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# Laws for "Aliens and Strangers": Examining the Foreign Commerce Clause through the Lens of Indian Commerce Clause Law

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# LAW FOR “ALIENS AND STRANGERS”: EXAMINING THE FOREIGN COMMERCE CLAUSE THROUGH THE LENS OF INDIAN COMMERCE CLAUSE LAW

Laura Choi<sup>1</sup>

## I. INTRODUCTION<sup>2</sup>

IN 2004, Larry Bollinger, a Lutheran minister, moved from his home in North Carolina to a community outside Port-au-Prince, Haiti, where he had been hired to oversee a religious ministry known as the Lazarus Project.<sup>3</sup> The Project included a school and a health center that served local communities and was funded by non-Haitian donors who “believe[d] the value of education, the impact of primary health care and the power of spiritual growth will result in the empowerment of Haitians.”<sup>4</sup> Unbeknownst to his new employers, Bollinger was a sex addict.<sup>5</sup> Once in Haiti, Bollinger progressed to molesting children he met through his job.<sup>6</sup> In 2009, Bollinger sought counseling in the United States, where he confessed to his crimes abroad.<sup>7</sup> During the session, Bollinger’s counselor noted that the minister was not “overly concerned” about disclosing his indiscretions in Haiti, but was unwavering in his insistence that he never harmed a child in the United States, leading the counselor to believe that “perhaps [Bollinger] thought he was beyond the reach of the law because . . . his behavior had taken place in another country.”<sup>8</sup>

As Bollinger eventually learned, however, his abuse of children in Haiti violated a controversial provision of the Prosecutorial Remedies and

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1. SMU Dedman School of Law, J.D. expected 2017. Thank you to Professor Colangelo for his suggestions and to Brennwyn Romano for her invaluable research assistance. All mistakes are my own. Deepest thanks to Max, for everything.

2. *Ex parte* Kan-gi-shun-ca, 109 U.S. 556, 571 (1883) (arguing that tribal sovereignty should not be trampled by intrusions of U.S. law into internal tribal affairs “where, against an express exception in the law itself, that law . . . is sought to be extended over aliens and strangers . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code. . . which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions . . .”).

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

4. *Mission Statement*, LAZARUS PROJECT VILLAGE OF HOPE, <http://village-of-hopehaiti.org/> [<https://perma.cc/BV6Q-NKG8>].

5. *Bollinger*, 798 F.3d at 203.

6. *Id.*

7. *Id.* at 204.

8. *Id.*

Other Tools to end the Exploitation of Children Today Act (hereinafter PROTECT Act), which criminalizes sexual exploitation of children by Americans abroad.<sup>9</sup> Within the past ten years, serious debate has arisen as to whether Congress had the power to pass this law under the Foreign Commerce Clause, which gives Congress the power “[t]o regulate Commerce with foreign Nations . . . .”<sup>10</sup> Although many cases have inquired into the meaning of the dormant Foreign Commerce Clause, little case law exists on what Professor Anthony Colangelo calls the “outward-looking foreign commerce power,” which allows Congress to regulate extra-territorially.<sup>11</sup> The validity of the PROTECT Act hinges on the type of activity that qualifies as “commerce”—and so can properly be regulated—under the outward-looking Foreign Commerce Clause.<sup>12</sup> *United States v. Bollinger* is only one of the most recent cases in a profusion of legal and academic interest in the definition of commerce under the outward-looking Foreign Commerce Clause.<sup>13</sup>

Oddly, none of the commentators or judges to explore this subject have looked to Indian Commerce Clause law as an interpretive aid. If they had, they would have discovered a cast of characters Larry Bollinger might recognize: well-intentioned missionaries,<sup>14</sup> desperate children,<sup>15</sup> unscrupulous traders eager to help Native Americans acquire a taste for alcohol,<sup>16</sup> and perpetrators of cross-racial and cross-national crimes of the most dastardly kind.<sup>17</sup>

This Article argues that similarities like these make Indian Commerce Clause law an important resource in the search for the meaning of commerce under the Foreign Commerce Clause. Specifically, pre-1885 Indian Commerce Clause law suggests that foreign “commerce” is a broad concept that includes commercial and diplomatic relations between sovereign nations and activity that demonstrably affects willingness or ability of foreign countries or individuals to engage in commercial or diplomatic activities with the United States. Moreover, this power is limited by the sovereignty of other nations and—to a lesser extent—by an independent obligation to protect the welfare of foreign nationals.

This Article will begin by briefly exploring the history of the outward-looking Foreign Commerce Clause, focusing especially on the reasons why it has remained largely unexplored as a source of federal power. The

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9. See 18 U.S.C.A. § 2423 (West 2016).

10. U.S. CONST. art. 1, § 8, cl. 3; see, e.g., *United States v. Pendleton*, 658 F.3d 299, 308 (3d Cir. 2011).

11. Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 969 (2010).

12. See Alaina Caliendo, *What Happens Abroad Does Not Stay Abroad: United States v. Pendleton and Congress's Constitutional Authority to Regulate Child Sex Abuse Abroad*, 10 SETON HALL CIRCUIT REV. 375, 401 (2014).

13. See *Bollinger*, 798 F.3d at 203.

14. See *Worcester v. Georgia*, 31 U.S. 515, 538 (1832).

15. See *In re Can-Ah-Couqua*, 29 F. 687, 688 (D. Alaska 1887).

16. See *United States v. Forty-Three Gallons of Whisky*, 108 U.S. 491, 493 (1883).

17. See *United States v. Bailey*, 24 F. Cas. 937, 940 (C.C.D. Tenn. 1834).

Article will generally focus on criminal prosecution for crimes committed abroad and will describe two laws—the PROTECT Act and the International Parental Kidnapping Crime Act (hereinafter, IPKC Act)<sup>18</sup>—that are frequently implicated in Foreign Commerce Clause case law. The Article will then briefly outline the current state of Foreign Commerce Clause jurisprudence, focusing especially on the four-way circuit split as to the relationship between the Foreign Commerce Clause and the *Lopez* definition of interstate commerce.

The second part of this Article will discuss the Indian Commerce Clause, an interpretive lens that has never been applied to the Foreign Commerce Clause. As this Article will show, there are important doctrinal, textual, and policy similarities between Indian Commerce Clause law and Foreign Commerce Clause law that suggest that the former may be useful in understanding the latter. However, as this Article will argue, the most relevant Indian Commerce Clause law and case law occurred before 1885, when the Indian plenary power doctrine was developed and Congress began to treat Native Americans less as truly sovereign nations and more as dependent wards. Examining pre-1885 Indian Commerce Clause law, this comment will develop a novel definition of commerce that can also be applied in the Foreign Commerce Clause context. The Article will conclude by using this new definition to analyze the constitutionality of the PROTECT Act and the IPKC Act.

## II. THE RIDDLE OF THE OUTWARD-LOOKING FOREIGN COMMERCE

Until recently, courts have largely ignored the outward-looking portion of the Foreign Commerce Clause.<sup>19</sup> Congress has always regulated activity that might seem to qualify as foreign commerce, but historically these regulations could be justified under another enumerated power—such as the treaty power, provided that the regulations were made pursuant to a treaty.<sup>20</sup> Beginning in the 1990s, however, Congress passed several laws targeting Americans who tried to evade domestic laws by traveling abroad to commit crimes.<sup>21</sup> These laws were not developed pursuant to treaty and did not directly implicate traditional sources of Congressional extra-territorial power.<sup>22</sup> However, proponents of these laws argued that they were valid under the Foreign Commerce Clause.<sup>23</sup> Subsequent convictions under laws such as the PROTECT Act and the IPKC Act have prompted a flowering of judicial inquiry into the limits of the foreign

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18. See 18 U.S.C.A. § 1204 (West 2016).

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

20. See, e.g., General Agreement on Tariffs and Trade, Oct. 30, 1947; 61 Stat. A-11, 55 U.N.T.S. 194.

21. See, e.g., 18 U.S.C.A. § 1204 (West 2015).

22. See Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 *FORDHAM L. REV.* 1955, 1968 (2015).

23. See, e.g., Brief for the United States at \*30, *United States v. Bollinger*, 798 F.3d 201 (4th Cir. 2015) No. 14-4086, 2014 WL 5174426.

commerce clause.<sup>24</sup>

A. USING THE FOREIGN COMMERCE POWER TO REGULATE  
AMERICAN CONDUCT ABROAD

Although some commentators suggest that the outward-looking Foreign Commerce Clause is a repository of vast, previously untapped Congressional power, modern judicial interest in the clause has developed in response to a fairly narrow set of laws that regulate American criminal activity overseas.<sup>25</sup> This section explores why these laws implicate the Foreign Commerce Clause and describes two examples of these laws.

Generally, United States criminal law is presumed not to apply extra-territorially,<sup>26</sup> and those laws that do explicitly criminalize conduct abroad usually involve activity on ships or planes;<sup>27</sup> conduct prohibited by international treaty;<sup>28</sup> conduct against government employees or property;<sup>29</sup> or conduct that has an effect on the United States as a whole,<sup>30</sup> such as terrorist plans. Hence, an American who traveled to a foreign country with a weak or corrupt justice system could go unpunished for a crime committed on foreign soil that would have resulted in serious criminal penalties had the crime been committed in the United States. As long as the harm caused by the crime was local in scope, prosecuting the wrongdoing would have limited implications for foreign affairs, would likely not be justified via relationship to a treaty, and would not have an appreciable effect on U.S. domestic affairs. However, the victims of the crime could suffer great harm and have limited legal recourse.

Child sex tourism is a prime example of this type of foreign crime,<sup>31</sup> and one of the laws that appears most in outward-looking foreign commerce clause cases<sup>32</sup> is the PROTECT Act.<sup>33</sup> With the advent of the internet and affordable, accessible means of foreign travel, many sexual

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24. See, e.g., *Bollinger*, 798 F.3d at 203.

25. See, e.g., Colangelo, *supra* note 11, at 951-52 (“Despite the mounting significance of the Clause for modern U.S. regulatory regimes at home and abroad, it remains an incredibly under-analyzed source of congressional power.”); Naomi Harlin Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 FLA. L. REV. 1139, 1213 (2013) (“Given that there are already hundreds of laws with extraterritorial application and that society is becoming increasingly global, Congress’s foreign commerce power may become as prominent an issue as Congress’s interstate commerce power.”).

26. *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 248 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

27. E.g., 18 U.S.C. § 2285(a) (2015).

28. E.g., 18 U.S.C. § 175 (biological weapons).

29. E.g., 18 U.S.C. §§ 351(a), (i) (relating to crimes of violence committed against Members of Congress, Supreme Court justices, and certain senior executive officials).

30. E.g., 18 U.S.C. § 2340A(b)(2).

31. Caliendo, *supra* note 12, at 378.

32. See, e.g., *United States v. Bollinger*, 798 F.3d 201, 210 (4th Cir. 2015); *United States v. Pendleton*, 658 F.3d 299, 306 (3d Cir. 2011); *United States v. Al-Maliki*, 787 F.3d 784, 791-92 (6th Cir. 2015); *United States v. Clark*, 435 F.3d 1100, 1114 (9th Cir. 2006).

33. 18 U.S.C.A. § 2423 (West 2016).

predators have begun preying on victims in developing countries.<sup>34</sup> Although some offenders travel for the primary purpose of engaging in sexual tourism and pay cash for sex, other offenders, like Bollinger, are preferential or situational.<sup>35</sup> These offenders may engage in less formal economic transactions—like a promise of a television set in exchange for the opportunity to befriend a twelve-year-old boy<sup>36</sup>—or in no exchange at all. At least some overseas child exploitation is driven by the belief that crimes in poor countries will go unreported or at least unprosecuted.<sup>37</sup>

Four sections of the 2003 PROTECT Act address foreign commerce, the most relevant of which for this Article is § 2423(c), which criminalizes illicit sexual conduct by U.S. citizens or permanent residents overseas.<sup>38</sup> Section 2423(f) defines illicit sexual conduct as a sexual act with a person under 18 that would (1) be a federal crime of sexual abuse<sup>39</sup> or (2) any commercial sexual act.<sup>40</sup> The combination of § 2423(c) and (f)(1) is sometimes called the noncommercial prong of the Act; the combination of § 2423(c) and (f)(2) is called the commercial prong.<sup>41</sup> Notably, the 2003 version of the statute revised a 2002 version which only criminalized foreign travel with intent to engage in a sexual act with a minor.<sup>42</sup>

Another example of the type of crime implicated in Foreign Commerce Clause case law is international parental kidnapping.<sup>43</sup> In 2010, the U.S. Department of State received 1,135 new requests for assistance in the return of 1,621 children to the United States from other countries.<sup>44</sup> A significant number of those children were taken to countries that signed the Hague Convention on the Civil Aspects of International Child Abduction, a multilateral treaty designed to streamline the return of a child from one member nation to another.<sup>45</sup> However, parents whose children

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34. Gregory Van Houten, *Testing Congress's Foreign Commerce and Treaty Powers: A New, (Un)constitutional Tool for Combating American Child Sex Tourists?*, 53 AM. CRIM. L. REV. 177, 183 (2016).

35. *Extraterritorial Sexual Exploitation of Children*, U.S. DEP'T OF JUSTICE., <http://www.justice.gov/criminal-ceos/extraterritorial-sexual-exploitation-children> [https://perma.cc/956S-3ZSJ]; *Bollinger*, 798 F.3d at 203.

36. *See supra* note 23, at \*12-13; *United States v. Bianchi*, 386 F. App'x 156 (3d Cir. 2010).

37. Van Houten, *supra* note 34, at 183; *see Bollinger*, 798 F.3d at 204.

38. 18 U.S.C.A. § 2423(c) (West 2016).

39. § 2423(f)(1).

40. § 2423(f)(2).

41. Jessica E. Notebaert, *The Search for A Constitutional Justification for the Noncommercial Prong of 18 U.S.C. § 2423(c)*, 103 J. CRIM. L. & CRIMINOLOGY 949, 953 (2013).

42. § 2423(b). Establishing intent would likely be difficult for predators like Larry Bollinger who traveled to Haiti for legitimate reasons and, allegedly, did not begin to abuse children until several years after he arrived in the country. *See Bollinger*, 798 F.3d at 204-05.

43. *See, e.g., United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 734 (E.D. Va. 2003).

44. U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2014).

45. *See Hague Convention on the Civil Aspects of International Child Abduction* art. 1, *opened for signature* Oct. 25, 1980; 22 U.S.C. §§ 9001-9011 (formerly cited as 42 U.S.C. §§ 11601-11611); 1343 U.N.T.S. 89.

are taken to non-signatory or non-compliant countries may face a protracted, expensive—and often unsuccessful—battle to enforce an American court order in a foreign country.<sup>46</sup>

The IPKC Act was passed in 1993 in the hopes of further deterring parental abduction and giving the United States jurisdiction over parental abductors who flee to other countries.<sup>47</sup> The Act criminalizes the removal or retention of a child “who has been in the United States” from the United States by anyone—regardless of nationality—provided they have the “intent to obstruct the lawful exercise of parental rights.”<sup>48</sup> People convicted of violating the IPKC Act face fines or imprisonment of up to three years.<sup>49</sup> The Act was the first federal law to criminalize international parental kidnapping and augments state custody and parental kidnapping laws which may be difficult to enforce on an international basis or—depending on the state—may not exist.<sup>50</sup>

Since its inception, indictment under the IPKC Act has only been used in very limited circumstances.<sup>51</sup> Nevertheless, the law gives U.S. law enforcement enormous power to, for instance, reach into a foreign country with whom the United States has no treaty regarding parental kidnapping and assert jurisdiction over a non-U.S. citizen in order to facilitate the return of a non-U.S. citizen child.<sup>52</sup>

The PROTECT Act and the IPKC Act raise important questions about the scope of the Foreign Commerce Clause because they criminalize fundamentally local conduct abroad, without reference to an international treaty. Although the PROTECT Act’s foreign commerce and travel provisions were enlarged<sup>53</sup> after the United States signed the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, a supplement to a United Nations treaty that required signatories to take steps to prohibit child prostitution, trafficking, and pornography,<sup>54</sup> the Optional Protocol is not mentioned as justification for the Act in any of the legislative materials accompanying the 2002 revision.<sup>55</sup> Given Congress’s stated preference for pursuing abducted children through the

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46. Jason Nitz, “*Splitting the Baby*” *Internationally: Evaluating the “Least Restrictive” Conundrum When Protecting Children from International Parental Abduction*, 16 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 417, 420-21 (2014).

47. *Id.* at 422-23; Donyale N. Leslie, *A Difficult Situation Made Harder: A Parent’s Choice Between Civil Remedies and Criminal Charges in International Child Abduction*, 36 GA. J. INT’L & COMP. L. 381, 394 (2008).

48. 18 U.S.C.A. § 1204 (West 2015).

49. *Id.*

50. Leslie, *supra* note 47, at 394.

51. *Id.* at 394-95. Congress has made clear that parents seeking the return of a child should always use the Hague Convention if possible. *Id.* Some commentators point out that imposing criminal penalties on the perpetrator only makes the return of a child less likely. *Id.* In addition, prosecution under the IPKC Act still requires some cooperation from the foreign country in extraditing the offending parent. Nitz, *supra* note 46, at 433.

52. *See* § 1204.

53. *See id.*; Protection of Children from Sexual Predators Act of 1998, PL 105-314, October 30, 1998, 112 Stat 2974.

54. G.A. Res 2171/A-27531, U.N. Doc. A/RES/54/263 (May 25, 2000).

55. *See* Notebaert, *supra* note 41, at 955.

Hague Convention,<sup>56</sup> the IPKC—by definition—criminalizes acts that are not subject to outstanding treaty. Hence, neither Act can be justified under the Necessary and Proper Clause as a way of implementing treaty provisions.<sup>57</sup>

Extraterritorial regulation has also been justified as a way of effectuating the broad—and some instances, extra-constitutional—power the legislative branch holds over foreign affairs.<sup>58</sup> However, while the conduct targeted by the PROTECT Act and the IPKC Act is abhorrent, it arguably lacks the type of widespread political or economic implications that usually characterize conduct regulated under the foreign affairs power.<sup>59</sup> Child kidnapping and child abuse have historically been treated as local matters that are best left to the supervision of states at home and foreign states abroad.<sup>60</sup> It is unlikely that the PROTECT Act or the IPKC Act could be justified under Congress's power to effectuate executive power over foreign affairs.

If the IPKC Act and the PROTECT act are to be constitutional, then, they must fall within the scope of activity that can be regulated under the Foreign Commerce Clause. However, both statutes criminalize conduct that strains the definition of commerce set forth in *United States v. Lopez*.<sup>61</sup> Neither the kidnapping contemplated by the former nor the abuse contemplated by the latter necessarily require the use of channels or instrumentalities of commerce.<sup>62</sup> Moreover, both crimes may occur without an economic transaction; therefore, it is difficult to show any kind of substantial effect from kidnapping or abuse on interstate or foreign commerce.<sup>63</sup> The holding in *United States v. Morrison*—which rejected the possibility that gender-motivated violence is an economic activity—strongly suggests that child kidnapping and non-commercial child sexual abuse would also fail to qualify as commerce under the *Lopez* defini-

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56. See Leslie, *supra* note 47, at 394.

57. But see *United States v. Martinez*, 599 F. Supp. 2d 784, 798 (W.D. Tex. 2009) (suggesting in dicta that the constitutionally contentious portions of the foreign commerce clause could be authorized under the Necessary and Proper Clause pursuant to implementing the Optional Protocol, thus sidestepping the foreign commerce clause issue altogether).

58. *United States v. Belfast*, 611 F.3d 783, 805 (11th Cir. 2010) (“Congressional power to pass those laws necessary and property to effectuate the enumerated powers of the Constitution is nowhere broader and more important than in the realm of foreign relations.”).

59. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (describing use of the plenary power doctrine in order to enact an embargo on arms shipments to South America).

60. See, e.g., Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 831, 835 (2010).

61. 514 U.S. 549, 558 (1995) (holding that Congress may regulate the channels and instrumentalities of interstate commerce and “those activities having a substantial relation to interstate commerce”).

62. Under the IPKC Act, mere retention of a child outside the United States is a crime. 18 U.S.C.A. § 1204 (West 2015).

63. See *United States v. Morrison*, 529 U.S. 598, 615-19 (2000) (holding that acts of violence against women had an “attenuated” effect, and not a substantial one, on interstate commerce).



tion.<sup>64</sup> Hence, the PROTECT Act and the IPKC Act beg the question of whether the *Lopez* definition of commerce applies to the Foreign Commerce Clause.

B. THE OUTWARD-LOOKING FOREIGN COMMERCE CLAUSE IS A  
DEEPLY UNSETTLED AND UNEXPLORED PORTION  
OF THE LAW

Case law regarding the scope of the outward-looking foreign commerce clause is highly unsettled. Most courts that have considered the issue use the *Lopez* definition of commerce as a jumping off point.<sup>65</sup> However, courts differ widely on how the *Lopez* definition applies—if at all—to the foreign prong of the commerce clause.

A few courts have relied on what Professor Saikrishna Prakash calls “the presumption of intrasentence uniformity” throughout the Commerce Clause to conclude that the foreign commerce clause employs the same definition of commerce as the interstate commerce clause.<sup>66</sup> In *United States v. Al-Maliki*, the Sixth Circuit suggested in dicta that the noncommercial prong of the PROTECT Act<sup>67</sup> is likely unconstitutional because the activity regulated under the noncommercial prong does not fall into any of the *Lopez* categories.<sup>68</sup> Relatedly, a district court in the District of Columbia held that the IPKC Act was valid under the Foreign Commerce Clause because the statute included a “jurisdictional hook” requiring movement in foreign commerce that the court likened to the interstate jurisdictional element required under *Lopez*.<sup>69</sup>

However, the majority of circuits and other courts which have examined the issue reject intrasentence uniformity in favor of the idea that congressional power under the Foreign Commerce Clause was intended to be greater than power under the Interstate Commerce Clause.<sup>70</sup> The courts that favor this broad reading of the Foreign Commerce Clause fall into two camps.

The first group recognizes the broader scope of the Foreign Commerce Clause, but tries to fit challenged law within the *Lopez* categories in order to leave room for future guidance from the Supreme Court.<sup>71</sup> In *United States v. Pendleton*, for instance, the Third Circuit upheld the con-

64. *See id.*

65. *See, e.g.*, *United States v. Clark*, 435 F.3d 1100, 1102-03 (9th Cir. 2006).

66. *See* Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1149 (2003).

67. *See* Notebaert, *supra* note 41.

68. *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015) *cert. denied*, 136 S. Ct. 204 (2015).

69. *United States v. Homaune*, 898 F. Supp. 2d 153, 159-160 (D.D.C. 2012).

70. *United States v. Pendleton*, 658 F.3d 299, 306 (3d Cir. 2011) (“Notwithstanding Chief Justice Marshall’s statement in *Gibbons*, the three subclauses of Article 1, § 8, cl. 3 have acquired markedly different meanings over time.”).

71. *See, e.g., id.* at 308 (“Although we agree . . . that the Interstate Commerce Clause developed to address ‘unique federalism concerns’ that are absent in the foreign commerce context, we are hesitant to dispose of *Lopez*’s ‘time-tested’ framework without further guidance from the Supreme Court.”).

stitutionality of § 2423(c) of the PROTECT Act by arguing that it targeted “American citizens [who] were using the channels of foreign commerce to travel to countries where ‘dire poverty and . . . lax enforcement’ would allow them to ‘escape prosecution’ for their crimes of child sexual abuse.”<sup>72</sup> Similarly, in *United States v. Martinez*, a district court in the Western District of Texas ruled against a § 2423(c) challenge on the grounds that even the noncommercial prong of the law<sup>73</sup> concerned activities that were substantially related to foreign commerce.<sup>74</sup>

In contrast, the second group—which includes the Third, Fourth and Ninth Circuits—suggests a new definition of commerce that reflects Congress’ broad power under the foreign commerce clause. In *United States v. Clark*, a case that questioned the constitutionality of the commercial prong of § 2423(c), the Ninth Circuit held that laws that fall under Congress’s foreign commerce clause power must have “a constitutionally tenable nexus with foreign commerce.”<sup>75</sup> Applying the rational basis test from *Gonzales v. Raich*, the Ninth Circuit found 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.”<sup>76</sup> In *United States v. Bianchi*—which involved an American citizen who raped children in Romania and Moldova after befriendng their families—the Third Circuit applied the *Clark* test to uphold the constitutionality of the non-commercial prong of the PROTECT Act.<sup>77</sup>

More recently, in *United States v. Bollinger*, the Fourth Circuit proposed a definition of foreign commerce that includes the channels and instrumentalities of foreign commerce and “activities that demonstrably affect such commerce.”<sup>78</sup> Examining *Lopez*,<sup>79</sup> the Fourth Circuit found that the first two *Lopez* categories were applicable abroad, but rejected the third category as “unduly demanding in the foreign context,” noting that the substantial effects test was developed in response to federalism concerns.<sup>80</sup> Requiring that an activity demonstrably affect foreign commerce implicates a much broader array of activity than the interstate commerce clause but still precludes regulation of activities with an “imag-

72. *Id.* at 310; *see also* *United States v. Flath*, 845 F. Supp. 2d 951, 955-56 (E.D. Wis. 2012). In *Bollinger*, the Fourth Circuit points out that this analysis means that Congress is free to criminalize any foreign conduct that occurs after an American citizen travels out of the United States because travel will always implicate the “channels” of commerce. 798 F.3d 201, 216 (4th Cir. 2015).

73. *See* Notebaert, *supra* note 41.

74. *United States v. Martinez*, 599 F. Supp. 2d 784, 806 (W.D. Tex. 2009).

75. 435 F.3d 1100, 1114 (9th Cir. 2006).

76. *Id.*

77. *United States v. Bianchi*, 386 F. App’x 156, 162 (3d Cir. 2010) (“The Supreme Court’s broad interpretation of the Foreign Commerce Clause applies with equal force to the non-commercial sexual conduct prong of § 2423(c), and *Bianchi* has simply not made the required ‘plain showing that Congress has exceeded its constitutional bounds’ by enacting that prong of the statute.”).

78. 798 F.3d 201, 215-16 (4th Cir. 2015).

79. *See generally* *United States v. Lopez*, 514 U.S. 549 (1995).

80. *Bollinger*, 798 F.3d at 215.

inable or hypothetical” effect.<sup>81</sup>

Under the new test it proposed, the Fourth Circuit held that the non-commercial prong of § 2423(c) was a valid exercise of Congress’ foreign commerce clause power because § 2423(c) is part of a larger effort to close legal loopholes that formerly allowed sex tourists to abuse children abroad with impunity.<sup>82</sup> As the Fourth Circuit explained, “prohibiting the non-commercial sexual abuse of children by Americans abroad has a demonstrable effect on . . . the commercial sex industry” and, thus, is permissible under the foreign commerce clause,<sup>83</sup> even though the regulation of non-commercial sexual assault on women does not have a substantial effect on interstate commerce.<sup>84</sup>

To summarize, a few themes run through the deeply unsettled landscape of foreign commerce clause jurisprudence. Although most courts concur that the interstate definition of commerce does not apply in the Foreign Commerce Clause context, they continue to use the *Lopez* definition as the framework for their analysis. The recent Fourth Circuit decision in *Bollinger* takes the boldest step toward establishing a truly novel definition of commerce. Finally, the current four-way circuit split on this issue speaks to the need for greater foreign commerce clause guidance.<sup>85</sup> The Supreme Court should grant certiorari on a foreign commerce clause case to bring clarity to this area of the law.

### III. EXAMINING THE FOREIGN COMMERCE CLAUSE THROUGH THE LENS OF THE INDIAN COMMERCE CLAUSE

The Indian Commerce Clause is an underutilized source for interpreting the Foreign Commerce Clause. No court that has analyzed the definition of commerce under the Foreign Commerce Clause has looked to Indian Commerce Clause law for guidance. One commentator on the subject explicitly rejected using Indian Commerce Clause law on the grounds that U.S.-tribal relationships are unique and have limited application to international relationships.<sup>86</sup> This section suggests that the Indian Commerce Clause parallels the Foreign Commerce Clause in four key ways and that reservations about the applicability of Indian Commerce Clause law can be lessened by focusing on cases and law prior to the Supreme Court’s announcement of plenary power over Native American affairs in *United States v. Kagama*.<sup>87</sup>

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81. *Id.* at 216.

82. *Id.* at 218. The intent before travel requirement of the 2002 version of the law prevented prosecution of many abusers.

83. *Id.*

84. See *United States v. Morrison*, 529 U.S. 598, 615-19 (2000).

85. See *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015) *cert. denied*, 136 S. Ct. 204 (2015); *United States v. Bollinger*, 798 F.3d 201, 215-16 (4th Cir. 2015); *United States v. Pendleton*, 658 F.3d 299, 308 (3d Cir. 2011); *United States v. Clark*, 435 F.3d 1100, 1114 (9th Cir. 2006).

86. Goodno, *supra* note 25, at 1191-92.

87. 118 U.S. 375, 378-79 (1886).

Examining law and case law from this period suggests that under the pre-1885 Indian Commerce Clause, “commerce” was defined as commercial and diplomatic relations between sovereign nations and activity that demonstrably affects willingness or ability of foreign countries or individuals to engage in commercial or diplomatic activities with the United States. Moreover, this power is limited by the sovereignty of other nations and—to a lesser extent—by an independent obligation to protect the welfare of foreign nationals. Applying this definition to the Foreign Commerce Clause yields sensible results: upholding the constitutionality of the PROTECT Act, yet limiting the ability of the IPKC Act to criminalize the conduct of non-Americans in regard to non-American children.

A. SIMILARITIES BETWEEN INDIAN COMMERCE CLAUSE LAW AND FOREIGN COMMERCE CLAUSE LAW: SOVEREIGNTY, INEQUALITY, AND THE LURE OF LIMITLESS POWER

1. *Textual Similarities Between the Foreign Commerce Clause and Indian Commerce Clause*

Despite widespread reliance on Interstate Commerce Clause law in Foreign Commerce Clause cases, the Foreign Commerce Clause is textually closer to the Indian Commerce Clause than to the Interstate Commerce Clause. As Professor Goodno points out, the first two concern commerce “with Indian tribes” or “with foreign nations,” while the latter concerns commerce “among the several [s]tates.”<sup>88</sup>

Textual interpretations of the Commerce Clause ascribe importance to this difference. Professor Colangelo, for instance, draws on *Gibbons v. Ogden* to define “among” in the commerce clause as meaning “intermingled with,” such that “[c]ommerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”<sup>89</sup> In contrast, “with” requires a nexus with the United States.<sup>90</sup> Textually, Professor Colangelo argues, Congress is precluded under the Foreign Commerce Clause from regulating local foreign conduct absent a joint regulatory scheme with the foreign nation in question.<sup>91</sup> In *Lopez* terms, Professor Colangelo suggests that Congress may properly regulate channels of foreign commerce with the United States, instrumentalities of foreign commerce with a constitutionally sufficient U.S. nexus, and activities with a substantial effect on foreign commerce provided that the effect “would reasonably authorize U.S. jurisdiction under international law.”<sup>92</sup>

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88. Goodno, *supra* note 25, at 1152, 1188; U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

89. Colangelo, *supra* note 11, at 972 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 193-94 (1824)).

90. *Id.* at 973-74.

91. *Id.* at 975.

92. *Id.* at 1039.

This distinction is not merely academic. Both Professor Colangelo and Jessica Notebaert—who suggest similar restrictions on the Foreign Commerce Clause power—concur that under this restricted definition of foreign commerce, the non-commercial prong of the PROTECT Act is unconstitutional.<sup>93</sup> The textual similarities between the Indian Commerce Clause and Foreign Commerce Clause, therefore, are noteworthy and suggest that it may be worthwhile to examine the latter through the lens of the former.

## 2. *A Shared Freedom from Federalism*

As an interpretive device, Indian Commerce Clause jurisprudence has the added advantage of not being colored by questions of federalism. Although some states made early overtures to establish independent relationships with Native Americans, the framers intended that the federal government should exclusively oversee Indian affairs.<sup>94</sup> Hence, unlike the *Lopez* definition, the definition of commerce that developed under the Indian Commerce Clause was not influenced by the need to reserve certain powers to the states.<sup>95</sup>

Some courts interpreting the Foreign Commerce Clause hesitate to adopt the *Lopez* definition because they believe it was crafted specifically to respond to the unique requirements of federalism.<sup>96</sup> In *Bollinger*, for instance, the Fourth Circuit wrote that the “assumption [that interstate jurisprudence should be applied to the foreign commerce clause] is belied by decades of Supreme Court cases that have consistently interpreted Congress’s interstate authority against the backdrop of . . . federalism concerns that are inapposite in the international arena.”<sup>97</sup> Similarly, in *Clark*, the Ninth Circuit questioned the applicability of the *Lopez* framework to foreign commerce clause issues given that “[t]his framework developed in response to the unique federalism concerns that define congressional authority in the interstate context.”<sup>98</sup>

In *Al-Maliki*, the Sixth Circuit appears to undermine this argument by suggesting an analogy between the limits federalism places on Interstate Commerce Clause law and the limits foreign sovereignty and the rights of individual Americans place on Foreign Commerce Clause law.<sup>99</sup> However, the Sixth Circuit never explains why Indian Commerce Clause law—which is riddled with concerns of Native American sovereignty and tales of individual Americans anxious to contract with Native Americans—is not even more analogous to Foreign Commerce Clause law.

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93. *Id.* at 1039-40; Notebaert, *supra* note 41, at 974-75.

94. Goodno, *supra* note 25, at 1189.

95. *See, e.g.*, United States v. Clark, 435 F.3d 1100, 1116 (9th Cir. 2006) (“At times, forcing foreign commerce cases into the domestic commerce rubric is a bit like one of the stepsisters trying to don Cinderella’s glass slipper . . .”).

96. *See, e.g.*, United States v. Bollinger, 798 F.3d 201, 210 (4th Cir. 2015).

97. *Id.*

98. *Clark*, 435 F.3d at 1103.

99. United States v. Al-Maliki, 787 F.3d 784, 793 (6th Cir. 2015).

### 3. *The Siren's Song of Limitless Federal Power*

In the absence of federalism-based limits on the type of activities Congress can regulate under the Indian Commerce Clause and the Foreign Commerce Clause, courts have struggled to determine if power in these areas is limited by another principle. The tantalizing possibility of essentially unlimited—or even extra-Constitutional—power over U.S.-Native American relations or U.S.-foreign commercial relations has variously tempted and repelled the courts.

Early Indian Commerce Clause law suggested that congressional power was limited by tribal sovereignty. In the early years of the country, interaction with Native American tribes hewed closely to principles of international law.<sup>100</sup> At the time, Native American tribes were autonomous groups capable of entangling the young nation in “expensive and protracted wars.”<sup>101</sup> Accordingly, the United States built relationships with tribes in the same way it did with other sovereign nations—by treaty.<sup>102</sup> Some treaties ceded considerable power to the federal government.<sup>103</sup> However, a significant number also limited federal interference in tribal affairs.<sup>104</sup> In contrast, early laws that were passed under the Indian Commerce Clause were limited in scope. For instance, a series of statutes known as the Nonintercourse Act were passed to regulate trade and crime between Americans and Native Americans, but did not presume to interfere with intra-tribal affairs.<sup>105</sup>

In 1885, however, Congress responded to frustration about a recent Supreme Court decision that affirmed strong limits on federal regulation of intra-tribal crime by passing the Major Crimes Act.<sup>106</sup> The Act, which gave federal courts jurisdiction over serious crimes committed by Native Americans, was an unprecedented assertion of federal power into what had long been purely internal tribal affairs.<sup>107</sup> In 1885, a stabbing on the Hoopa Valley Reservation by Kagama, a Yurok Native American, presented the first opportunity for the Supreme Court to review the con-

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100. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 28 (2002).

101. *Id.* at 27.

102. Nathan Speed, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. REV. 467, 471 (2007).

103. *See, e.g.*, Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin band of Snake Indians art. IX, Oct. 14, 1864, 16 Stat. 707.

104. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 792 (2006).

105. Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329. The statutes are substantively very similar to each other. *See, e.g.*, *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366, 367 (1858). There are six statutes because each statute expired within two to four years of being passed and had to be renewed.

106. Act of Mar. 3, 1885, ch. 341, 23 Stat. 362 (1885).

107. Speed, *supra* note 102, at 479-480.

stitutionality of the law.<sup>108</sup>

The Court upheld the law but acknowledged that only “a very strained construction” of the Indian Commerce Clause could support “a system of criminal laws for Indians living peaceably in their reservations.”<sup>109</sup> Instead, the Court found that federal power over Native American affairs was necessary—whether or not it was authorized by the Constitution—because Native Americans were wards of the state.<sup>110</sup> As Justice Miller wrote, “from [the tribes’] very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of [federal] protection, and with it the power.”<sup>111</sup>

Following *Kagama*, the Court enlarged the extra-constitutional power Justice Miller first described into what came to be regarded as Congress’s “plenary power” over Native American affairs.<sup>112</sup> The Indian plenary power doctrine “quickly infiltrated the [Supreme] Court’s analysis even in straight Commerce Clause cases” and contributed to the speedy demise of Native American sovereignty.<sup>113</sup> In *Lone Wolf v. Hitchcock*, for instance, the Court relied on the plenary power doctrine to uphold Congressional action stripping Native Americans of tribal land notwithstanding pre-existing treaties to the contrary.<sup>114</sup> Moreover, the Court found that Congress’s plenary power was not subject to judicial review.<sup>115</sup> Despite widespread criticism, the plenary power doctrine remained an important force in Native American affairs until the mid-twentieth century.<sup>116</sup>

Foreign Commerce Clause jurisprudence is much less developed than Indian Commerce Clause law in terms of articulating the scope of federal power. Certainly, the Supreme Court has stated that congressional power under the Foreign Commerce Clause is “exclusive and plenary” and therefore “its exercise may not be limited, qualified, or impeded to any extent by state action.”<sup>117</sup> Most recently, in *Japan Line, Ltd. v. County of Los Angeles*, a dormant foreign commerce clause case, the Court stated in dicta that congressional power granted by the foreign commerce clause was greater than its interstate counterpart because “Congress’ power to regulate interstate commerce may be restricted by

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108. Mark Stuart Weiner, *Americans Without Law: The Racial Boundaries of Citizenship* 45 (2006).

109. *United States v. Kagama*, 118 U.S. 375, 378 (1886).

110. *Id.* at 384.

111. *Id.*

112. *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899).

113. Cleveland, *supra* note 100, at 63-64.

114. 187 U.S. 553, 565-67 (1903).

115. *Id.* at 568 (“[A]s Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned. . .by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts.”).

116. Cleveland, *supra* note 100, at 77.

117. *Bd. of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48, 56-57 (1933).

considerations of federalism and state sovereignty.”<sup>118</sup> Both these decisions have been cited in outward-looking foreign commerce clause cases for the general proposition that power under the Foreign Commerce Clause is greater than the power under the Interstate Commerce Clause.<sup>119</sup> This begs the question, how much greater?

Generally, 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.”<sup>120</sup> In *United States v. Al-Maliki*, the Sixth Circuit suggested that the Foreign Commerce power is limited by the sovereignty of other nations and by the liberties granted to individual citizens.<sup>121</sup> However, the Ninth Circuit discusses no inherent constitutional limitation and simply gestures broadly toward “Congress’s sweeping powers over foreign commerce.”<sup>122</sup> Still other courts considering non-Foreign Commerce Clause matters suggest that Congress—like the executive branch—may have some sort of extra-constitutional power over foreign affairs that proceeds from the United States’ status as an independent nation.<sup>123</sup> In *United States v. Curtiss-Wright*, the Supreme Court wrote that “the investment of the *federal government* with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.”<sup>124</sup> This suggests a colorable argument that federal power over foreign commerce is not merely plenary, but extra-constitutional. After

118. *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 448, n.13 (1979).

119. *See, e.g., United States v. Clark*, 435 F.3d 1100, 1103 (9th Cir. 2006) (citing *Japan Line* as “evidence that the Founders intended the scope of the foreign commerce power to be . . . greater . . .”). This reliance on *Japan Line* has been criticized by academics. *See* Colangelo, *supra* note 11, at 968; *see also* Notebaert, *supra* note 41, at 969. As Professor Colangelo points out, the *Japan Line* holding occurred in the context of an interaction between a state and a foreign nation in which “the need for national uniformity and the power to override state law” were paramount. Colangelo, *supra* note 11, at 968. However, outward-looking foreign commerce clause cases consider the ability of a nation to legislate within the borders of another nation. *Id.* State-federal conflicts are not an issue in these cases and the need for national uniformity is not implicated because the nation is legislating as a whole. *Id.* Hence, conclusions reached about the scope of the dormant commerce clause may not be apposite to questions about the scope of the outward-looking foreign commerce clause. *Id.* It is possible that the many courts which have quoted *Japan Line* in support of an expansive outward-looking foreign commerce clause power do so not because the reasoning *Japan Line* uses is exactly applicable to the outward-looking foreign commerce clause but because the *Japan Line* footnote sums up a widespread conviction that congressional power in foreign affairs should be broad. *See, e.g., Clark*, 435 F.3d at 1109 (quoting *Japan Line*, but later asserting “[i]n considering whether Congress exceeded its power under the Foreign Commerce Clause in enacting § 2423(c), we ground our analysis in the fundamental principle that ‘[i]t is an essential attribute of [Congress’s power over foreign commerce] that it is exclusive and plenary.’”).

120. *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L.Ed. 23 (1824).

121. *United States v. Al-Maliki*, 787 F.3d 784, 793 (6th Cir. 2015) *cert. denied*, 136 S. Ct. 204 (2015).

122. *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2006).

123. *Rocha v. United States*, 288 F.2d 545, 545 (9th Cir. 1961) (“The powers of the government and the Congress in regard to sovereignty are broader than the powers possessed in relation to internal matters.”) (quoting *United States v. Rodriguez*, 182 F.Supp. 479, 490-91 (S.D.Cal. 1960), *aff’d in part, rev’d in part sub nom. Rocha v. U.S.* 288 F.2d 545).

124. 299 U.S. 304, 318 (1936) (emphasis added).



all, why should the foreign affairs power granted to the executive branch be so much greater than the foreign commerce power granted to the legislative branch? For that matter, why should “[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties. . . have vested in the federal government as necessary concomitants of nationality,” while the ability to regulate commerce with foreign nations does not?<sup>125</sup>

The answers to these questions have been sources of anxiety for commentators and courts who have pointed out that an unbounded Foreign Commerce Clause power could justify intrusive U.S. regulation of “foreign labor, manufacturing, production, and employment practices”<sup>126</sup> or micromanagement of American conduct abroad.<sup>127</sup> As an established body of law that has wrestled with a “limitless” federal power and, later, an extra-constitutional power over US-Native American commerce, Indian Commerce Clause jurisprudence may shed important light on this matter.

#### 4. *Shared Regulation of Relationships Fraught with Inequality and Exploitation*

Another similarity between the Foreign Commerce Clause and the Indian Commerce Clause is that both give Congress the power to regulate relationships that are deeply unequal and may be ripe for exploitation. Indian Commerce Clause law is fairly frank about the profound power imbalance between the United States and Native American tribes. Native American-U.S. relations have long been colored by the widely criticized “doctrine of discovery,” which suggests that American colonists had a right to own Native American land because they were the first Europeans to discover it and that this right passed to the United States upon the country’s foundation.<sup>128</sup> The relationship between the United States and Native American tribes has also been compared to a trust, complete with an attendant federal responsibility to act in favor of tribal interests.<sup>129</sup> These overlapping and intertwining doctrines have inspired policies and cases that variously regard Native Americans as savages standing in the way of manifest destiny,<sup>130</sup> wards in need of guidance from the United States,<sup>131</sup> and vulnerable parties to be protected from exploitation.<sup>132</sup>

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125. *Id.*

126. Colangelo, *supra* note 11, at 1017.

127. *United States v. Bollinger*, 798 F.3d 201, 216 (4th Cir. 2015).

128. DAVID E. WILKINS, ET AL., *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 20 (2001).

129. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011).

130. See JOHN H. VINZANT, *THE SUPREME COURT’S ROLE IN AMERICAN INDIAN POLICY* 50 (2009) (quoting Commissioner of Indian Affairs, Francis A. Walker, as saying of the end to treaty making between the United States and tribes, “This is, indeed, the only hope of salvation for the aborigines of the continent. If they stand up against the progress of civilization. . . they must be relentlessly crushed.”).

131. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

132. See Act of Aug. 7, 1789, 1 Stat. 50.

In contrast, Foreign Commerce Clause case law suggests by its silence that whatever power imbalance may exist between the United States and another country is merely incidental. In *Bollinger*, for instance, the defendant's crime was facilitated by his privileged status as an American expatriate in a far less wealthy country and by the poverty of the children he preyed upon.<sup>133</sup> Despite this, the opinion makes little mention of the deep disparity in power between the parties.<sup>134</sup> Intuitively, this implicit policy might seem to make sense. Congress has the power to regulate commerce with many countries, including those that are as economically stable and politically powerful as the United States. However, as discussed earlier, the fact of the matter is that laws authorized under the Foreign Commerce Clause tend to address the exploitation of vulnerable parties by Americans overseas.<sup>135</sup>

It is possible that this will not be a temporary feature of the law. For instance, the scope of federal power under the Interstate Commerce Clause and *Curtiss-Wright* may be permanently enlarged in such a way that it is unlikely that the Foreign Commerce Clause will ever be relied upon for anything other than regulating American conduct overseas in matters that do not implicate foreign relations, are not covered by a treaty, and largely fall outside the *Lopez* definition of commerce.<sup>136</sup> Accordingly, a California district court recently upheld the constitutionality of a statute prohibiting the foreign murder of a U.S. national—a question that might otherwise prompt a discussion of the limits of the foreign commerce clause—by citing *Curtiss-Wright* in support of general federal “plenary power over external affairs.”<sup>137</sup> Similarly, in a 2003 international child-kidnapping case in which the defendant challenged the application of the IPKC Act to an abduction that occurred in Iran, the constitutionality of the Act was upheld based on Congress’ general ability to regulate the channels of interstate commerce.<sup>138</sup>

Hence, it may be that regulating unequal nation to nation and American to foreign citizen relationships is not an incidental trait of contemporary Foreign Commerce Clause law, but rather a defining characteristic of how the Foreign Commerce Clause power will be deployed in fact. If this is the case, then the Indian Commerce Clause becomes even more relevant as an interpretive lens for the Foreign Commerce Clause.

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133. *United States v. Bollinger*, 798 F.3d 201, 206-07(4th Cir. 2015) (noting in the fact section of the opinion that impoverished children in Haiti often offer sex in exchange for food and that Bollinger appeared to believe his crimes in Haiti would go unpunished).

134. *See id.*

135. *See supra* text accompanying notes 52-59.

136. Goodno, *supra* note 25, at 1144 (“There are potentially hundreds of federal laws that give Congress the power to regulate the conduct of U.S. citizens abroad, both in the civil and criminal context.”).

137. *United States v. Brimager*, No. 13CR2381 JM, 2015 WL 4923646, at \*7 (S.D. Cal. Aug. 18, 2015).

138. *United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 734 (E.D. Va. 2003) (“While defendant is correct that the [IPKC Act] targets interference with lawful parental rights, it does not do so in the abstract; it specifically targets interference with lawful parental rights that impedes movement in the channels of commerce.”).

B. FOCUSING THE LENS: INDIAN COMMERCE CLAUSE LAW PRIOR TO 1885

Indian Commerce Clause law has the potential to suggest important insights into the scope of the outward-looking Foreign Commerce Clause. However, no court has looked to Indian Commerce Clause law for guidance in interpreting the Foreign Commerce Clause and the few commentators who considered this possibility ultimately rejected it.<sup>139</sup> This reluctance to use the Indian Commerce Clause as an interpretive device may be due to what many sources call the “special relationship” between the United States and Native American tribes, suggesting a relationship that is so specific to its origins and circumstances that it has no application elsewhere.<sup>140</sup> In fact, the Supreme Court has stated that Native American tribes are not foreign nations, but rather “domestic dependent nations” that are subject to the plenary power of Congress over Indian affairs.<sup>141</sup>

This drawback is resolved, however, by focusing on Indian Commerce Clause laws and cases prior to the passage of the Major Crimes Act. Before 1885, Congress and the courts generally treated Native Americans as autonomous nations that—if not perfectly sovereign—were entitled to a protected sphere of sovereignty within the borders of their territory.<sup>142</sup> The laws passed and cases decided under the Indian Commerce Clause during this time represent a substantial body of American law concerning nations whose citizens conducted cross-border commercial and non-commercial transactions with a frequency and intimacy that characterizes U.S.-foreign relations in the age of the internet and affordable airfare. The nations in question had different cultures and different levels of resources at their disposal. Accordingly, laws and cases from this period reflect strikingly modern concerns about cultural conflict and exploitation.

Of course, this approach all but pre-supposes there is no extra-constitutional power over foreign commerce. However, there is compelling support for this assumption. The *Curtiss-Wright* doctrine has been heavily criticized as “a twentieth-century anomaly” that should “be brought back into the fold of mainstream constitutional jurisprudence.”<sup>143</sup> Indian Commerce Clause law suggests the destruction that an extra-territorial power over commerce could cause in U.S.-foreign relations: many commentators point to *Kagama* as a turning point in U.S.-Native American relations that led to the evisceration of Native American sovereignty.<sup>144</sup> For these reasons, pre-1885 Indian Commerce Clause law has more applica-

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139. Goodno, *supra* note 25, at 1191.

140. *See, e.g.*, LaPier v. McCormick, 986 F.2d 303, 305 (9th Cir. 1993).

141. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014).

142. *See supra* text accompanying notes 128-133.

143. Cleveland, *supra* note 100, at 6.

144. *See, e.g.*, Cleveland, *supra* note 100, at 62.

bility than modern Indian Commerce Clause law to modern Foreign Commerce Clause law.

### C. THE DEFINITION OF COMMERCE UNDER THE INDIAN COMMERCE CLAUSE

Under the pre-1885 Indian Commerce Clause, “commerce” was a broad concept that encompassed trade but also non-commercial interchanges and general diplomatic relations between Native Americans and American settlers. The Indian Commerce Clause and the Treaty Clause are the only two constitutional provisions that permit the federal government to regulate relationships with Native American tribes.<sup>145</sup> Hence, any law passed regarding Native Americans that was not made pursuant to treaty must involve the regulation of commerce. The diverse set of laws made to govern U.S.-Native American relations suggests a fluid definition of commerce that could succinctly be described as commercial and diplomatic relations and any American activity that might influence Native American willingness or ability to engage in those relations.

Early laws passed under the Indian Commerce Clause reflect this fluidity. For instance, a series of six statutes, known as the Nonintercourse Act, that were passed to regulate commerce between Americans and Native Americans, focused on two major areas: regulation of trade and punishment of crime.<sup>146</sup> Regulation of trade focused largely on limiting access to Native American trade by providing that a license must be obtained in order to trade with Native Americans<sup>147</sup> and that land sales between Native Americans and U.S. citizens were forbidden, except according to the terms of a treaty.<sup>148</sup> Although this might seem like a purely commercial regulation, it likely arose as a continuation of similar colonial laws that sought to limit violent Native American-colonial clashes following exploitation of Native Americans by unscrupulous colonial traders.<sup>149</sup> As Gregory Ablavsky points out in his recent article *Beyond the Indian Commerce Clause*, colonial trade with Native Americans was not merely a means of commerce, but also “a form of diplomacy and politics, ‘the defining feature of Native-colonial relations.’”<sup>150</sup> Accordingly, a similar provision in the Northwest Ordinance of 1789 states that “[the] utmost good faith should always be observed towards Indians; their

145. See U.S. CONST. art. 1 § 8, cl. 3.

146. Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329. The statutes are substantively very similar to each other. See, e.g., *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366, 367 (1858). There are six statutes because each statute expired within two to four years of being passed and had to be renewed.

147. Act of July 22, 1790 § 1.

148. *Id.* § 4.

149. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2567-68 (2013).

150. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1030 (2015).

land and property shall never be taken from them without their consent.”<sup>151</sup>

Other provisions of the Nonintercourse Act speak more directly to the way in which “commerce” was taken to encompass general diplomatic relations. Provisions of the 1793 Act, for instance, barred American settlers from taking over Native American land and assured Native Americans that they would not be subject to state commerce laws.<sup>152</sup> The Act also provided for criminal sanctions for U.S. citizens who committed any crime upon, or trespass against, the person or property of any peaceable and “friendly Indian or Indians.”<sup>153</sup>

Jurisdiction over crimes involving Native Americans or occurring on Native American territory has been a subject of ever-changing legislation.<sup>154</sup> In *United States v. Bailey*, for instance, the Tennessee Circuit Court held that a law extending the jurisdiction of U.S. courts to include crimes committed on Native American territory was unconstitutional because it exceeded the power delegated to Congress in the Indian Commerce Clause.<sup>155</sup> Several years later, Congress passed the Indian Country Crime Act—one of the most important laws covering crimes in Indian country prior to the Major Crimes Act—which gave federal courts jurisdiction over “crimes committed by an Indian against a non-Indian, and by a non-Indian against an Indian,” but reserves prosecution of Native American on Native American crime or Native American crimes punished under tribal law to the tribes.<sup>156</sup>

Compared to the definition of commerce in *Lopez*, the definition of commerce under the pre-1885 Indian Commerce Clause is far broader.<sup>157</sup> Specifically, laws such as the Indian Country Crime Act regulate activity that does not affect the channels or instrumentalities of commerce and does not necessarily have a substantial effect on commerce, but would likely affect U.S.-Native American diplomatic relations.<sup>158</sup> This suggests that highly offensive, socially destructive behavior with arguably limited economic impact—such as the sexual violence regulated by the Violence Against Women Act—would count as “commerce” under the Indian Commerce Clause because of its potential to strain U.S.-Native American dialogue even though it is not “commerce” under the Interstate Commerce Clause.<sup>159</sup>

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151. Act of Aug. 7, 1789, I Stat. 50.

152. Act of Mar. 1, 1793, ch. 19, 1 Stat. 329.

153. *Id.*

154. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES*, 128 (4th ed. 2012).

155. *United States v. Bailey*, 24 F. Cas. 937, 940 (C.C.D. Tenn. 1834) (“If this [Act] be a constitutional provision, the jurisdiction by congress for the punishment of offences in the Indian country, within the boundaries of any state, is without limit.”).

156. Pevar, *supra* note 154, at 129.

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

158. *See id.*; Pevar, *supra* note 154, at 129.

159. *See United States v. Morrison*, 529 U.S. 598, 598 (2000).

D. LIMITATIONS ON THE EXERCISE OF THE INDIAN  
COMMERCE POWER

As expansive as this definition of commerce is, pre-1885 law and case law makes clear that Congressional power over Indian commerce is not without limits. On the contrary, federal power is limited by tribal rights as “distinct, independent political communities” and by the trust relationship between the federal government and tribes.<sup>160</sup>

First and foremost, the Indian commerce power is limited by the sovereignty of Native American tribes. As the Supreme Court explained in *Worcester v. Georgia*, “Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.”<sup>161</sup> Accordingly, tribes have an inherent right of self-government.<sup>162</sup> Congress might regulate internal tribal affairs via treaty, but never by law.<sup>163</sup> Internal tribal affairs seem generally to be those that occur on tribal territory. For instance, historically, tribes have exercised jurisdiction over civil matters that occur on tribal land, including matters involving non-Native Americans.<sup>164</sup> Those few laws that did regulate Native American conduct on Native American territory, concerned criminal activity against non-Native Americans,<sup>165</sup> thus suggesting that to be valid, a law that trespassed into internal tribal affairs required a “jurisdictional nexus” with the immediate welfare of non-Native Americans.<sup>166</sup>

Although it might seem that the Indian commerce power would also be limited by the rights of individual Americans to contract and trade with Native Americans, there is little evidence to support this assertion.<sup>167</sup> In fact, the federal government has historically been very willing to constrict individual contact with Native Americans by requiring that potential traders obtain licenses to conduct trade, precluding transfers of land without federal approval, and restricting the types of goods that could be traded.<sup>168</sup> Certainly non-Native Americans have no intrinsic right to exploit or harm Native Americans and, on paper at least, pains have been taken to pass laws that discourage this.<sup>169</sup>

In contrast, federal power does seem limited by a sort of general responsibility to the welfare and protection of Native American tribes. In many instances, this responsibility appears to arise from explicit agree-

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160. *Worcester v. Georgia*, 31 U.S. 515, 519 (1832).

161. *Id.* at 557.

162. Pevar, *supra* note 154, at 82.

163. *See supra* text accompanying notes 101-103.

164. Pevar, *supra* note 154, at 150.

165. *See, e.g., supra* text accompanying note 155.

166. Pevar, *supra* note 154, at 129.

167. *See United States v. Al-Maliki*, 787 F.3d 784, 793 (6th Cir. 2015).

168. *See Act of July 22, 1790* § 1; *United States v. Forty-Three Gallons of Whisky*, 108 U.S. 491, 493 (1883); *Johnson v. M’Intosh*, 21 U.S. 543, 568 (1823).

169. *See, e.g., supra* text accompanying note 50.

ments with Native Americans.<sup>170</sup> In *United States v. Forty-Three Gallons of Whisky*, for instance, the Supreme Court upheld the constitutionality of a law that prohibited the unlicensed sale of liquor in “Indian country” and surrounding areas.<sup>171</sup> This prohibition was enacted subject to a treaty with the affected Native Americans and was purportedly designed to secure Indian communities against the debasing influence of “spirituous liquors.”<sup>172</sup> Generally, the many treaties signed between the United States and tribes contained assurances of protection from non-Native Americans and “the perpetual availability of a sustained, land-based, traditional existence for the native nations.”<sup>173</sup>

In addition, at least part of this responsibility appears to arise from the inequality in fact between tribes and the United States.<sup>174</sup> In *Cherokee Nation v. Georgia*, the Supreme Court famously described this relationship as “resembl[ing] that of a ward to his guardian,” such that Native American tribes “look to [the federal] government for protection; rely upon its kindness and its power; appeal to it for relief to their wants.”<sup>175</sup> As Stephen Pevar points out in his book, *The Rights of Indians and Tribes*, notwithstanding some paternalistic overtones, the ward-guardian analogy the Supreme Court employs suggests obligation between the United States and tribes, not tribal inability to self-govern.<sup>176</sup> After all, at the time *Cherokee Nation* was decided, Congress did not attempt to legislate internal tribal matters.<sup>177</sup> The ward theory of U.S.-Native American relations is thought to have contributed to the trust doctrine, which continues to guide modern Native American law and policy.<sup>178</sup>

#### E. INDIAN COMMERCE CLAUSE LAW SUGGESTS A NEW DEFINITION OF FOREIGN COMMERCE

Examining the Foreign Commerce Clause through the lens of pre-1885 Indian Commerce Clause law suggests a novel definition of foreign commerce. Given the many similarities between pre-1885 U.S.-Native American relations and modern U.S.-foreign relations,<sup>179</sup> courts should consider importing the pre-1885 definition of commerce into the Foreign Commerce Clause context. This Article suggests that commerce under the Foreign Commerce Clause should be defined as commercial or diplomatic activities between the United States and a foreign nation and—

170. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1496-97 (1994).

171. *Forty-Three Gallons of Whiskey*, 93 U.S. at 492.

172. *Id.*

173. Wood, *supra* note 170, at 1497.

174. See *supra* Section III.A.4: Shared Regulation of Relationships Fraught with Inequality and Exploitation.

175. 30 U.S. 1, 17 (1831).

176. Pevar, *supra* note 154, at 31.

177. See *supra* text accompanying notes 99-101.

178. See Wilkins, *supra* note 128, at 68.

179. See *supra* Section III.A: Similarities Between Indian Commerce Clause Law and Foreign Commerce Clause Law: Sovereignty, Inequality, and the Lure of Limitless Power.

borrowing from *Bollinger*—an activity that “demonstrably affects” willingness or ability of foreign countries or individuals to engage in commercial or diplomatic activities with the United States.<sup>180</sup>

As with the Indian Commerce Clause power,<sup>181</sup> the Foreign Commerce Clause power is limited by the sovereignty of foreign nations. In practice, this suggests two levels of regulation under the Foreign Commerce Clause. When regulating American conduct overseas, power under the Clause is quite broad. Congress has the ability to regulate Americans engaged in any type of conduct implicated under the definition described above, including apparently local criminal activity against non-Americans.<sup>182</sup> On the other hand, power under the Clause to regulate non-American conduct is quite limited and requires a strong nexus with the United States.<sup>183</sup> Commercial or diplomatic activity with the United States would likely suffice. Criminal activity against an American on foreign soil might qualify as well.<sup>184</sup> However, a mere civil wrong against an American would not.<sup>185</sup> Certainly, non-American on non-Americans crimes and civil wrongs that occur on foreign soil could not be regulated except via treaty.<sup>186</sup>

An obligation to protect and support less powerful nations constrains the foreign commerce power to a lesser degree than the same obligation constrains the Indian Commerce power.<sup>187</sup> The “unique” relationship between the United States and Native American tribes, and the many treaties promising protection and friendship between them, is unlikely to be

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180. *See* *United States v. Bollinger*, 798 F.3d 201, 215-16 (4th Cir. 2015). This definition violates the maxim that law should generally be understood to minimize redundancy. *See, e.g., Andrus v. Sierra Club*, 442 U.S. 347, 362 (1979) (interpreting a statute in a way that eliminates unnecessary redundancy). If the Foreign Commerce Clause confers power on Congress to regulate diplomatic activity, for instance, at least part of the power conferred by this clause is redundant with congressional power to effectuate treaties via the Necessary and Proper Clause. *See* U.S. Const. art. I, § 8, cl. 18. However, there may be compelling reasons to overlook the redundancies this definition creates. First, redundancy is a long-standing issue for the Indian Commerce Clause: as applied pre-1885 when relationships with Native Americans were often formalized with treaties, the Indian Commerce Clause and the Necessary and Proper Clause partially overlap in the power they confer. *See, e.g., Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin band of Snake Indians* art. IX, Oct. 14, 1864, 16 Stat. 707. Generally, the Commerce Clause is often read to permit such broad power that it suffers from acquired redundancy. *See* Richard Primus, *The Limits of Enumeration*, 124 *YALE L.J.* 576, 641 (2014). Eliminating redundancy from the Commerce Clause may no longer be possible or practical. Second, commentators have pointed out that redundancy can confer real benefits, such as improving clarity and guarding against communication failure. John M. Golden, *Redundancy: When Law Repeats Itself*, 94 *TEX. L. REV.* 629, 659-60 (2016). In a concise, flexible document like the Constitution, clarity may be improved by simply granting Congress the power to regulate foreign commerce without carving out an exception for commerce that is already regulated under treaty.

181. *See supra* Section III.D: Limitations on the Exercise of the Indian Commerce Power.

182. *See supra* text accompanying notes 52-56.

183. *See supra* text accompanying note 165.

184. *Cf. Pevar, supra* note 154, at 129.

185. *Cf. Pevar, supra* note 154, at 150.

186. *See supra* text accompanying notes 163-165.

187. *See supra* text accompanying notes 173-175.



duplicated between the United States and another foreign nation.<sup>188</sup> However, to the extent the United States has promised protection and aid to another nation, the United States owes a duty to that nation and its citizens. Further, as a general matter, the United States should not assist in the American exploitation of vulnerable non-Americans. Individual Americans do not necessarily have a right to engage in commerce with non-Americans if doing so will discourage those non-Americans from transacting further with the United States.<sup>189</sup>

#### F. EXAMPLE APPLICATIONS OF THE PROPOSED DEFINITION OF FOREIGN COMMERCE

Applying this definition of commerce to the PROTECT Act and the IPKC Act highlights the strengths of this definition. Under the definition proposed in this Article, both the commercial and non-commercial prongs of the PROTECT Act would be valid exercises of the Foreign Commerce Clause power.<sup>190</sup> The commercial prong would survive because sexual acts for any type of monetary exchange are fundamentally commercial acts and thus can be regulated. The non-commercial prong would survive because sexual abuse of foreign nationals by U.S. citizens or U.S. permanent residents is conduct that would affect the willingness of victims, their families, and their communities to interact commercially and diplomatically with the United States.<sup>191</sup> Sexual abuse—especially the repeated sexual abuse that characterizes child sex tourism—damages the image of the United States abroad.<sup>192</sup> Moreover, in so far as there are friendly relations between the United States and the country the crime victim lives in, the United States also has an obligation to ensure that its citizens do not abuse their power abroad.<sup>193</sup>

Notably, the definition this article proposes has an attenuated nexus requirement regarding the regulation of American conduct. This eliminates the need for an awkward intent requirement in the non-commercial prong of the PROTECT Act.<sup>194</sup> The definition proposed here bears little resemblance to the *Lopez* definition because it was not crafted to allow for state rights. Accordingly, this definition does not force proponents of the non-commercial prong to base the provision's validity on the fact that

188. See *supra* text accompanying note 85.

189. See *supra* text accompanying notes 165-168.

190. See Notebaert, *supra* note 41 and accompanying text.

191. See *United States v. Bollinger*, 798 F.3d 201, 205 (4th Cir. 2015) (citing victim impact statements describing how victims of Bollinger and their families were humiliated and ostracized in their community).

192. See, e.g., Kyle Cutts, *A Modicum of Recovery: How Child Sex Tourism Constitutes Slavery Under the Alien Tort Claims Act*, 58 CASE W. RES. L. REV. 277, 279 (2007) (“United States citizens account for nearly twenty-five percent of all sex tourists worldwide—the largest percentage of any country in the world.”).

193. See, e.g., U.S. Relations With Haiti Fact Sheet, U.S. DEP’T STATE (May 11, 2015), <http://www.state.gov/r/pa/ei/bgn/1982.htm> [<https://perma.cc/RPE2-98DB>] (describing Haiti, where Bollinger’s victims lived, as a “U.S. policy priority” such that “[w]hen this close neighbor is more prosperous [and] secure . . . Haitians and Americans benefit.”).

194. See *supra* text accompanying note 41.

the abuser traveled in the channels of commerce in order to commit abuse.<sup>195</sup> The definition embraces the breadth of the *Bollinger* definition, but supports it based on a substantial body of law.<sup>196</sup>

In contrast, the IPKC Act would be constitutional as applied to cases involving American kidnapers or American victims, but not to cases in which a foreign national retains a foreign child who are merely passed through the United States abroad. Analyzing the first type of event, the kidnapping or retention of a child or by an American overseas may have some effect on how that child and his or her family perceives the United States. Unlike child sexual abuse, which is universally reviled, parental kidnapping may elicit different reactions depending on the culture and circumstances of the person witnessing the act. In *United States v. Shahani-Jahromi*, for instance, the removing parent was from Iran and argued that his actions were legal under Iranian law and, presumably, acceptable to at least some Iranians.<sup>197</sup> However, given the broad power Congress enjoys under the suggested definition over American conduct<sup>198</sup> and the presence of a strong nexus with the United States through the citizenship of the perpetrator or the victim of the crime,<sup>199</sup> it seems likely that Congress could regulate the criminal activity of child kidnapping by or against an American abroad.

On the other hand, a case in which a foreign national kidnapped or retained a foreign national child abroad has a far less compelling jurisdictional nexus. Passage through the United States in connection with commission of the crime might serve as a nexus. However, mere passage of the foreign child through the United States at some unspecified point in the past is almost certainly insufficient to justify U.S. intrusion into foreign sovereignty.<sup>200</sup> Hence, under the definition suggested in this article, the IPKC Act should be altered to include a nexus requirement such that, “[w]hoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both,” provided that the abductor or the child is a U.S. citizen or Lawful Permanent Resident.<sup>201</sup>

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195. *See United States v. Pendleton*, 658 F.3d 299, 310 (3d Cir. 2011); *United States v. Flath*, 845 F. Supp. 2d 951, 955-56 (E.D. Wis. 2012). In *Bollinger*, the Fourth Circuit correctly points out that this analysis means that Congress is free to criminalize any foreign conduct that occurs after an American citizen travels out of the United States because travel will always implicate the “channels” of commerce. 798 F.3d 201, 216 (4th Cir. 2015).

196. *See Bollinger*, 798 F.3d at 216-17.

197. 286 F. Supp. 2d 723, 726 (E.D. Va. 2003).

198. *See supra* text accompanying note 181.

199. *See supra* text accompanying note 165.

200. *See supra* text accompanying note 182-185.

201. 18 U.S.C.A. § 1204 (West 2016).

## IV. CONCLUSION

The largely blank slate of the outward-looking Foreign Commerce Clause can tempt courts and commentators to cling to the Interstate Commerce Clause—a thoroughly analyzed portion of the Commerce Clause, but dissimilar in many ways to its foreign counterpart—or to move boldly into the breach, crafting novel interpretations with little reference to precedent. This Article urges a third approach. The Indian Commerce Clause has produced a developed body of law that tracks U.S. relations with diverse, independent nations. The depth of this law gives modern analysts the benefit of hindsight: certainly, there are chapters of U.S.-Native American relations that should not be repeated. This law suggests that the framers understood “commerce” between the U.S. and other sovereign nation to encompass not just trade, but commercial and diplomatic relations with other nations as well as activity that “demonstrably affects” willingness or ability of foreign countries or individuals to engage in commercial or diplomatic activities with the United States. This broad understanding was subject to profound limitations: in deference to other nations’ sovereignty, the United States retained significant control over its own citizens’ behavior on foreign soil, but had very limited ability to regulate the behavior of other citizens. In some instances, the United States also had an independent duty to make decisions consistent with the welfare and autonomy of foreign nations.

If the Foreign Commerce Clause does become the basis for more extra-territorial laws, it may raise larger questions about the proper scope of the Interstate Commerce Clause and the extra-constitutional powers described in *Curtiss-Wright*.<sup>202</sup> Precisely defining the scope of the Foreign Commerce Clause might encourage Congress to cite it as a source of power and might ultimately contribute to the constriction of other powers which have historically filled this void.

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202. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).