerce . . . with the intent to kill, injure, harass, or intimidate a spouse"); Violence Against Women and Department of Justice Reauthorization Act of 2005 § 114(a), 18 U.S.C. § 2261A (2006) (stalking statute prohibiting "travel[ing] in interstate or foreign commerce . . . with the intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate another person"); Animal Enterprise Protection Act of 1992 § 2(a), 18 U.S.C. § 43 (2006) (force, violence, and threats involving animal enterprises statute prohibiting "travel[ing] in interstate or foreign commerce . . . for the purpose of damaging or interfering with the operations of an animal enterprise"); Child Support Recovery Act of 1992 § 2(a), 18 U.S.C. § 228 (2006) (failure to pay legal child support obligations statute prohibiting "travel[ing] in interstate or foreign commerce with the intent to evade a support obligation"); 18 U.S.C. § 1073 (2006) (flight to avoid prosecution or giving testimony) (same); 18 U.S.C. § 1231 (2006) (transportation of strikebreakers) (same); 18 U.S.C. § 1952 (2006) (interstate and foreign travel or transportation in aid of racketeering enterprises) (same); cf. *United States v. Ballinger*, 395 F.3d 1218, 1222 (11th Cir. 2005) (en banc) (construing 18 U.S.C. § 247 (2006) to prohibit traveling in interstate commerce "for the purpose of burning churches"); *id.* at 1227, 1228, 1237 & n.8, 1241.

²⁴⁸ *Clark*, 435 F.3d at 1104–05.

²⁴⁹ *Id.* at 1119 (Ferguson, J., dissenting); see also *United States v. Martinez*, 599 F. Supp. 2d 784, 805 n.13 (W.D. Tex. 2009) ("Because a person may form the intent to

in illicit sexual conduct in a foreign location [which] constitutes the offense conduct. Indeed, one need only look so far as the title of the statute to determine the offense conduct at issue: ‘engaging in illicit sexual conduct in foreign place.’”²⁵⁰ Section 2423(c) thus merely punishes the subsequent illicit sex act in the same way that so-called “jurisdictional hook” statutes punish, say, a felon’s possession of a firearm that has traveled interstate.²⁵¹ The subsequent conduct falls within Congress’s regulatory authority solely by virtue of the hook: prior travel in interstate or foreign commerce. But the travel itself—whether by a gun or by a person with no improper intent or purpose—is not wrongful. For this reason, courts have rejected the notion that jurisdictional hook statutes regulate channels of commerce,²⁵² since the ultimate prohibited act, like the illicit sex act prohibited in Section 2423(c), occurs “entirely intrastate.”²⁵³ Instead, courts have generally chosen to evaluate domestic hook statutes under the “substantially affects” prong of the three-category framework.²⁵⁴ Thus, like domestic hooks, Section 2423(c) does not regulate channels of commerce; “[r]ather, it punishes future conduct in a foreign country entirely divorced from the act of traveling except for the fact that the travel occurs at some point prior to the regulated conduct.”²⁵⁵ There is, in short, no regulation

commit the criminal act in § 2423(c) after all use of the channels of commerce cease, the Court expresses doubt that § 2423(c) may be constitutionally upheld simply as regulation of the channels of commerce.”); cf. *Patton*, 451 F.3d at 621 (explaining that the channels category “is confined to statutes that regulate interstate transportation itself”).

²⁵⁰ *United States v. Armstrong*, 2007 WL 3171775, at *2, *5–6 (W.D. Tex. Oct. 26, 2007) (contrasting § 2423(c), under which the offense is illicit conduct in a foreign location, with § 2423(b), under which, because of the intent requirement during travel, the offense is the travel itself).

²⁵¹ See *Scarborough v. United States*, 431 U.S. 563, 575 (1977).

²⁵² *United States v. Alderman*, 565 F.3d 641, 647 (9th Cir. 2009); *Patton*, 451 F.3d at 621; see also Corey Rayburn Yung, *One of These Laws Is Not Like The Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 *Harv. J. on Legis.* 369, 417 (2009).

²⁵³ *Alderman*, 565 F.3d at 647; *Patton*, 451 F.3d at 621.

²⁵⁴ See, e.g., *Alderman*, 565 F.3d at 646–47. But see *Patton*, 451 F.3d at 634 (finding that the jurisdictional hook statute at issue “does not fit within any of the *Lopez* categories, [but that] it is supported by the pre-*Lopez* precedent of *Scarborough v. United States*”).

²⁵⁵ *United States v. Clark*, 435 F.3d 1100, 1119 (9th Cir. 2006) (Ferguson, J., dissenting).

of the channel itself,²⁵⁶ and, as in the domestic context, the subsequent illicit conduct is “entirely intrastate”²⁵⁷—or here, intranational.

Because Section 2423(c) does not regulate a channel of foreign commerce, it a fortiori does not regulate a channel of commerce with the United States. It therefore fails the nexus requirement on a channels theory. Put another way, the statute cannot regulate a channel of commerce with the United States if it does not regulate a channel of commerce period. Instead, like domestic hooks, Section 2423(c) regulates local activity—illicit sex acts abroad by U.S. persons. One could argue that Section 2423(c) constitutes a permissible regulation of local activity abroad that nonetheless “substantially affects” foreign commerce with the United States by virtue of the involvement of U.S. citizens or permanent residents in the illicit sex act. But that is not a channels theory, and I will address that commerce rationale in its own Section below.²⁵⁸

That Section 2423(c) is really a hook designed to ensnare foreign conduct means it fails not only the nexus requirement, but also the foreign sovereignty concern. Equally important to the fact that jurisdictional hook statutes do not regulate channels of commerce per se is that they traditionally apply to things²⁵⁹—not persons—traveling in commerce, for the reason stated above: anything done by anyone who has ever traveled interstate would then be subject to congressional regulation, thus erasing the distinction between federal and state authority.²⁶⁰

²⁵⁶ Id.; see also *United States v. Martinez*, 599 F. Supp. 2d 784, 805 n.13 (W.D. Tex. 2009).

²⁵⁷ See supra note 253.

²⁵⁸ See infra Subsection II.B.3.

²⁵⁹ See, e.g., 18 U.S.C. § 922(g)(1) (2006) (firearm); 18 U.S.C. § 931(a) (2006) (body armor).

²⁶⁰ Only recently has Congress attempted to use the person as a jurisdictional hook, and courts are all over the place on whether such statutes are constitutional, and, if they are, why. See Yung, supra note 252, at 407–23 (discussing myriad lower-court approaches to SORNA’s prohibition on convicted sex offenders “travel[ing] in interstate or foreign commerce” and “knowingly fail[ing] to register or update a registration,” see 18 U.S.C. § 2250(a)(2)(b), and concluding that the statute is an unconstitutional exercise of the Commerce Clause).

The Supreme Court recently avoided the issue in a case involving SORNA. See supra note 40. The Seventh Circuit opinion below upheld the statute as analogous to 18 U.S.C. § 922(g)(1), which punishes felon possession of guns that have crossed state lines. *United States v. Dixon*, 551 F.3d 578, 582 (7th Cir. 2008). But “the analogy

To uphold Section 2423(c) on a channels-of-commerce theory therefore is a radical move, and would mean that any time a U.S. citizen or permanent resident travels in foreign commerce, every subsequent act by that individual is within Congress's regulatory authority.²⁶¹ Such a channels rationale not only eviscerates the concept of a government of limited and enumerated powers at home (the individual who travels abroad would always be subject to regulation for acts abroad upon return),²⁶² but also endows Congress with a virtually unlimited police power over U.S. persons inside the territories of other countries, even if those persons engage in conduct allowed or even compelled by foreign law. If this sort of complete and total regulatory power in the domestic context could obliterate the distinction between federal and state, in the international context it could obliterate the distinction between the United States and foreign nations in important respects. It would grant Congress the equivalent of a "plenary [global] police power"²⁶³ of unlimited subject matter jurisdiction over U.S. citizens and residents anywhere in the world²⁶⁴ and run directly counter to the textual, structural and historical evidence that Congress has less—not

breaks down and actually favors the defendant's position . . . [because] [t]he crime of felony possession puts the emphasis on an economic good, a gun, traveling across state lines and expressly provides that it is insufficient for a person to merely travel across state lines to trigger Commerce Clause jurisdiction." Yung, *supra* note 252, at 417. The analogy also leads directly to the highly doubtful proposition, under current Supreme Court jurisprudence, that by attaching the words "travel in interstate or foreign commerce" to a statute, Congress can regulate anything done by anyone who has ever crossed state lines. The Seventh Circuit also analogized to the Mann Act to show that Congress can regulate "movement of a person as distinct from a thing across state lines." *Dixon*, 551 F.3d at 583. But that too is inapposite because the Mann Act explicitly requires improper intent during the travel. See 18 U.S.C. § 2421 (2006).

²⁶¹ See *United States v. Clark*, 435 F.3d 1100, 1120 (9th Cir. 2006) (Ferguson, J., dissenting).

²⁶² See, e.g., *United States v. Bianchi*, No. 06-19, 2007 WL 1521123, at *1-2 (E.D. Pa. May 22, 2007) (taking defendant into custody for various PROTECT Act offenses, including a violation of § 2423(c), arising out of travels in eastern Europe).

²⁶³ *United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.").

²⁶⁴ See *Clark*, 435 F.3d at 1120 (Ferguson, J., dissenting) (warning that the majority's channels of commerce reasoning could not be correct because "the Commerce Clause will have been converted into a general grant of police power"); cf. *Lopez*, 514 U.S. at 566.

more—power to impose U.S. law inside foreign nations than inside the several states under the Commerce Clause.

Yet lower courts have mistakenly upheld Section 2423(c) on a foreign-channels theory. To do so, courts have seized upon the familiar rationale that “Congress possesses broader power to regulate foreign commerce than interstate commerce.”²⁶⁵ But none of the Supreme Court decisions invoked for this rationale involve legislation of extraterritorial operation which purports to regulate conduct inside foreign nations. Instead, the cases cited, like *Japan Line*²⁶⁶ and *Board of Trustees of the University of Illinois*,²⁶⁷ all deal with the much different question of federal power inside the several U.S. states.²⁶⁸

Thus to rely on the Supreme Court’s statement—as some lower courts have done—that “the principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce,”²⁶⁹ is a nonstarter when it comes to the extraterritorial reach of Section 2423(c). While this type of statement might be relevant if the question were about the scope of Congress’s foreign commerce power to impose federal law inside the U.S. states, that is simply not the relevant factual or legal question when evaluating the quite different power to impose federal law inside foreign nations. By unreflectively plucking statements from the inward-looking context, in which Congress has a large power to override state sovereignty, and casually transposing them to the outward-looking context, in which Congress has a limited power only to regulate commerce “with”—not “among”—foreign nations, lower courts have gotten the law backwards.

For instance, in the first prosecution under Section 2423(c),²⁷⁰ the district court in *United States v. Clark* upheld the statute’s application to a U.S. citizen for conduct in Cambodia on a channels-of-

²⁶⁵ *United States v. Clark*, 315 F. Supp. 2d 1127, 1133, 1135 (W.D. Wash. 2004); see also *Clark*, 435 F.3d at 1116–17 (agreeing with the district court’s channels analysis).

²⁶⁶ 441 U.S. 434, 448 (1979).

²⁶⁷ 289 U.S. 48, 57 (1933).

²⁶⁸ *Supra* notes 266–67.

²⁶⁹ *United States v. Martinez*, 599 F. Supp. 2d 784, 805 (W.D. Tex. 2009) (quoting *Bd. of Trustees of the Univ. of Ill. v. United States*, 289 U.S. 48, 57 (1933)); *United States v. Bianchi*, No. 06-19, 2007 WL 1521123, at *4 (E.D. Pa. May 22, 2007) (quoting *Univ. of Ill.*, 289 U.S. at 57).

²⁷⁰ *Clark*, 435 F.3d at 1104 n.3.

foreign-commerce theory.²⁷¹ The court noted the absence of federalism and state sovereignty concerns, and from there reasoned that Congress had larger powers to project U.S. law abroad since “the Supreme Court’s principal motivating factor for the . . . injection of renewed vitality in Commerce Clause limitations is not present here”;²⁷² that is, “there is not the counter veiling concern of a federal invasion of the general police power of the states.”²⁷³ Never mind the counter veiling concern of invading the general police power of *foreign nations!*—a concern that constitutional text, structure and history all suggest limits Congress’s commerce power vis-à-vis foreign nations more than its power vis-à-vis the states.²⁷⁴ Other courts have fallen into the same trap, upholding Section 2423(c) on the rationale that, since there are no domestic state sovereignty concerns limiting Congress in the foreign commerce context, all of Congress’s foreign commerce powers must be “broad and plenary,”²⁷⁵ while completely ignoring other sovereignty concerns evident in the Clause which limit power to legislate inside foreign nations; namely, the sovereignty concerns of those nations.

Section 2423(c) is therefore not a regulation of “channels of foreign commerce with the United States.” Rather, it attempts to hook illicit local conduct abroad to foreign travel in order to justify its own constitutionality. Whether that local foreign conduct falls within Congress’s foreign commerce power on some other commerce theory, like the “substantially affects” prong of the three-category framework, will be addressed below.²⁷⁶ But to uphold Section 2423(c) on a *channels* theory would be a radical move: it would grant Congress plenary global power over any U.S. citizen or resi-

²⁷¹ United States v. Clark, 315 F. Supp. 2d 1127, 1136 (W.D. Wash. 2004).

²⁷² Id. at 1135.

²⁷³ Id. at 1136 (quoting United States v. Bredimus, 352 F.3d 200, 208 n.10 (5th Cir. 2003)).

²⁷⁴ Although the Ninth Circuit upheld the constitutionality of § 2423(c) on other grounds, to be discussed infra Subsection II.B.3.b, it approved as a possible alternative ground the district court’s channels-of-foreign-commerce rationale. See *Clark*, 435 F.3d at 1116.

²⁷⁵ See United States v. Bianchi, No. 06-19, 2007 WL 1521123, at *4–5 (E.D. Pa. May 22, 2007) (explaining that “Congress’s authority under the Foreign Commerce Clause is broad. . . . [T]he principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.”) (quoting Bd. of Trustees of Univ. of Ill. v. United States, 289 U.S. 48, 57, 53 (1933)).

²⁷⁶ See infra Subsection II.B.3.

dent who has ever traveled in foreign commerce. It also contradicts strong textual, structural, and historical evidence that Congress has less—not more—power to impose U.S. law inside foreign nations than inside the several states under the Commerce Clause. Indeed, the only reason courts have upheld Section 2423(c) on a channels theory is that they have carelessly plucked Supreme Court statements about Congress’s power to regulate inside the states under the Foreign Commerce Clause and mistakenly applied these statements to Congress’s power to regulate inside foreign nations. Through this misguided reasoning, these courts have conferred something more than the power to regulate commerce “with foreign Nations.” In fact, they have conferred something even more than the power to regulate commerce “among foreign Nations,” since, according to these courts, Congress has more power to regulate inside foreign nations than inside the states. The text of the Foreign Commerce Clause says otherwise.

2. Instrumentalities of Foreign Commerce with the United States

As with channels of foreign commerce, for Congress to regulate instrumentalities of foreign commerce or persons or things therein, those instrumentalities must have a constitutionally adequate U.S. nexus. Congress also may not more extensively regulate them than it may regulate instrumentalities of interstate commerce. The Supreme Court has given two examples of statutes that regulate instrumentalities of commerce, both of which by their terms extend to instrumentalities of foreign commerce: 18 U.S.C. § 32, known as the “Aircraft Sabotage Act,”²⁷⁷ which prohibits destruction of aircraft in interstate or foreign commerce, and 18 U.S.C. § 659, which prohibits theft from shipments in interstate or foreign commerce.²⁷⁸ Other important instrumentalities of foreign commerce include the

²⁷⁷ Pub. L. No. 98-473, § 2011, 98 Stat. 2187 (codified at 18 U.S.C. § 32 (2006)); see also *United States v. Yunis (Yunis I)*, 681 F. Supp. 896, 905 (D.D.C. 1988).

²⁷⁸ *United States v. Lopez*, 514 U.S. 549, 558 (1995) (citing *Perez v. United States*, 402 U.S. 146, 150 (1971)).

Internet²⁷⁹ and the securities markets.²⁸⁰

While Section 659 has been applied to thefts from foreign shipments traveling through U.S. territory,²⁸¹ the statute apparently has not been extended to activity abroad. Section 32, however, has. And its extraterritorial application has raised exactly the sort of questions about Congress's foreign commerce power this Article sets out to answer. It also provides an actual case example of how the minimum triggering facts inquiry would work.

The Aircraft Sabotage Act. The Supreme Court's description of 18 U.S.C. § 32 as a statute regulating instrumentalities of commerce turns out to be only partially correct when the legislation concerns aircraft outside the United States. Section 32 outlaws two main categories of offenses. Subsection (a) proscribes a variety of conduct targeting "aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in

²⁷⁹ See *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (finding the Internet is an instrumentality of commerce); *United States v. MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006) (same); *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) (same). Federal law extends explicitly to computers in foreign commerce. Regulations against fraud and related activity in connection with computers protect computers "used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce," 18 U.S.C. § 1030(e)(2)(B) (2006), and the federal prohibition on the dissemination of child pornography criminalizes sending and receiving child pornography through "any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer," 18 U.S.C. §§ 2252A(a)(1), (2)(B) (2006); cf. *United States v. Ivanov*, 175 F. Supp. 2d 367, 368, 373-75 (D. Conn. 2001) (applying as a statutory matter 18 U.S.C. §§ 1951, 1030, 1029 to defendant for conduct committed while he was physically present in Russia but targeting computers in the United States).

²⁸⁰ See, e.g., Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (2006) (prohibiting the use of "[m]anipulative and deceptive devices" "directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange"); Securities and Exchange Commission Rule, 17 C.F.R. § 240.10b-5 (2009) (prohibiting the "[e]mployment of manipulative and deceptive devices" "directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange").

²⁸¹ See, e.g., *United States v. Kim*, 105 F.3d 1579, 1580 (9th Cir. 1997); *United States v. Gimmelstob*, 475 F.2d 157, 159 (3d Cir. 1973); *United States v. Augello*, 452 F.2d 1135, 1136 (2d Cir. 1971); *Sterling v. United States*, 333 F.2d 443, 444 (9th Cir. 1964); *United States v. Wilson*, 160 F.2d 745, 745 (7th Cir. 1947) (conviction under predecessor statute); *United States v. Werner*, 160 F.2d 438, 439 (2d Cir. 1947) (same).

interstate, overseas, or foreign air commerce.”²⁸² As the statutory language indicates, it relies on Congress’s foreign commerce power for its extraterritorial reach.²⁸³ Subsection (b), on the other hand, proscribes conduct targeting any “civil aircraft registered in a country other than the United States.”²⁸⁴ This provision does not rely on the Commerce Clause, but instead implements U.S. obligations under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,²⁸⁵ to which the United States is a party.²⁸⁶ Although Sections 32(a) and 32(b) regulate similar conduct, Section 32(a) prohibits a seemingly broader and certainly more detailed range of activity,²⁸⁷ while Section 32(b) largely tracks the offense definition in the Montreal Convention, and is limited to acts of violence against individuals on board aircraft,²⁸⁸ destroying aircraft,²⁸⁹ placing explosive devices on aircraft,²⁹⁰ and attempting or conspiring to do the same.²⁹¹

The district court’s decision in *United States v. Yunis*²⁹² remains one of the more thorough analyses of the extraterritorial reach of the Act and, unlike other recent judicial treatments of 18 U.S.C. § 32’s application abroad,²⁹³ squarely addresses the foreign com-

²⁸² 18 U.S.C. § 32(a)(1) (2006); see also *id.* § 32(a)(2) (proscribing conduct targeting “any such aircraft”); *id.* § 32(a)(3) (same); *id.* § 32(a)(4) (same); *id.* § 32(a)(5) (same); *id.* § 32(a)(6) (same); *id.* § 32(a)(7) (same).

²⁸³ *United States v. Yunis (Yunis I)*, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988).

²⁸⁴ 18 U.S.C. § 32(b)(1), (2), (3) (2006).

²⁸⁵ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 1, 23 Sept. 1971, 24 U.S.T. 565, 974 U.N.T.S. 178 [hereinafter Montreal Convention]. See S. Rep. No. 98-619, at 3682 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3682; see also *United States v. Yousef*, 327 F.3d 56, 89–90 (2d Cir. 2003) (“§ 32(b) . . . was adopted pursuant to the United States’ obligations under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.”) (citation omitted).

²⁸⁶ Office of the Legal Adviser, U.S. Dep’t of State, Treaties in Force 320 (Jan. 1, 2009), available at <http://www.state.gov/documents/organization/123747.pdf> [hereinafter *Treaties in Force*].

²⁸⁷ See 18 U.S.C. § 32(a) (2006) (detailing eight categories of prohibited activity).

²⁸⁸ *Id.* § 32(b)(1).

²⁸⁹ *Id.* § 32(b)(2).

²⁹⁰ *Id.* § 32(b)(3).

²⁹¹ *Id.* § 32(b)(4).

²⁹² 681 F. Supp. 896 (D.D.C. 1988).

²⁹³ See *United States v. Yousef*, 327 F.3d 56, 86–90 (2d Cir. 2003) (finding as a statutory matter that § 32(a) applied to an attempt and conspiracy to bomb twelve U.S. flag aircraft, eleven of which were carrying passengers destined for the United States,

merce rationale underpinning Section 32(a).²⁹⁴ Yunis, a Lebanese citizen, hijacked a Jordanian commercial airliner which happened to have three U.S. citizens aboard in Beirut, Lebanon.²⁹⁵ He then flew the plane around the Mediterranean Sea for approximately thirty hours in an attempt to land in Tunisia, where an Arab League conference was underway.²⁹⁶ Unable to land in Tunisia (or anywhere else), Yunis eventually returned to Beirut, held an impromptu press conference on the runway, and blew up the plane²⁹⁷ (the passengers had already disembarked and nobody was harmed).²⁹⁸ The U.S. government indicted Yunis, initially charging him with, among other things, violations of Section 32(a).²⁹⁹ After being lured into international waters and captured by U.S. agents in “Operation Goldenrod,”³⁰⁰ a superseding indictment also charged him with violations of Section 32(b).³⁰¹

Yunis moved to dismiss all charges against him “[b]ased on the absence of any nexus to United States territory”³⁰² since the plane never landed on or flew over American airspace, and its flight path had been limited to an area around the Mediterranean Sea.³⁰³ Specifically, Yunis argued that the United States had “[no] jurisdiction to prosecute a foreign national for crimes committed in foreign airspace and on foreign soil”³⁰⁴ because “Congress neither had the

and that § 32(b) applied to an attack on a non-U.S. flag aircraft traveling from the Philippines to Japan).

²⁹⁴ *Yunis I*, 681 F. Supp. at 907–09.

²⁹⁵ *Id.* at 898–99.

²⁹⁶ *Id.* at 899; *United States v. Yunis (Yunis II)*, 924 F.2d 1086, 1089 (D.C. Cir. 1991).

²⁹⁷ *Yunis I*, 681 F. Supp. at 899.

²⁹⁸ *Yunis II*, 924 F.2d at 1089–90.

²⁹⁹ *Yunis I*, 681 F. Supp. at 898.

³⁰⁰ *Yunis II*, 924 F.2d at 1089.

³⁰¹ *Yunis I*, 681 F. Supp. at 898. The reason Yunis was not charged initially under § 32(b) may have been that the government felt he needed to be “found in” the United States in order to assert jurisdiction over him, see 18 U.S.C. § 32(b) (“There is jurisdiction over an offense under this subsection if . . . an offender is afterwards found in the United States.”), see also *Yunis I*, 681 F. Supp. at 905–07, a condition satisfied by taking him into U.S. custody and transporting him back to the United States, see *Yunis II*, 924 F.2d at 1090. However, as the D.C. Circuit explained on appeal, § 32(b) applied to his conduct even if he was not found in the United States, since there were U.S. nationals aboard the hijacked flight. See *id.* at 1090; see also 18 U.S.C. § 32(b) (2006).

³⁰² *Yunis I*, 681 F. Supp. at 899.

³⁰³ *Id.*

³⁰⁴ *Id.*

power nor the intention to authorize jurisdiction over [his] offenses . . . committed ‘halfway around the world.’”³⁰⁵

The court upheld application of Section 32(b) as implementing legislation under the Montreal Convention, which by its terms applied extraterritorially to foreign air piracy.³⁰⁶ The court found that Section 32(a), however, did not apply to Yunis’s conduct. The court resolved the Section 32(a) question primarily as a matter of statutory construction, concluding that Congress did not intend it to apply to flights that were not “between” the United States and another location.³⁰⁷

In the course of its discussion, however, the court also considered, and rejected, the government’s constitutional contention that the Foreign Commerce Clause authorized Section 32(a)’s application to the flight.³⁰⁸ The government argued that the Clause licensed regulation of “global air commerce” writ large, such that Congress could “regulate air commerce broadly and impose liability against alleged perpetrators of aircraft piracy irregardless [sic] of where the offense took place or which country operated the aircraft.”³⁰⁹ In response, the court explained—in line with this Article’s argument—that

[c]ertainly Congress has plenary power to regulate the flow of commerce within the boundaries of United States territory. But it is not empowered to regulate foreign commerce which has no connection to the United States. Unlike the states, foreign nations have never submitted to the sovereignty of the United

³⁰⁵ Id. at 903.

³⁰⁶ Id. at 905–07.

³⁰⁷ Because § 32(a) covers only aircraft in “overseas or foreign air commerce,” *Yunis I*, 681 F. Supp. at 907–09, and that term was defined by reference to the Federal Aviation Act of 1958, 49 U.S.C. §1301 (1958), amended by 49 U.S.C. § 40102(a)(22) (2006), which requires the foreign commerce to be “between a place in the United States” and another location, the court found that Yunis’s conduct fell outside the scope of the statute. *Yunis I*, 681 F. Supp. at 907–08 (quoting 49 U.S.C. § 1301(23) (2006)). Although the Federal Aviation Act of 1958 was repealed by the recodification of Title 49, United States Code, most of the language of this act was retained. See Pub. L. No. 103–272, 108 Stat. 745 (1994).

³⁰⁸ Id. at 907 n.24. The court indicated that § 32(a)’s extraterritorial reach could be justified under Congress’s Article I, Section 8 power to define and punish offences against the law of nations. Id.

³⁰⁹ Id. at 907 & n.24.

States government nor ceded their regulatory powers to the United States.³¹⁰

As Section A demonstrated, constitutional text, structure and history support this reading of the Clause.³¹¹

Yet the concrete question remains: what “connection to the United States” is enough to constitutionally qualify an aircraft as an instrumentality of foreign commerce “with” the United States? Suppose Congress revised Section 32(a) to define “foreign air commerce” to include “any flight with a passenger departed from the United States.” Could such a law, with such a U.S. nexus built right in—however attenuated it might turn out to be on the facts of a case—constitutionally apply to, say, Yunis under the Foreign Commerce Clause? The district court did not seem to think so, on the theory, correct in my view, that there must be a U.S. connection. But the relevant factual inquiry stands: what connection counts?

The government had in fact argued for the interpretation above in seeking to apply Section 32(a) to Yunis on a foreign commerce rationale. According to the government, “If the passenger . . . *ever* landed or departed from American territory then . . . any flight taken by such a passenger would be considered in ‘foreign air commerce.’”³¹² And thus, “[b]ecause the American nationals [on the hijacked flight] must have departed from the United States some time in the past . . . any flight they boarded in the future . . . would be considered in the stream of ‘foreign air commerce’”³¹³ This is a big jurisdictional hook: the fact that a passenger on an instrumentality of otherwise purely foreign commerce had, at some unidentified prior point, departed from the United States is alone enough to bring that entire instrumentality within Congress’s extensive regulatory power over foreign commerce.

Though ruling on the statutory question, the court’s rejection of the government’s interpretation, which the court labeled “extreme,”³¹⁴ is instructive: “By focusing solely on the passengers and

³¹⁰ Id. at 907 n.24.

³¹¹ See *supra* Section II.A.

³¹² *Yunis I*, 681 F. Supp. at 908.

³¹³ Id.

³¹⁴ Id.

their connection to United States soil no matter how remote, the government's definition makes almost every aircraft subject to regulation by the United States."³¹⁵ As a result, "[a]irline companies operating exclusively overseas which wanted to avoid such regulation would be forced to research the travel history of every potential passenger and then exclude any person who had ever traveled to the United States."³¹⁶ The court also noted that the Department of Transportation had rejected this "flow of commerce" interpretation because the results would be "absurd."³¹⁷

The relevant inquiry, according to the district court in *Yunis I* and the D.C. Circuit, was more contextual: "[L]ook at the particular flight and determine 'whether there was a significant break in the journey' between its connection to the United States and points elsewhere."³¹⁸ Because the flight *Yunis* hijacked had no connection with U.S. territory, and the government had not shown that the U.S. passengers were using it as a connection either to or from the United States, Section 32(a) did not apply.³¹⁹

The minimum triggering facts inquiry outlined at the start of the channels section also provides a contextual, fact-based approach—but one that goes to the *constitutional* question of what type or degree of nexus suffices to connect an instrumentality of foreign commerce "with" the United States under the Foreign Commerce Clause. It has the added benefit of authorizing a large regulatory power without stretching the text of the Clause beyond its breaking point. Again, under the inquiry, if the minimum facts purporting to establish the U.S. nexus would portend a global regulatory power over the channel or instrumentality, the nexus is presumptively insufficient. To hold otherwise would contradict an inherent limit in the Clause by granting Congress global authority over every such channel or instrumentality among and within foreign nations.

Consider the alternatives. First, as the district court in *Yunis* observed, if departure of a passenger from the United States at some previous point could alone qualify an aircraft as being "in foreign commerce with the United States" virtually every aircraft every-

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 908–09.

³¹⁸ *Id.* (quoting *Japan Air Lines Co. v. Dole*, 801 F.2d 483, 487 (D.C. Cir. 1986)).

³¹⁹ *Id.*

where could be subject to complete U.S. regulation.³²⁰ Such a result would not only be “absurd,” to borrow the Department of Transportation’s term, but would also defy the limits the Constitution places on the foreign commerce power by de facto expanding Congress’s authority to fully regulate all foreign aircraft in flight around the world. On the other hand, Congress does have power to regulate commerce “with foreign Nations,”³²¹ which undoubtedly includes instrumentalities outside, but coming to or leaving from, the United States. Yet to limit the Clause only to flights actually arriving at or departing from U.S. territory seems equally absurd, and fails to capture the complex reality of international travel.³²²

The Foreign Commerce Clause need not be an all-or-nothing proposition. The minimum triggering facts inquiry offers a principled guide for determining whether the facts establish a constitutionally minimum nexus. It pulls up short of the government’s all-encompassing theory so as not to rope in potentially every foreign aircraft around the world, while bringing within the Clause’s coverage aircraft having a real and discernable U.S. connection. It is, ultimately, a highly fact-based inquiry focused on both the character of the nexus and what blessing that nexus as constitutionally sufficient would mean for Congress’s power under the Clause. Applied to the facts of *Yunis*, it suggests that the court was right to reject the Foreign Commerce Clause as the basis for applying U.S. law to a Jordanian flight traveling around the Mediterranean Sea which happened to have three U.S. passengers aboard.³²³ Were the

³²⁰ See *Yunis I*, 681 F. Supp. at 908; see also infra notes 324–25 and accompanying text.

³²¹ U.S. Const. art. I, § 8, cl. 3.

³²² For instance, flights leaving from the United States often must stop over in foreign locations before continuing to their final destination abroad. See *Japan Air Lines Co.*, 801 F.2d at 487 (summarizing *Air Tungaru-UTA, Wet-Lease Exemption*, 90 CAB 606 (1981)).

³²³ Other courts have reached similar conclusions without specifically addressing the Foreign Commerce Clause question. In *United States v. Cafiero*, 211 F. Supp. 2d 328, 333–34 (D. Mass. 2002), the court held that U.S. law did not apply to an Italian national flying from Mexico to Italy on a foreign flag aircraft that was forced down at Boston’s Logan International Airport. The court noted that while U.S. drug laws may have extraterritorial reach, “that is not to say that the legislative history of the statute supports a finding that Congress intended to reach—or had the authority to do so—the international drug dealer who does not willingly enter the United States or intend to distribute his wares in this country.” *Id.* at 332 n.7 (emphasis added).

Clause the constitutional justification for applying U.S. law in that case, that same aircraft and all like it around the world could also be made subject to, for example, the full panoply of Federal Aviation Act (“FAA”) regulations³²⁴—a result the text, structure, and history of the Foreign Commerce Clause discourage.³²⁵

³²⁴ Pub. L. No. 85-726, 72 Stat. 731 (1958). For example, a foreign air carrier traveling entirely inside a foreign nation or between foreign destinations could need a certificate or permit from the FAA Board to operate, and could be subject to, among other things, Board-approved labor, design, manufacturing, construction, and performance standards as well as extensive Board inspection, accounting, recording, registration, and reporting requirements along with restrictions on business combinations, risk-pooling, and stock ownership. See §§ 401–605. Interestingly, the FAA itself seems to suggest that to extend its regulations abroad, there must be some form of international agreement. See § 1110 (“[T]he President . . . may . . . extend the application of this Act to any areas of land or water outside of the United States and the overlying airspace thereof in which the Federal Government of the United States, under international treaty, agreement or other lawful arrangement has the necessary legal authority to take such action.”).

³²⁵ The inquiry also suggests guidelines for extraterritorial Internet and securities regulation. For instance, it suggests that Congress’s foreign commerce powers would not, solely by virtue of the fact that the Internet is “an international network of interconnected computers,” generally reach foreigners operating in foreign locations and whose conduct targets and affects only foreign computers. See *Reno v. ACLU*, 521 U.S. 844, 849 (1997); see also cases cited *supra* note 279. The same holds for the securities laws: Congress would not be able to use the Foreign Commerce Clause to generally regulate purely foreign transactions on foreign markets. These results should not be all that surprising even though domestically, Congress may regulate *intrastate* conduct solely by virtue of the fact that the conduct involves the Internet or securities markets, see *supra* notes 279–80, given the difference between Congress’s domestic regulatory power “among” the states versus its regulatory power “with” foreign nations.

Requiring a particularized nexus for the exercise of extraterritorial jurisdiction is nothing new. Courts have refused to hold that the mere accessibility of a webpage is alone enough to subject defendants to extraterritorial personal jurisdiction, see, e.g., *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), and have instead developed fact-driven tests that measure the “nature and quality” of the contacts, *id.* at 1127 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)), thereby avoiding “the conclusion that anyone who puts up a website is amenable to suit anywhere on the planet.” Mark A. Lemley, *Place and Cyberspace*, 91 Cal. L. Rev. 521, 529 (2003) (“While a few early cases took that position, most courts quickly recognized its failings.”). Similarly, there must be a concrete nexus to the United States for U.S. securities laws to apply as a matter of statutory construction, see, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, No. 08-1191, 2010 U.S. LEXIS 5257, at *45 (U.S. June 24, 2010) (“Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”), rendering the constitutional question largely academic at the present moment.

Somewhat perversely, the extreme facts of *Yunis* may not fully capture what is truly at stake in the constitutional discussion about the Foreign Commerce Clause's reach. Few would argue with the United States prosecuting foreign-plane hijackers and bombers in U.S. custody. And indeed, the constitutional clash in *Yunis* over the reach of the Foreign Commerce Clause was not dispositive of whether the United States could ultimately prosecute him. In the end, *Yunis* was convicted under Section 32(b) for essentially the same conduct he was charged with under Section 32(a).³²⁶ But although the two statutes look similar on the surface, their different constitutional justifications raise crucial questions about the Foreign Commerce Clause's extraterritorial scope. This is what the foreign commerce clash in *Yunis* was really about: the constitutional *justification* for applying U.S. law to *Yunis*, and, even more importantly, what powers that justification portends.

Because Section 32(b)'s constitutional justification is implementing a treaty—the Montreal Convention—it can only cover a certain subject matter of conduct; that is, conduct “necessary and proper”³²⁷ to implement U.S. obligations under that treaty, here conduct related to hijacking and bombing aircraft.³²⁸ The Necessary and Proper Clause might offer some prescriptive flexibility,³²⁹ but

³²⁶ United States v. *Yunis* (*Yunis I*), 681 F. Supp. 896, 905–09 (D.D.C. 1988).

³²⁷ U.S. Const. art. I, § 8, cl. 18.

³²⁸ For a discussion of implementing legislation providing extraterritorial jurisdiction, see Colangelo, *supra* note 14, at 151–54.

³²⁹ According to Marshall's now-famous test in *McCulloch v. Maryland*: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” 17 U.S. (4 Wheat.) 316, 421 (1819). Courts have viewed this “plainly adapted” standard to “require[] that the effectuating legislation bear a rational relationship to a permissible constitutional end.” United States v. Wang Kun Lue, 134 F.3d 79, 84 (2d Cir. 1998); see also Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex. L. Rev. 795, 820 (1996). Congress may even regulate conduct that otherwise falls outside of its enumerated powers: “If the treaty is valid there can be no dispute about the validity of [a] statute [passed] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.” *Missouri v. Holland*, 252 U.S. 416, 432 (1920). As a matter of practice, U.S. implementing legislation tends to track faithfully the definitions of offenses as they are defined by the treaty the legislation implements. See Colangelo, *supra* note 14, at app. (comparing treaty provisions with U.S. code provisions).

there must always be a “telic” relationship,³³⁰ or means-ends fit, between the implementing legislation and the valid governmental objective articulated in the treaty.³³¹ The conduct is also, by virtue of the treaty, necessarily regulated in much the same way by foreign nations.³³² And these nations have expressly acceded, through the treaty’s jurisdictional provisions, to the power of the United States to apply that regulation.³³³ One might even say that the very purpose of a treaty like the Montreal Convention is to achieve international consensus on the substance of the regulation and to “create a comprehensive adjudicative jurisdiction among the states parties to the treaty” to apply that regulation in individual cases.³³⁴

By contrast, once triggered, the Foreign Commerce Clause encompasses an extensive regulatory power over a wide subject matter of commercial activity. And Congress unilaterally may exercise this extensive power quite apart from any expectation or agreement with foreign nations. Thus, while implementing legislation like Section 32(b) is by nature designed to avoid problems of sovereign interference because foreign nations will have agreed in advance upon the treaty’s substantive rule of decision and the jurisdiction of all states parties to apply it,³³⁵ the potential for sovereign interference when Congress exercises its foreign commerce power is large indeed.

The chief function of the nexus requirement is to ensure a constitutionally adequate connection to the United States in order to justify triggering this extensive regulatory power. The text of the Foreign Commerce Clause, as well as constitutional structure and history, demand it. The second-order challenge is discerning a principled way to measure that constitutionally minimum nexus so that each new case does not reduce to a tautology on its own facts. For the reasons indicated above, the minimum triggering facts in-

³³⁰ The literature on the Necessary and Proper Clause uses the term “telic” consistently, evidently used first by David Engdahl, see David E. Engdahl, *Constitutional Federalism in a Nutshell* 20 (2d ed. 1987), to describe the means-ends fit under the Clause.

³³¹ See Colangelo, *supra* note 14, at 151–54 (discussing applicability of this test to extraterritorial scope of implementing legislation).

³³² See Montreal Convention, *supra* note 285, arts. 1, 3.

³³³ *Id.* art. 5.

³³⁴ Colangelo, *supra* note 14, at 183.

³³⁵ *Id.*

quiry is a good candidate: it preserves something not enumerated in fidelity to the text of the Clause by guarding against a global regulatory power; it allows needed flexibility and encourages fact-specific determinations—the hallmark of any worthwhile jurisdictional test; and it helpfully frames the relevant constitutional inquiry for courts going forward.

3. Activity That “Substantially Affects” Foreign Commerce with the United States

A final loaded question in light of recent U.S. regulatory and criminal law enforcement actions at home involves Congress’s ability to project U.S. law to activity abroad that “substantially affects” commerce with the United States.³³⁶ As with other categories of foreign activity subject to U.S. regulation under the Foreign Commerce Clause, there must be a U.S. nexus and the character of that nexus becomes the determinative question in fact for the scope of extraterritorial regulation. In addition, more for this commerce rationale than for any other discussed so far, the foreign sovereignty concern has real bite because of the difference between the powers to regulate commerce “with” foreign nations versus “among” the several states.³³⁷ This textual difference deprives Congress of some of the more sweeping regulatory powers abroad that it enjoys at home under the Necessary and Proper Clause: namely, the power to reach otherwise local activity through the unilateral imposition of “comprehensive,”³³⁸ “general,”³³⁹ or “closed”³⁴⁰ regulatory schemes in order to effectively regulate commerce “among” members of the system of states.³⁴¹

*Gonzales v. Raich*³⁴² illustrates the point at issue. There, because the CSA was what the Court variously described as a “general

³³⁶ See *supra* Subsection II.B.1.

³³⁷ U.S. Const. art. I, § 8, cl. 3.

³³⁸ *Gonzales v. Raich*, 545 U.S. 1, 10, 12, 23 (2005).

³³⁹ *Id.* at 17.

³⁴⁰ *Id.* at 13.

³⁴¹ U.S. Const. art. I, § 8, cl. 3. Justice Scalia distinguished “this power ‘to make . . . regulation effective’” from the power to regulate activities that substantially affect, *Raich*, 545 U.S. at 37 (Scalia, J., concurring); but because the majority appears to treat them as the same kind of regulation, I will too.

³⁴² *Id.* at 9.

regulatory scheme,”³⁴³ “closed regulatory system,”³⁴⁴ “comprehensive regime,”³⁴⁵ and “comprehensive framework,”³⁴⁶ for regulating the interstate market in drugs, application of the CSA to homegrown, medical-use marijuana not for interstate distribution was deemed constitutional as “necessary and proper for carrying into Execution” Congress’s interstate commerce power.³⁴⁷ The Court explained that since “the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety,”³⁴⁸ production for purely intrastate use nonetheless “has a substantial effect on supply and demand in the national market.”³⁴⁹

Our question is whether this reasoning about the *interstate* market could extend with equal force to the *international* market. Could Congress, pursuant to the Foreign Commerce Clause, reach into the interior of a foreign *nation* to prohibit local production of marijuana for local use—perhaps a nation where, like California in *Raich*, the particular use of marijuana is legal³⁵⁰—simply because like homegrown marijuana in California, homegrown marijuana in, say, the Netherlands³⁵¹ “tends to frustrate the federal interest in eliminating commercial transactions in the inter[*national*] market in their entirety”?³⁵² If not, why not? The CSA certainly is not limited to the national market in drugs,³⁵³ as numerous federal prose-

³⁴³ Id. at 17.

³⁴⁴ Id. at 13.

³⁴⁵ Id. at 12.

³⁴⁶ Id. at 24.

³⁴⁷ Id. at 5, 24.

³⁴⁸ Id. at 18.

³⁴⁹ Id. at 19.

³⁵⁰ Id. at 5–6.

³⁵¹ See Wet van 13 juli 2002 tot wijziging van de Opiumwet (Opium Law), Staatsblad van het Koninkrijk der Nederlanden [Stb.] 2002, 520 (Netherlands), available at <https://zoek.officielebekendmakingen.nl/stb-2002-520.pdf> (unofficial translation available at http://www.cannabis-med.org/dutch/Regulations/Opium_Act.pdf).

³⁵² Cf. *Raich*, 545 U.S. at 19.

³⁵³ Some of the provisions explicitly authorize extraterritorial jurisdiction, such as the prohibition on unlawful importation. See, e.g., 21 U.S.C. § 959(c) (2006) (“This section is intended to reach acts . . . committed outside the territorial jurisdiction of the United States.”). Courts have also consistently construed the Act’s general domestic prohibitions to apply extraterritorially. See *United States v. Larsen*, 952 F.2d 1099, 1099–101 (9th Cir. 1991) (holding that 21 U.S.C. § 841(a)(1), which prohibits “knowingly or intentionally . . . manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense, a controlled sub-

cutions for extraterritorial conduct under the Act can attest,³⁵⁴ and as the Court itself acknowledged at various points in *Raich*.³⁵⁵ In fact, courts have uniformly held that a specific provision of the Act at issue in *Raich*,³⁵⁶ 21 U.S.C. § 841(a)(1), applies to non-U.S. nationals outside the United States.³⁵⁷

Moreover, what do answers to these questions bode for the vast multitude of other activities abroad over which Congress presently claims regulatory authority at home because they “substantially affect” commerce—activities such as intrastate price-fixing,³⁵⁸ or production, labor and employment conditions?³⁵⁹ The United States has famously extended the Sherman Antitrust Act to foreign corporations acting abroad.³⁶⁰ In one high-profile case, British reinsurance companies were found liable under the Sherman Act for activities in England that, although “perfectly consistent with British law and policy,”³⁶¹ had a “substantial effect” in the United States.³⁶²

stance,” applies extraterritorially); *United States v. Wright-Barker*, 784 F.2d 161, 165–70 (3d Cir. 1986) (same); *United States v. Orozco-Prada*, 732 F.2d 1076, 1087–88 (2d Cir. 1984) (same); *United States v. Baker*, 609 F.2d 134, 138–39 (5th Cir. 1980) (same).

³⁵⁴ See cases cited *supra* note 353; see also *United States v. Mohammad-Omar*, 323 F. App’x 259, 260, 262 (4th Cir. 2009) (upholding conviction under 21 U.S.C. §§ 952(a), 959, 963, 960(b)(1)(A) (2006) and 21 U.S.C. § 846 (2006) for acts committed “entirely in foreign countries,” specifically, Afghanistan, Dubai, and Ghana); *United States v. Paktipatt*, No. 97-30205, 1999 WL 90561, at *2–3 (9th Cir. Feb. 19, 1999).

³⁵⁵ 545 U.S. at 12 (“[The CSA is] . . . a comprehensive regime [designed] to combat the *international* and interstate traffic in illicit drugs.”) (emphasis added); *id.* at 20–21 (“The submissions of the parties and the numerous *amici* all seem to agree that the national, and *international*, market for marijuana has dimensions that are fully comparable to those defining the class of activities regulated by the Secretary [of Agriculture] [in *Wickard v. Filburn*].”) (emphasis added). The Court also quoted congressional findings that, *inter alia*, “[a] major portion of the traffic in controlled substances flows through interstate and foreign commerce.” *Id.* at 13 n.20.

³⁵⁶ *Id.* at 13.

³⁵⁷ See *Wright-Barker*, 784 F.2d at 165–70 (3d Cir. 1986); *Orozco-Prada*, 732 F.2d at 1087–88; *Baker*, 609 F.2d 134 at 138–39.

³⁵⁸ *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 221–22, 227 (1948).

³⁵⁹ See *United States v. Darby*, 312 U.S. 100, 125–26 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 108 (1937).

³⁶⁰ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795–96 (1993).

³⁶¹ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167 (2004) (describing the Court’s holding in *Hartford Fire*); *Hartford Fire*, 509 U.S. at 798–99.

³⁶² *Hartford Fire*, 509 U.S. at 796.

The Court upheld liability construing the Sherman Act as a *statutory* matter,³⁶³ and implicitly assumed the answer to the predicate question of whether application of U.S. law to the activity was within Congress's *constitutional* power to be an uncontroversial yes.³⁶⁴ Dissenting on the statutory issue, Justice Scalia made explicit this constitutional assumption, stating

[t]here is no doubt, of course, that Congress possesses legislative jurisdiction over the acts alleged in this complaint: Congress has broad power under Article I, § 8, cl. 3, “[t]o 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*.³⁶⁵

If we can agree that there must be some U.S. nexus under the Foreign Commerce Clause, then this latter qualification, evident in other Supreme Court opinions as well,³⁶⁶ becomes crucial to the exercise of Congress's power—that is, to determining “where United States interests are affected” for purposes of the Clause.

For instance, if the United States can extend U.S. antitrust law to foreign anticompetitive behavior because of its substantial effect on U.S. commerce, why not also to foreign labor, manufacturing, production, and employment practices—all of which could have just as substantial an effect on U.S. commerce?³⁶⁷ Indeed, the Court has reasoned repeatedly by analogy from antitrust, as an early area of federal regulation over intrastate activity that substantially af-

³⁶³ See *id.* at 769–70.

³⁶⁴ *Id.* at 813–14 (Scalia, J., dissenting).

³⁶⁵ *Id.* (emphasis added).

³⁶⁶ See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963) (“Since the parties all agree that the Congress has constitutional power to apply the National Labor Relations Act to the crews working foreign-flag ships, *at least while they are in American waters*, . . . we go directly to the question whether Congress exercised that power.”) (emphasis added).

³⁶⁷ Replacing the word “national” with “international” and “interstate” with “foreign” in the following quotation might lead to such a result:

When industries organize themselves on a[n] [inter]national scale, making their relation to [foreign] commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect [foreign] commerce from the paralyzing consequences of industrial war?

Cf. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937).

fects interstate commerce,³⁶⁸ to uphold federal regulation over these other areas of intrastate activity.

Suppose Congress decides to follow that domestic regulatory trajectory in its regulation of foreign commerce. If Congress can pass a national Fair Labor Standards Act (“FLSA”) and apply it broadly to domestic wage and hour conditions,³⁶⁹ can Congress claim a similar power to pass an *international* Fair Labor Standards Act, and apply it broadly to foreign wage and hour conditions?³⁷⁰ Related questions involve “jurisdictional hook” statutes: if Congress can regulate otherwise local crime because it involves use of a

³⁶⁸ Id. at 38 (analogizing federal regulation over “activities in relation to productive industry although the industry when separately viewed is local” to “application of the Federal Anti-Trust Act . . . [which] was applied to combinations of employers engaged in productive industry”); accord *Gonzales v. Raich*, 545 U.S. 1, 16 & n.27 (2005).

³⁶⁹ See *United States v. Darby*, 312 U.S. 100, 109 (1941).

³⁷⁰ As a statutory matter, extraterritorial application of U.S. law governing labor and labor relations has been an extremely hot topic. Regarding application abroad of the Fair Labor Standards Act, see *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 389–90 (1948) (extending FLSA protections to a U.S. military base in Bermuda by reasoning that the term “possession” in the statute includes leased bases overseas), superseded by statute, Pub. L. No. 85-231, 71 Stat. 514 (1957) (codified as amended at 29 U.S.C. § 213(f) (2006)); *Priyanto v. M/S Amsterdam*, No. CV 07-3811, 2009 WL 650734, at *7–8 (C.D. Cal. Mar. 11, 2009) (holding in the absence of clear congressional intent, the overtime provision of the FLSA did not apply to work performed on foreign-flagged ships outside the United States); S. Rep. No. 85-987, *reprinted in* 1957 U.S.C.C.A.N. 1756, 1756 (stating that the FLSA was amended to “exclude from any possible coverage of the Fair Labor Standards Act work performed by employees in a workplace within a foreign country”). Regarding extraterritorial application of the National Labor Relations Act (“NLRA”), compare *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 13 (1963) (finding that the jurisdictional provisions of the NLRA did not extend to maritime operations of foreign-flag ships employing alien seamen), and *In-cres S. S. Co. v. International Maritime Workers Union*, 372 U.S. 24, 27 (1963) (same), and *Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168, 174–80 (3d Cir. 2004) (determining that Congress did not intend to apply the NLRA to employees working temporarily outside of the United States for U.S. employers), with *International Longshoremen’s Ass’n, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 199–200 (1970) (concluding that the activities of American residents employed by foreign-flag vessels to work exclusively on American docks as longshoremen and not as seamen were within the scope of the NLRA). Regarding extraterritorial application of the Labor Management Relations Act (“LMRA”), see *Benz v. Compania Naviera Hidalgo, S. A.*, 353 U.S. 138, 143–47 (1957) (declining to extend an application of the Taft-Hartley amendments to wage disputes arising on foreign vessels between nationals of other countries) and *Labor Union of Pico Korea, Ltd. v. Pico Products*, 968 F.2d 191, 195–96 (2d Cir. 1992) (holding that the LMRA did not apply to citizens and domiciliaries of South Korea, doing work in South Korea, for a South Korean company).

firearm that traveled in interstate commerce,³⁷¹ can Congress also regulate local foreign crime that involves use of a firearm that traveled in foreign commerce?³⁷²

The foregoing raises two basic and related questions for Congress's ability to regulate extraterritorially on a "substantially affects" rationale. The first is whether the same reasoning that prevails in the interstate context can apply fully to the foreign context, thereby licensing Congress with the same sweeping regulatory power abroad as it does at home. And if the answer to the first question is no, the next question is how to measure whether foreign activity "substantially affects" commerce with the United States under the Foreign Commerce Clause—a constitutional threshold that must satisfy both the nexus requirement and the foreign sovereignty concern.

a. Less Power to Regulate Inside Foreign Nations

In response to the first question, the textual difference between "among" and "with" in the Interstate and Foreign Commerce Clauses is alone enough to disrupt any smooth extension of Congress's power to regulate intrastate activity through a comprehensive scheme over a "national market"³⁷³ to a similar power to regulate foreign, intra-national activity through a comprehensive

³⁷¹ See, e.g., *Scarborough v. United States*, 431 U.S. 563, 575–78 (1977).

³⁷² Presumably, the firearm in question must have traveled not only in foreign commerce, but also in foreign commerce "with" the United States for the application of federal law to satisfy the Constitution. In *United States v. Emmanuel*, No. 06-20758-CR, 2007 WL 2002452 (S.D. Fla. July 5, 2007), the court denied the challenge of Charles Emmanuel, son of former Liberian dictator Charles Taylor, to an indictment charging Emmanuel with violations of the Torture Convention Implementation Act ("Torture Act"), 18 U.S.C. §§ 2340–2340A (2006), and use of a firearm during the commission of a violent crime under 18 U.S.C. § 924(c)(1)(A) (2006). See *Emmanuel*, 2007 WL 2002452, at *4–5, *18. The extraterritorial application of the Torture Act, however, was not based on Congress's foreign commerce powers, which the government conceded. See *Emmanuel*, 2007 WL 2002452, at *4 n.3. Instead, it was based on Congress's authority under the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, to enact legislation executing a U.S. treaty, see U.S. Const. art. II, § 2, cl. 2, namely The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988); 1465 U.N.T.S. 85. See *Emmanuel*, 2007 WL 2002452, at *6. Alternatively, it was based on the Article I, Section 8 power "[t]o define and punish . . . Offences against the Law of Nations," U.S. Const. art. I, § 8, cl. 10. See *Emmanuel*, 2007 WL 2002452, at *9.

³⁷³ *Raich*, 545 U.S. at 17.

scheme over an international market. The Interstate Commerce Clause gives Congress a broad “general regulatory”³⁷⁴ power over commerce “among the several States,”³⁷⁵ such that Congress can comprehensively regulate the “national market” in a commodity.³⁷⁶ As Marshall emphasized long ago, the word “among” signifies power to reach “into the interior” of the states.³⁷⁷ And it is now well-established that Congress can reach purely intrastate activity when “necessary and proper” to effectuate the interstate commerce power.³⁷⁸

The Court in *Raich* relied specifically on this “general regulatory” power over a “national market” to find that both in the case before it and in *Wickard v. Filburn* (a case involving local production of wheat for home consumption)³⁷⁹ “the regulation is squarely within Congress’ commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.”³⁸⁰ Thus, “failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”³⁸¹ Accordingly, in both cases, “when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce . . . among the several States.’”³⁸² As a result, “[t]hat the regulation ensnares some purely intrastate activity is of no moment.”³⁸³

³⁷⁴ *Id.*

³⁷⁵ U.S. Const. art. I, § 8, cl. 3.

³⁷⁶ *Raich*, 545 U.S. at 17. In evaluating the exercise of this power, the Court also “assum[es] that we have a single market and a unified purpose to build a stable national economy.” *Id.* at 25 n.35 (quoting *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring)).

³⁷⁷ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824).

³⁷⁸ U.S. Const. art. I, § 8, cl. 18.

³⁷⁹ *Wickard v. Filburn*, 317 U.S. 111, 123–25 (1942).

³⁸⁰ *Raich*, 545 U.S. at 19.

³⁸¹ *Id.* at 18.

³⁸² *Id.* at 22 (quoting in part U.S. Const. art. I, § 8, cl. 18, 3); see also *id.* at 38 (Scalia, J., concurring) (“[T]he power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective.”).

³⁸³ *Id.* at 22.

But the Constitution specifically does not grant Congress a general, global regulatory power over commerce “among” foreign nations. The Foreign Commerce Clause does not give Congress this same type of general regulatory power abroad that it has at home to “enact[] comprehensive legislation to regulate the inter[national] market” writ large.³⁸⁴ As a result, local foreign activities unconnected with the United States cannot “undercut the regulation of the inter[national] market in that commodity,”³⁸⁵ and are therefore outside the reach of congressional control. Marshall also long ago famously set forth the test for determining whether an Act is within Congress’s Necessary and Proper Clause powers.³⁸⁶ As part of that test, the end sought must be “within the scope of the constitution,” and the means must be “appropriate,” “plainly adapted to that end,” and must “consist with the letter and spirit of the constitution.”³⁸⁷ As this Article has now argued at length, a comprehensive global regulatory power over international markets among the nations of the world is not within the scope of the Clause. And thus, reaching purely local conduct inside foreign nations pursuant to that power is neither appropriate nor adapted to the end of regulating commerce only “with,” not “among,” those nations;³⁸⁸ indeed, it is inconsistent with the letter and spirit of that constitutional language.

There are other constitutional reasons why Congress does not enjoy power to create comprehensive regulatory schemes for the nations of the world and, in so doing, displace foreign nations’ laws over their own citizens within their own sovereign territories. Again, *Raich* was untroubled by Congress interfering with California’s sovereignty because the Supremacy Clause holds that in conflicts between federal and state law, federal law prevails.³⁸⁹ Yet the Clause does not establish federal supremacy over the power of foreign nations to provide for the welfare or necessities of their own inhabitants in their own lands. Structural reasons bolster this conclusion. Because, unlike U.S. states, foreign nations never ceded

³⁸⁴ Cf. *id.*

³⁸⁵ Cf. *id.* at 18.

³⁸⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

³⁸⁷ *Id.*

³⁸⁸ U.S. Const. art. I, § 8, cl. 3.

³⁸⁹ *Raich*, 545 U.S. at 29.

their sovereignty to the U.S. government, the United States has no delegated power from them to prescribe general rules for international commerce among and inside the nations of the world.³⁹⁰ In short, and for all of these reasons, the Dutchman enjoying his homegrown marijuana in the Netherlands need not be worried about the CSA (as if he were).

A similar argument can be made against Congress creating a generally applicable International Fair Labor Standards Act. Upholding the national Fair Labor Standards Act in *United States v. Darby*,³⁹¹ the Court used the rationale, reinvigorated in *Raich*,³⁹² that “[t]he Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act.”³⁹³ Congress cannot claim a mirror global authority to reach all foreign, intra-national labor conditions purely on the basis of a “comprehensive legislative scheme for preventing the shipment in inter[national] commerce of certain products and commodities produced in [any nation in the world] under labor conditions . . . which fail to conform to [U.S.] standards”³⁹⁴

Integral to Congress’s use of a comprehensive regulatory scheme in *Darby* was the need for a centralized, overarching authority to prevent the notorious “race to the bottom” among the states.³⁹⁵ The Court explicitly relied upon this rationale to uphold the FLSA, looking favorably upon the Act’s “motive and purpose”³⁹⁶ “to make effective the Congressional . . . policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows.”³⁹⁷

³⁹⁰ See supra Subsection II.A.2.b.

³⁹¹ 312 U.S. 100, 125 (1941).

³⁹² *Raich*, 545 U.S. at 10, 12, 24.

³⁹³ *Darby*, 312 U.S. at 109.

³⁹⁴ *Id.*

³⁹⁵ Merritt, supra note 129, at 706; see also Revesz, supra note 129, at 1210–11.

³⁹⁶ *Darby*, 312 U.S. at 115.

³⁹⁷ *Id.*

On this reasoning the Court found the FLSA's all-encompassing provisions constitutional as "means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities."³⁹⁸ Not only could Congress regulate intrastate labor standards, it could regulate all intrastate labor standards, irrespective of their tangible effect on interstate commerce. "Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer."³⁹⁹ Rather, Congress had adroitly "recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great,"⁴⁰⁰—" [t]he legislation aimed at a whole embraces *all* its parts."⁴⁰¹ Extrapolated to the international arena, this reasoning could allow Congress to regulate any labor conditions, anywhere in the world, no matter how small the enterprise and how inconsequential the connection to U.S. commerce or, indeed, the global market generally. Neither the Foreign Commerce Clause nor the Necessary and Proper Clause contemplates such an overarching and comprehensive authority to prevent races to the bottom "among" the nations of the world by imposing U.S. labor standards on every industry everywhere on the planet.

³⁹⁸ *Id.* at 121 (explaining further that "[s]uch legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government"); see also *id.* at 118 ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.") (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

³⁹⁹ *Darby*, 312 U.S. at 123.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* (emphasis added).

b. Measuring the “Substantial Effect”

But the United States clearly does have power to regulate activity abroad that produces a “substantial effect” in the United States,⁴⁰² and does regulate such activity.⁴⁰³ In fact, what constitutes a “substantial effect” activating extraterritorial U.S. regulation has been the subject of volumes of court opinions and legal scholarship—albeit as a statutory question.⁴⁰⁴ The existence of a substantial effect has essentially become the judicial key to figuring out whether Congress intended “all sorts of public and private laws”⁴⁰⁵ to apply abroad in order to overcome the traditional statutory presumption against extraterritorial application of U.S. law.⁴⁰⁶

Yet missing from these statutory analyses about whether Congress has extended U.S. law to particular conduct abroad is the more foundational question of whether Congress constitutionally could.⁴⁰⁷ And more specifically for our purposes, if the extraterritorial application of U.S. law ultimately relies upon the foreign commerce power, what effect on foreign commerce with the United

⁴⁰² *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

⁴⁰³ *Id.*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986).

⁴⁰⁴ For a recent critique of the modern effects test, see Austen Parrish, *The Effects Test: Extraterritoriality’s Fifth Business*, 61 *Vand. L. Rev.* 1455, 1458–59 (2008) (arguing that “[a]lthough the effects test has become central to what many scholars perceive to be a correct modern analysis for legislative jurisdiction, courts rarely apply it appropriately”). Other thoughtful works on the topic include: Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 *Va. J. Int’l L.* 1, 27–37 (1992); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 *Harv. Int’l L.J.* 101, 141, 154 (1998); Larry Kramer, *Extraterritorial Application of American Law after the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 *Am. J. Int’l L.* 750, 751–52 (1995); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 *Minn. L. Rev.* (forthcoming) (abstract available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569643).

⁴⁰⁵ Parrish, *supra* note 404, at 1456 & n.5.

⁴⁰⁶ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”) (internal quotation omitted); see also *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (describing the presumption against extraterritoriality).

⁴⁰⁷ Colangelo, *supra* note 14, at 121.

States is substantial enough to make application of U.S. law abroad “necessary and proper” under the Constitution?⁴⁰⁸

We already have a feel for what effect is *not* substantial enough: namely, the “effect” of otherwise purely local foreign activity that threatens to undercut a comprehensive global U.S. regulatory scheme of the sort rejected above as generally not within Congress’s foreign commerce power to enact.⁴⁰⁹ But short of that and other Court-imposed limits on the kind of activity that falls within the commerce power, drawing with precision the geographic “outer limits”⁴¹⁰ of Congress’s authority to regulate conduct abroad that substantially affects foreign commerce with the United States is a difficult task with no immediate or obvious answers.

Accordingly, I want to approach the problem from a somewhat different direction: by exploring what effect is constitutionally sufficient—as opposed to constitutionally necessary—to trigger congressional regulation abroad. This may not seem like the most ambitious way to approach a novel constitutional question, but for now and the foreseeable future, let me suggest it is a good one. The reason is that by focusing on the sufficiency of the effect, the approach has the immense and very concrete benefit of equipping courts with a ready-made analytical framework for resolving the vast majority of Foreign Commerce Clause challenges through an analysis *they already perform*: namely, construing statutes in conformity with international law. In this way, the constitutional question folds into a statutory question courts are already resolving. The approach has the added benefit of avoiding unnecessarily ambitious—and extravagant—constitutional reasoning, which some lower courts have engaged in to fairly absurd theoretical, if not practical, ends.

So, what qualifies as a “substantial effect” on foreign commerce with the United States? As this Article has argued, the Foreign Commerce Clause’s text, as well as constitutional structure and history, oppose Congress disparaging the sovereignties of foreign nations by purporting to “impose a rule *on*”⁴¹¹ them via a Clause that

⁴⁰⁸ U.S. Const. art. I, § 8, cl. 18, 3.

⁴⁰⁹ See *supra* Subsection II.B.3.a.

⁴¹⁰ Cf. *United States v. Lopez*, 514 U.S. 549, 566 (1995) (noting “judicially enforceable outer limits” to Congress’s enumerated commerce power).

⁴¹¹ *The Antelope*, 23 U.S. (10 Wheat.) 66, 122–23 (1825) (emphasis added).

permits only the power to regulate commerce “with” them⁴¹²—that is, absent some valid justification to do so. One readily apparent way to measure whether a valid justification exists, and thus whether a particular extension of U.S. jurisdiction abroad adequately respects the sovereignties of foreign nations, is the “law of nations,”⁴¹³ or international law, to which all foreign nations have theoretically consented. This law has evolved significantly since the rigid territoriality of the Founding, and it now authorizes nations with a broad range of extraterritorial jurisdiction.

To put the point another way, if the claimed effect on foreign commerce would be sufficient to authorize U.S. regulation inside a foreign nation under jurisdictional principles of international law, it automatically should be sufficient under the Foreign Commerce Clause. The reason is that, by definition, there is no interference with the sovereignties of foreign nations, since they will already have agreed *ex ante* to the application of U.S. law inside their territories, through assent to those jurisdictional principles of international law with which the application of U.S. law comports.⁴¹⁴ Thus, if the “substantial effect” on foreign commerce with the United States would establish jurisdiction under international law, *a fortiori* is enough to trigger Congress’s foreign commerce power under the Constitution. To be clear, this is in addition to, not in place of, Supreme Court jurisprudence on what *kind* of activity qualifies for Commerce Clause regulation. We are concerned here principally with the reach of U.S. law over foreign conduct that would fall within Congress’s power if it occurred domestically. The question is at what point the nexus “with” the United States becomes

⁴¹² U.S. Const. art. I, § 8, cl. 3 (emphasis added).

⁴¹³ Although the “law of nations” is typically thought of as the old term for “international law,” and that is how I use it here, the terms are not strictly synonymous. “International law” was popularized in the eighteenth century by Jeremy Bentham to describe the interactions between nation states. The law of nations, while providing for customary norms among nations, also aligns with natural law concepts of universal moral values. See *United States v. Yousef*, 327 F.3d 56, 103 & n.38 (2d Cir. 2003). Though query whether the twentieth-century development of international human rights law has reincorporated these universal moral values.

⁴¹⁴ The text of the Foreign Commerce Clause tends to support the use of international law as an appropriate guide as well, since there is something explicitly international about the power to regulate commerce “with foreign Nations.” See U.S. Const. art. I, § 8, cl. 3.

constitutionally too attenuated; and the answer is that, in the vast majority of cases, courts should never get there.

This answer derives from the fact that international law already largely guides judicial evaluation of extraterritorial application of U.S. law as a statutory matter. My constitutional approach therefore has the very significant consequence of severely reducing the number of viable constitutional challenges under the Foreign Commerce Clause since, if the statute's reach comports with international law, the constitutional question collapses into the statutory question and both are satisfied. For courts increasingly facing extraterritorial Foreign Commerce Clause issues of "first impression,"⁴¹⁵ this line of reasoning can be extremely valuable.

The approach begins with a longstanding canon of statutory construction announced by Chief Justice Marshall in *Murray v. The Schooner Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."⁴¹⁶ On this canon, the international law of jurisdiction has been used repeatedly throughout the history of U.S. judicial decisionmaking⁴¹⁷ to evaluate both the basis of U.S. jurisdiction over conduct abroad,⁴¹⁸ and whether the assertion of such jurisdiction "unreasonabl[y] interfere[s] with the sovereign authority of other nations."⁴¹⁹ Thus, any statute that is silent on ex-

⁴¹⁵ *United States v. Clark*, 435 F.3d 1100, 1102 (9th Cir. 2006).

⁴¹⁶ *Murray v. The Schooner Charming Betsy* (*The Charming Betsy*), 6 U.S. (2 Cranch) 64, 118 (1804); see also *McCullough v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963) (quoting *The Charming Betsy* and holding that the Court would only allow such a reading if Congress clearly expressed its intention to do so).

⁴¹⁷ See generally Restatement (Third) of the Foreign Relations Law of the United States §§ 401–404 (1987).

⁴¹⁸ See, e.g., *Yousef*, 327 F.3d at 91 n.24 (citing cases).

⁴¹⁹ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); see also *Lauritzen v. Larsen*, 345 U.S. 571, 577–79 (1953) (recounting and applying the jurisdictional principle of "international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory") (internal quotation marks and citation omitted); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815–18 (1993) (Scalia, J., dissenting) (discussing cases and concluding that "the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence . . . [A] nation having some 'basis' for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction 'with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable'" (citing Restatement (Third) of the Foreign Relations Law of the United States § 403(1) (1987))).

traterritorial scope should be construed in conformity with jurisdictional principles of international law.⁴²⁰ Moreover, many U.S. statutes with explicit extraterritorial reach by their terms satisfy international law by requiring a U.S. nexus that would establish jurisdiction under international law, such as a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce.⁴²¹ Consequently, while the outer limits of what constitutionally qualifies as a “substantial effect” under the Foreign Commerce Clause may be difficult to draw with precision, such precision is not needed for a large number of statutes and cases involving U.S. extraterritoriality.

And hence the very real significance of what satisfying international law means for a “substantially affects” theory of foreign commerce regulation: it erases constitutional challenges under the Clause to extraterritorial jurisdiction by folding the constitutional question into the statutory question. If extraterritorial application of the statute comports with international law—either because the statute expressly requires an effect of the sort that would satisfy international law, or because courts construe it that way—the application will not exceed Congress’s powers under the Constitution, since it almost by definition satisfies the nexus and foreign sovereignty concern by satisfying international law, to which all other nations have consented.

⁴²⁰ Though, as Hannah Buxbaum observes, “[T]he U.S. approach relies heavily on private [as opposed to public] international law concepts in defining the scope of prescriptive jurisdiction.” Buxbaum, *supra* note 17, at 636. In the United States, private international law is commonly referred to as “conflict of laws.” Symeon C. Symeonides, *American Private International Law* 15 (2008).

⁴²¹ See Foreign Trade Antitrust Improvements Act (“FTAIA”) of 1982 § 402, 15 U.S.C. § 6a(1) (2006); Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(3)(A) (2006); Act to Complete the Codification of Title 46, § 7, 46 U.S.C. § 40307(a)(4) (2006) (“The antitrust laws do not apply to . . . an agreement or activity relating to transportation services within or between foreign countries, whether or not via the United States, unless the agreement or activity has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States.”); see also Restatement (Third) of the Foreign Relations Law of the United States § 402(1)(c) (“Subject to [the reasonableness requirement of] § 403, a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory.”); Parrish, *supra* note 404, at 1500–01 (“[I]nternational law now plainly accepts the effects test as a basis for legislative jurisdiction.”).

The problem, mentioned earlier, with using international law as a constitutional guide is that Congress may override it.⁴²² Thus, under U.S. law, Congress may extend the reach of U.S. legislation beyond jurisdictional perimeters fixed by international law.⁴²³ As a result, while international law can provide a good measure of whether a claimed substantial effect would trigger extraterritorial regulation *within* the foreign commerce power, it does not define whether a claimed effect would trigger extraterritorial regulation *beyond* that power. Again, as a doctrinal matter, this question should technically arise only when Congress overrides international law through the express jurisdictional provisions of the statute. But that, I want to argue now, is probably rare. Let us reconsider Section 2423(c) of the PROTECT Act—this time as an exercise of power to regulate activity that substantially affects foreign commerce with the United States.

The PROTECT Act (revisited). Recall that Section 2423(c) exceptionally and purposely disposes of an improper intent requirement during travel in foreign commerce itself, criminalizing instead illicit local conduct abroad—commercial and non-commercial sexual abuse of a minor—subsequent to the travel.⁴²⁴ The leading case on Section 2423(c)'s constitutionality under the Foreign Commerce Clause is the Ninth Circuit's decision in *United States v. Clark*, which involved a U.S. citizen permanently residing in Cambodia who made annual trips to the United States and maintained various other U.S. connections.⁴²⁵ About two months after one such trip, Cambodian authorities arrested him for engaging in commercial sex acts with two minor boys in a Phnom Penh guesthouse.⁴²⁶

⁴²² See, e.g., *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 600 (1889); Restatement (Third) of the Foreign Relations Law of the United States § 115(a) (1987).

⁴²³ See, e.g., *Yousef*, 327 F.3d at 86 (discussing extraterritorial application of U.S. criminal law); *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983) (noting Congress is not limited by international law but is limited by the application of the Due Process Clause of the Fifth Amendment).

⁴²⁴ 18 U.S.C. § 2423(c) (2006); see also *supra* Subsection II.B.1.

⁴²⁵ 435 F.3d 1100, 1103 (9th Cir. 2006). Although the court never really explained why such connections were relevant to its analysis, it noted that Clark “maintained real estate, bank accounts, investment accounts, a driver’s license, and a mailing address” in the United States. *Id.*

⁴²⁶ *Id.*

Clark was then extradited to the United States for prosecution and eventual conviction under Section 2423(c).⁴²⁷

As noted in the Channels Section of this Article, the district court rejected Clark's Foreign Commerce Clause challenge and upheld the statute as a constitutional exercise of Congress's power to regulate channels of foreign commerce with the United States—an analysis that, this Article has already argued, is seriously flawed.⁴²⁸ On appeal, the Ninth Circuit upheld the statute on a different Foreign Commerce Clause rationale. The remainder of this Section critiques the Ninth Circuit's constitutional reasoning as analytically empty and ultimately backward and evaluates whether Section 2423(c) can nonetheless stand on a "substantially affects" commerce rationale using the foreign commerce framework developed so far.

Although the Ninth Circuit went out of its way to disclaim "slavishly . . . grafting the interstate commerce framework onto foreign commerce,"⁴²⁹ its opinion is best understood as a species of the "substantially affects" rationale. The majority 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."⁴³⁰ In other words, the prohibited conduct substantially affects foreign commerce to a constitutionally adequate degree.⁴³¹ As the quoted language indicates, the court limited itself to only one of the two types of conduct prohibited in Section 2423(c), that is, the one squarely presented on the facts: engaging in "any commercial sex act . . . with a person under 18 years of age."⁴³² Indeed, as "an expression of judicial restraint," the court stressed that "[w]e do not decide the constitutionality of § 2423(c) with respect to illicit sexual conduct covered by the non-commercial prong of the statute, such as sex acts accomplished by use of force or threat,"⁴³³ thus leaving open whether Congress constitutionally could prohibit

⁴²⁷ Id. at 1103–04.

⁴²⁸ See *supra* text accompanying notes 236–76.

⁴²⁹ *Clark*, 435 F.3d at 1103.

⁴³⁰ Id. at 1114.

⁴³¹ See, e.g., *id.* at 1117 ("The rational nexus requirement is met to a constitutionally sufficient degree.").

⁴³² Id. at 1110 (quoting 18 U.S.C. § 2423(f)(2)) (internal quotation marks omitted).

⁴³³ Id. at 1110 n.16.

non-commercial sexual abuse of a minor after travel in foreign commerce.⁴³⁴

The Ninth Circuit's abstention from ruling on the non-commercial prong of the statute is significant, as well as strategic, because under Supreme Court precedent regarding Congress's ability to regulate local activity that substantially affects commerce, whether that activity is "economic" is a key consideration.⁴³⁵ In *United States v. Morrison*, which involved the constitutionality of the Violence Against Women Act ("VAWA") on a "substantially affects" rationale under the Commerce Clause,⁴³⁶ the Court noted that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."⁴³⁷ It was therefore "clear" that the VAWA did not qualify on a "substantially affects" rationale in primary part because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."⁴³⁸

Raich affirmed both the "economic activity" category⁴³⁹ as well as the specific finding in *Morrison* that the gender-motivated violence covered by the VAWA provision at issue in that case "did not regulate economic activity."⁴⁴⁰ To be sure, the Court in *Raich* went so far as to explicitly distinguish the CSA from the VAWA, explaining that "[u]nlike [the statutes] at issue in *Lopez* and *Morri-*

⁴³⁴ The court did suggest, however, that § 2423(c)'s noncommercial prong might violate *Lopez* and *Morrison*. See *id.* at 1115.

⁴³⁵ See *Gonzales v. Raich*, 545 U.S. 1, 24–27 (2005); *United States v. Morrison*, 529 U.S. 598, 609–13 (2000).

⁴³⁶ 529 U.S. at 609 ("Petitioners do not contend that these cases fall within either of the first two . . . categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Given § 13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry.").

⁴³⁷ *Id.* at 611; see also *id.* at 613 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

⁴³⁸ *Id.* at 613.

⁴³⁹ 545 U.S. at 25; see also *id.* at 17 ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").

⁴⁴⁰ *Id.* at 25.

son, the activities regulated by the CSA are quintessentially economic.”⁴⁴¹ If gender-motivated violence like the alleged rape in *Morrison* is not economic activity, neither is the non-commercial sexual abuse of a minor prohibited by Section 2423(c).⁴⁴² For this reason, the economic nature of Clark’s conduct took center stage in the Ninth Circuit’s resolution of the Foreign Commerce Clause issue. The court explained that “[t]he essential economic character of the commercial sex acts regulated by § 2423(c) stands in contrast to the non-economic activities regulated by the statutes at issue in *Lopez* and *Morrison*.”⁴⁴³

But, instead of looking to *Lopez* and *Morrison* to solve the constitutional question before it, the court announced that it would

⁴⁴¹ Id. at 25–26 (describing the activities regulated in the statute as “the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market”). Despite this, and *Raich*’s other qualifications that the activities be “part of an economic ‘class of activities,’” id. at 17, at least one district court has upheld § 2423(c)’s non-commercial sex prong on the rationale that because Congress is seeking to regulate the market in child prostitution, Congress may also regulate non-commercial sexual abuse of minors because it affects that market. See *United States v. Martinez*, 599 F. Supp. 2d 784, 807–08 (W.D. Tex. 2009). Such a finding is in tension with the language quoted above from *Raich* and seems to contradict *Morrison*’s holding, reaffirmed in *Raich*, that violent crime of a sexual nature is not a class of economic activity subject to Commerce Clause regulation. Even the Ninth Circuit in *Clark* apparently would not have gone so far. See *United States v. Clark*, 435 F.3d 1100, 1115 (9th Cir. 2006) (“The essential economic character of the *commercial sex acts* regulated by § 2423(c) stands in contrast to the non-economic activities regulated by the statutes at issue in *Lopez* and *Morrison*. . . . Like the statute regulating illicit drugs at issue in *Raich*, the activity regulated by the *commercial sex prong* of § 2423(c) is ‘quintessentially economic,’ and thus falls within foreign trade and commerce.”) (emphasis added) (internal citation, quotation marks, and footnotes omitted).

⁴⁴² Nor does the existence of a “jurisdictional hook” in § 2423(c)—the requirement that the person traveled in foreign commerce—save the provision under *Morrison*’s reasoning. As explained above, see *supra* Subsection II.B.1, § 2423(c)’s hook is unconventional. Instead of fastening the commerce power to the fact that an item, like a gun or bulletproof vest, traveled in interstate or foreign commerce and prohibiting improper use of that item, § 2423(c) ties the commerce power to the *person*, which effectively grants Congress virtually unlimited power over everything done by anyone who has ever traveled in foreign commerce. Id. By contrast, the Court in *Morrison* implied that other provisions of the VAWA with an “interstate travel” requirement were constitutionally sound because these provisions prohibit “travel[ing] across a State line . . . with *the intent* [to commit the prohibited conduct],” and therefore, as discussed above in Subsection II.B.1, “regulate[] the use of the channels of interstate commerce.” *Morrison*, 529 U.S. at 613–14 n.5 (emphasis added).

⁴⁴³ *Clark*, 435 F.3d at 1115.

“step back” and use what it labeled “a global, commonsense approach to the circumstance[s].”⁴⁴⁴ Based on this novel approach, which the court rather candidly admitted inventing to sidestep the Supreme Court’s three-category commerce framework,⁴⁴⁵ “[t]he illicit sexual conduct reached by the statute expressly includes commercial sex acts performed by a U.S. citizen on foreign soil. This conduct might be immoral and criminal, but it is also commercial.”⁴⁴⁶ As a result, “[w]here . . . the defendant travels in foreign commerce to a foreign country and offers to pay a child to engage in sex acts, his conduct falls under the broad umbrella of foreign commerce and consequently within congressional authority under the Foreign Commerce Clause.”⁴⁴⁷ This no doubt seems like a good result on the facts, but it offers very little in the way of principled legal backing. A test that asks courts to “step back,” look at the circumstances, and then use nothing more than their own common sense to resolve the constitutional issue before them is not much of a test.

How the court appears to have arrived at this freewheeling “approach” is equally problematic, since it once again springs from selective quotation of inapposite Supreme Court cases and a fundamental misunderstanding about the nature of Congress’s foreign commerce powers inside foreign nations, as opposed to inside the United States. The reason the Ninth Circuit gave for why it could ignore limits in Supreme Court cases like *Lopez* and *Morrison* and invent its own, brand new “commonsense approach” was that in the interstate context there exists a “concern for state sovereignty and federalism. On the other hand, ‘[t]he principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.’”⁴⁴⁸ The language internally quoted, however, comes from a Supreme Court case dealing with the exercise of federal power inside the several U.S. states—

⁴⁴⁴ Id. at 1103.

⁴⁴⁵ Id. (“Instead of slavishly marching down the path of grafting the interstate commerce framework onto foreign commerce, we step back and take a global, commonsense approach to the circumstance presented here.”). The court cites nothing for this approach.

⁴⁴⁶ Id.

⁴⁴⁷ Id.

⁴⁴⁸ Id. at 1111 (quoting in part *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 57 (1933)).

specifically, to exact duties on imports.⁴⁴⁹ The same is true of the statement later in *Clark* that “[f]ederalism and state sovereignty concerns do not restrict Congress’s power over foreign commerce,”⁴⁵⁰ which cites for support *Japan Line, Ltd. v. County of Los Angeles*, another case dealing with federal power vis-à-vis U.S. states, not foreign nations.⁴⁵¹

Blind to this difference, the Ninth Circuit openly emphasized that lack of federalism and U.S. state sovereignty concerns created a “distinction [which] provides a crucial touchstone in applying the Foreign Commerce Clause” in ways that allowed the court to bypass “the precision set forth by *Lopez* and *Morrison* in the interstate context.”⁴⁵² The court could thus conclude that Congress has—astonishingly—“exclusive and plenary” power over foreign commerce, not only inside the United States, but also evidently inside every other nation in the world.⁴⁵³ To be certain, after crafting this novel and extravagant approach, *Clark* proclaimed that “[c]ritical to this understanding [is] the Supreme Court’s now familiar statement in *Japan Line* that ‘the Founders intended the scope of the foreign commerce power to be . . . greater’ as compared with interstate commerce.”⁴⁵⁴ Maybe so when Congress seeks to unify the national economic voice so that the United States can interact as a single economic unit with other nations, but the Founders would have been shocked to learn that the Clause also licenses Congress with an “exclusive and plenary”⁴⁵⁵ power to regulate those nations.

As it turns out, Congress did not need such “exclusive and plenary” power to regulate *Clark*’s conduct abroad under the Foreign Commerce Clause. According to this Article’s analysis, so long as the effect of *Clark*’s conduct on foreign commerce with the United

⁴⁴⁹ *Bd. of Trustees of Univ. of Ill.*, 289 U.S. at 56.

⁴⁵⁰ *Clark*, 435 F.3d at 1113 (citations omitted).

⁴⁵¹ 441 U.S. 434, 448 (1979).

⁴⁵² *Clark*, 435 F.3d at 1111.

⁴⁵³ *Id.* at 1109 (quoting *Bd. of Trustees of Univ. of Ill.*, 289 U.S. at 56).

⁴⁵⁴ *Id.* at 1116 (quoting *Japan Line*, 441 U.S. at 448).

⁴⁵⁵ *Id.* at 1109 (quoting *Bd. of Trustees of Univ. of Ill.*, 289 U.S. at 56). Lower courts have followed *Clark*’s holding in this regard. See, e.g., *United States v. Pendleton*, No. 08-111, 2009 WL 330965, at *1, *3 (D. Del. Feb. 11, 2009) (upholding a § 2423(c) conviction for activity abroad under the Foreign Commerce Clause and citing *Clark* for the proposition that “Congress’ authority under the Foreign Commerce Clause is broad and plenary”).

States would authorize extraterritorial jurisdiction under current international law, that effect should be constitutionally sufficient to permit regulation under the Clause (again, whether satisfaction of international law is necessary is a separate question). The concrete question in *Clark* would therefore be whether extraterritorial jurisdiction over a U.S. national for commercial sex acts with a minor in Cambodia is permissible under international law. It is.

Modern international law provides certain bases or principles for the exercise of jurisdiction.⁴⁵⁶ The Ninth Circuit addressed the international jurisdiction question as a statutory matter in *Clark*,⁴⁵⁷ concluding first that, because Clark was a U.S. national, Congress intended Section 2423(c) to apply to him abroad.⁴⁵⁸ Here the court was clearly correct. Under international law, “the ‘nationality principle’ . . . provides for jurisdiction over extraterritorial acts committed by a State’s own citizen.”⁴⁵⁹ The Foreign Commerce Clause rationale would therefore be that Clark’s foreign commercial sex act “substantially affects” commerce with the United States by virtue of his U.S. citizenship. That is probably unobjectionable as far as Clark’s specific acts go, but as the dissent in *Clark* observed, it may only go so far. For example, under this reasoning “the purchase of a lunch in France by an American citizen who traveled there by airplane would constitute a constitutional act of engaging in foreign

⁴⁵⁶ A state may exercise jurisdiction over activity that occurs, even in part, within its territory. This is called subjective territoriality. A state also may exercise jurisdiction over activity that does not occur within its territory but that has an effect within its territory, or what is called objective territoriality. Furthermore, and of particular relevance to *Clark*, a state may exercise jurisdiction over activity involving its nationals. Where the acts in question are committed by a state’s nationals, the state may exercise active personality jurisdiction. And where the acts victimize a state’s nationals, the state may exercise passive personality jurisdiction. Additionally, under the protective principle, a state may claim jurisdiction over activity that is directed against the state’s security or its ability to carry out official state functions, such as its exclusive right to print state currency. Finally, the very commission of certain crimes denominated “universal” under international law engenders jurisdiction for all states, irrespective of where the crimes occur or which state’s nationals are involved. See *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003); Restatement (Third) of the Foreign Relations Law of the United States §§ 402, 404 (1987).

⁴⁵⁷ *Clark*, 435 F.3d at 1106–07.

⁴⁵⁸ *Id.*

⁴⁵⁹ *Yousef*, 327 F.3d at 91 n.24; see also *United States v. Hill*, 279 F.3d 731, 740 (9th Cir. 2002) (explaining that the nationality principle “permits a country to apply its statutes to extraterritorial acts of its own nationals”); Restatement (Third) of the Foreign Relations Law of the United States § 402(2) (1987).

commerce.”⁴⁶⁰ Even more problematic would be a “conflict of laws” where the local foreign law allows (or even requires) the relevant conduct, but U.S. law prohibits it. For instance, could the United States constitutionally prosecute U.S. citizens under the CSA for buying and smoking a marijuana cigarette in the Netherlands in conformity with Dutch law?

At this point in the international law analysis, the Supreme Court,⁴⁶¹ lower courts⁴⁶² (among them the Ninth Circuit in *Clark*⁴⁶³), and the drafters of the Restatement (Third) of Foreign Relations Law,⁴⁶⁴ turn to the question of whether, if a basis of jurisdiction exists, the exercise of jurisdiction would nonetheless be inappropriate because it is “unreasonable.”⁴⁶⁵ On this analysis, the Supreme Court recently refused to allow a Sherman Act claim under the Foreign Trade Antitrust Improvements Act based on certain foreign anti-competitive conduct.⁴⁶⁶ Although the conduct had an “adverse domestic effect,” the Court indicated that U.S. regulation would have created “unreasonable interference with the sovereign authority of other nations”⁴⁶⁷ because “an independent foreign effect [gave] rise to the [plaintiff’s] claim.”⁴⁶⁸

⁴⁶⁰ *Clark*, 435 F.3d at 1120 (Ferguson, J., dissenting).

⁴⁶¹ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818–19 (1993) (Scalia, J., dissenting).

⁴⁶² See, e.g., *United States v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994) (“In general, international law recognizes several principles whereby the exercise of extra-territorial jurisdiction may be appropriate. . . . Nevertheless, an exercise of jurisdiction on one of these bases still violates international principles if it is ‘unreasonable.’”) (quoting the Restatement (Third) of the Foreign Relations Law of the United States § 403 cmt. a (1987) for “[t]he principle that an exercise of jurisdiction on one of the bases indicated . . . is nonetheless unlawful if it is unreasonable . . .”).

⁴⁶³ 435 F.3d at 1107.

⁴⁶⁴ Restatement (Third) of the Foreign Relations Law of the United States § 403(1) (1987).

⁴⁶⁵ *Empagran*, 542 U.S. at 164; Restatement (Third) of the Foreign Relations Law of the United States § 403(1) (1987).

⁴⁶⁶ *Empagran*, 542 U.S. at 164–65.

⁴⁶⁷ *Id.* at 164 (citing cases).

⁴⁶⁸ *Id.* at 159; see also *id.* at 165 (asking rhetorically, “[W]hy is it reasonable to apply [U.S.] laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim?* . . . Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anti-competitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?”). The Court did suggest that the result would be different

The reasonableness test, famously set out in the Restatement,⁴⁶⁹ provides that “a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”⁴⁷⁰ Factors for determining reasonableness include: “the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory”;⁴⁷¹ “connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect”;⁴⁷² the “importance of regulation to the regulating state”;⁴⁷³ the “justified expectations that might be protected or hurt by the regulation”;⁴⁷⁴ the interests of, and “likelihood of conflict” with, other states’ regulations;⁴⁷⁵ and “traditions of the international system.”⁴⁷⁶

The Ninth Circuit concluded in *Clark* that, as a statutory matter, the application of U.S. law was reasonable under international law. It noted that “Cambodia consented to the United States taking jurisdiction and . . . Clark himself stated . . . that he ‘wanted to return to the United States.’”⁴⁷⁷ This statutory conclusion could also resolve the constitutional question under the Foreign Commerce Clause. Far more than, say, application of the CSA to a U.S. citizen for smoking marijuana in the Netherlands in conformity with Dutch law, application of U.S. law to Clark’s conduct in Cambodia is eminently reasonable under international law.

if it were the U.S. government, as opposed to private plaintiffs, bringing the action. See *id.* at 170.

⁴⁶⁹ Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987).

⁴⁷⁰ *Id.* § 403(1). For an application of this standard, see *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818–19 (1993) (Scalia, J., dissenting).

⁴⁷¹ Restatement (Third) of the Foreign Relations Law of the United States § 403(2)(a) (1987).

⁴⁷² *Id.* § 403(2)(b).

⁴⁷³ *Id.* § 403(2)(c).

⁴⁷⁴ *Id.* § 403(2)(d).

⁴⁷⁵ *Id.* § 403(2)(g), (h).

⁴⁷⁶ *Id.* § 403(2)(f).

⁴⁷⁷ *United States v. Clark*, 435 F.3d 1100, 1107 (9th Cir. 2006).

In fact, the reasonableness of applying U.S. law to Clark might even be cast in terms of *Raich*'s Commerce Clause rationale, but modified for the international as opposed to the national system of states. While Congress does not have global regulatory power to create comprehensive international regulatory schemes *on its own*, and to unilaterally reach local foreign conduct that undercuts those schemes, Congress does have power to regulate local conduct abroad that undermines an *internationally agreed-upon* comprehensive regulatory scheme. The Foreign Commerce Clause textually supports regulation pursuant to such international agreements or joint endeavors. After all, it grants Congress power to regulate commerce "with" foreign nations.⁴⁷⁸

The United States and Cambodia are part of just such a scheme. Both nations are parties to an international instrument, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,⁴⁷⁹ which explicitly prohibits Clark's conduct, whether "committed domestically or transnationally,"⁴⁸⁰ and requires its criminalization under national law.⁴⁸¹ Further, the instrument specifically founds jurisdiction on the nationality principle.⁴⁸² We might therefore say that the Optional Protocol creates a "comprehensive [international] scheme" to regulate, and—like the CSA's regulation of the national market in *Raich*—eliminate the international market in a particular activity inside the two nations. As a result, Congress can reach otherwise local foreign conduct that threatens to undercut that comprehensive international regulatory scheme.

Structural arguments against Congress extending U.S. law into a foreign sovereign's territory fall away under this view as well. Although Cambodia certainly did not agree to cede a portion of its regulatory authority to the U.S. government, it did agree to the substantive prohibition contained in the treaty and its jurisdictional

⁴⁷⁸ U.S. Const. art. I, § 8, cl. 3.

⁴⁷⁹ G.A. Res. 54/263, U.N. Doc. A/54/263 (May 25, 2000) [hereinafter Optional Protocol]; Treaties in Force, *supra* note 286, at 326; see also *United States v. Frank*, 486 F. Supp. 2d 1353, 1356 (S.D. Fla. 2007).

⁴⁸⁰ See Optional Protocol, *supra* note 479, arts. 1, 2, 3.

⁴⁸¹ *Id.* art. 3.

⁴⁸² *Id.* art. 4(2) ("Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences [set out in the treaty] . . . [w]hen the alleged offender is a national of that State . . .").

provisions, which allow other states parties to apply the prohibition in certain circumstances, even where the conduct occurs inside Cambodia.⁴⁸³ That the United States applied the prohibition to Clark would therefore not interfere with Cambodian sovereignty, since Cambodia agreed in advance both to the prohibition and to the ability of the United States to apply it to U.S. nationals for acts in Cambodia. And finally, although Cambodia enjoys no political representation in the U.S. lawmaking process, it does enjoy representation in the international treaty making process, and it can exercise that representation by either accepting or rejecting the terms of the treaty. A treaty of this sort will not always be necessary, but it is a slam-dunk argument for the reasonable exercise of U.S. jurisdiction in Clark's case.

To quickly summarize this Section's main points, Congress has a large yet limited power to regulate conduct abroad that "substantially affects" foreign commerce with the United States. I have not attempted to precisely mark the outer limits of that power in all respects, but instead revealed which domestic Commerce Clause rationales do not fully extend to the foreign commerce context. Namely, Congress cannot create, on its own, comprehensive schemes that purport to regulate global markets and thus reach local foreign activities because they threaten to undercut such comprehensive global schemes.

I next offered a useful way of determining whether a "substantial effect" on foreign commerce with the United States is constitutionally sufficient (but not necessary) to trigger Congress's foreign commerce power. According to this analysis, an effect is sufficient if it would reasonably authorize U.S. jurisdiction under international law. Such an effect is sufficient because it creates a jurisdictional connection already recognized and approved by other nations, thereby satisfying both the nexus requirement and foreign sovereignty concern inherent in the Foreign Commerce Clause. As a result, legislation over acts producing that effect would be necessary and proper to execute Congress's power under the Clause. This analysis is in addition to, not in place of, current Supreme Court jurisprudence. It is therefore unlikely, for example, that Congress could regulate noneconomic activity abroad under the

⁴⁸³ See *id.* art. 4 (laying out bases of jurisdiction).

Foreign Commerce Clause like the non-commercial sexual abuse of a minor proscribed under Section 2423(c).⁴⁸⁴

But under this view, Section 2423(c)'s extension to Clark's commercial sex acts with minors in Cambodia is patently constitutional. His U.S. citizenship creates a basis of U.S. jurisdiction, and the exercise of such jurisdiction is eminently reasonable by virtue of the substantive and jurisdictional provisions of the treaty to which both the United States and Cambodia are parties.⁴⁸⁵ Again, this is not to say that extraterritorial application of U.S. law must satisfy international law to be constitutional. However, a major benefit recommending this way of viewing the constitutional question—at least at present and for the foreseeable future—is that it folds that constitutional question into a statutory analysis courts already are or should be performing, and fits comfortably with how Congress tends to phrase legislation with explicit extraterritorial reach. It may leave the outer limits of Congress's foreign commerce power imprecisely defined, but it promises to resolve the vast majority of constitutional challenges to that power with an established analysis courts already undertake, and in which they are well-practiced and equipped.

CONCLUSION

Congress is projecting U.S. law abroad in new and aggressive ways. A chief source of constitutional power behind this extraterritorial regulatory boom is the Foreign Commerce Clause. Yet until now, the Clause has received little scholarly attention. Faced with

⁴⁸⁴ See *supra* notes 435–43 and accompanying text.

⁴⁸⁵ The reasonableness argument becomes more complicated when, for example, the United States has no important interest to protect, see Restatement (Third) of the Foreign Relations Law of the United States § 403(2)(c) (1987), or the application defeats the defendant's reasonable expectations, *id.* § 403(2)(d)—perhaps as in the case of the U.S. citizen buying lunch in France. Cf. *United States v. Clark*, 435 F.3d 1100, 1120 (9th Cir. 2006) (Ferguson, J., dissenting). It also becomes more complicated when foreign law conflicts with U.S. law, see Restatement (Third) of the Foreign Relations Law of the United States § 403(2)(h) (1987), as in the case of the U.S. citizen smoking marijuana in the Netherlands. Less reasonable still would be the application of U.S. law to the Dutchman in the Netherlands, but Congress would have no initial basis to apply U.S. law in that situation, see *id.* § 402, and, as discussed, absent Congress's ability to reach the activity through a comprehensive global regulatory scheme, there is no substantial effect on foreign commerce with the United States authorizing U.S. regulation. See *supra* notes 384–85 and accompanying text.

an increasing number of challenges under the Clause, lower courts have been unable to coherently articulate the contours of Congress's power. When they have tried, their efforts have largely been wrong. This Article has explained why they have been wrong, and has offered instead a doctrinally and conceptually sound approach to the Clause based on the text and structure of the Constitution.

The approach also holds practical and normative appeal. It reformats familiar tests so that courts need not embark upon wholly novel quests for the Clause's meaning, quests which too often have turned out constitutionally inapt or extravagant reasoning. Reasoning has weight; how courts decide cases matters. Recommending this Article's approach is not only its constitutional coherence but also that, at bottom, the only truly novel question is whether foreign commerce is "with" the United States.

This first-order question raises a series of intriguing second-order questions not only for the Commerce Clause but also for U.S. foreign affairs and individual rights. In response, I propose a text-based, minimum-triggering-facts inquiry to measure Congress's power over channels and instrumentalities of foreign commerce. And I suggest international law as an established and sophisticated gauge for whether activity sufficiently affects foreign commerce with the United States. International law has the benefit of authorizing regulatory power over a vast array of foreign conduct touching U.S. interests, while at the same time mitigating objections that habitually attend unilateral exercises of extraterritorial jurisdiction by easing potential for international conflicts and unfair application of domestic law to individuals abroad. Going forward, these questions animate an important new horizon of legal and policy thinking that is only going to gain prominence in an increasingly shrinking world: how the Constitution envisages the reach and operation of U.S. law abroad. It is a larger discussion in which the Foreign Commerce Clause plays a central role.