

**TAKING THE BALL AND RUNNING WITH IT:  
U.S. V. CLARK AND CONGRESS'S UNLIMITED POWER  
UNDER THE FOREIGN COMMERCE CLAUSE**

*Julie Buffington\**

In June of 2003, the Cambodian police discovered Michael Lewis Clark in a guesthouse in Phnom Penh molesting two Cambodian boys, one ten years old and the other thirteen.<sup>1</sup> The boys told authorities that Clark occasionally paid them to engage in sex acts and they complied because they needed money to feed their families.<sup>2</sup> Clark confessed to being a pedophile and admitted he had engaged in sex acts with between “40–50 children since he began traveling in 1996.”<sup>3</sup> The United States extradited Clark and indicted him under 18 U.S.C. § 2423(c) (section (c)) of the illicit sex acts statute, which prevents United States citizens or aliens traveling in foreign commerce from engaging in illicit sex acts.<sup>4</sup>

Clark pled guilty to violating the illicit sex acts statute, but on appeal, he argued that the statute exceeded Congress’s power to regulate commerce with foreign nations.<sup>5</sup> The Ninth Circuit found that Congress had broad power under the Foreign Commerce Clause<sup>6</sup> and that the illicit sex acts statute was enacted within the scope of those powers.<sup>7</sup> Part II of this Casenote analyzes two lines of cases that have examined Congress’s power under the Foreign Commerce Clause. Part III discusses the Ninth Circuit’s decision in *U.S. v. Clark* and examines the court’s justifications for finding that the illicit sex acts statute fell within Congress’s Foreign Commerce Clause powers. Part IV recognizes that

---

\* The author would like to thank Professor Ingrid Brunk Wuerth for her guidance throughout the topic selection and publication process. The author dedicates this article to her family, Dad, Mom, and Cristy, and her friends, especially Bill, Megan and Leslie, for their continued support, encouragement, and, most of all, patience.

1. *United States v. Clark*, 435 F.3d 1100, 1103 (9th Cir. 2006).

2. *Id.* at 1104.

3. *Id.*

4. *Id.* Section (c) states that “[a]ny United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.” 18 U.S.C. § 2423(c) (2006). Section (e) states that “[w]hoever attempts or conspires to violate” sections (a)–(d) will be punished in whatever manner that a violation of the section calls for. *Id.*

5. *Clark*, 435 F.3d at 1105. Clark also challenged his conviction by arguing that it violated international law, that his conduct did not fall within the language of § 2423(c), and that his conviction violated his due process right. *Id.* See U.S. CONST. art. I, § 8, cl. 3.

6. *Clark*, 435 F.3d at 1114.

7. *Id.* at 1115.

neither prior Foreign Commerce Clause cases nor the Ninth Circuit's decision in *U.S. v. Clark* provides guidance to future courts for determining the constitutionality of congressional statutes that regulate the conduct of U.S. citizens after they travel in foreign commerce. Part IV then examines the consequences of failing to use any standard or guideline to analyze the constitutionality of a statute regulating foreign commerce. Part V concludes by determining that courts cannot ignore the test for determining the activities Congress may regulate under its Commerce Clause power the Supreme Court set forth in *United States v. Lopez*<sup>8</sup> in analyzing whether Congress overstepped its bounds by enacting a statute under its Foreign Commerce Clause powers.

## II. CASE LAW INTERPRETING CONGRESS'S FOREIGN COMMERCE CLAUSE POWER

### A. *The Foreign Commerce Clause*

The Foreign Commerce Clause is found in Article 1, § 8, Clause 3 of the United States Constitution. The clause states that Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>9</sup> Although courts have struggled for over 180 years to interpret Congress's power to regulate domestic interstate commerce,<sup>10</sup> they have devoted much less attention to determining what activities Congress can control under the Foreign Commerce Clause.

In determining Congress's power to regulate foreign commerce, two distinct lines of cases have emerged. First, courts have analyzed whether state taxes on instrumentalities of foreign commerce, such as foreign ships, infringe on Congress's power to regulate foreign commerce.<sup>11</sup> For example, in *Japan Line v. Los Angeles*, the Supreme Court analyzed whether a California statute that required certain Japanese ships to pay a tax for docking at California ports encroached upon Congress's power to regulate foreign commerce.<sup>12</sup> Under this line of cases, courts have recognized broad congressional power to regulate

8. 514 U.S. 549, 558 (1995).

9. U.S. CONST. art. I, § 8, cl. 3.

10. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Gonzales v. Raich*, 545 U.S. 1 (2005).

11. See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994); *Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41 (1st Cir. 2005).

12. 441 U.S. at 444.

foreign commerce by finding that a state's taxation on instrumentalities of foreign commerce, such as California's tax on Japanese ships, infringed on Congress's Foreign Commerce Clause power, thereby deeming Congress the sole authority to tax foreign commerce.<sup>13</sup>

Similarly, in the second line of cases, courts have affirmed Congress's broad power under the Foreign Commerce Clause. In this vein, courts have analyzed congressional statutes that prevent United States citizens from traveling abroad with the intent to commit a crime. In *U.S. v. Bredimus*, for example, the Fifth Circuit Court of Appeals upheld a federal statute that prevented traveling in foreign commerce with the intent to engage in illicit sexual conduct.<sup>14</sup> Similarly, in *U.S. v. Cummings*, the Ninth Circuit Court of Appeals affirmed the constitutionality of a congressional statute that prevented parents from transporting their children in interstate or foreign commerce with the intent to obstruct the lawful custody of the other parent.<sup>15</sup>

Thus, in cases that prevent states from taxing instrumentalities of foreign commerce and in cases that allow Congress to regulate travel and conduct of U.S. citizens abroad, courts have affirmed that Congress has broad power under the Foreign Commerce Clause. Further, neither line of cases has imposed any limit on Congress's power under the Foreign Commerce Clause.

B. *Japan Line v. Los Angeles:*  
*Striking Down State Statutes that Regulate Foreign Commerce*

*Japan Line v. Los Angeles* provides the test courts use in analyzing whether a state's taxation on foreign commerce encroaches on Congress's power under the Foreign Commerce Clause. In *Japan Line*, California imposed a tax on any property present in its jurisdiction on March First of any year.<sup>16</sup> Six Japanese companies shipped containers that passed through California on March First while on international voyages.<sup>17</sup> The companies paid over \$550,000 in taxes for their vessels being present in California on March First of three consecutive years.<sup>18</sup> The trial court determined that because the vessels were "instrumentalities of foreign commerce"<sup>19</sup> that were already subjected to

---

13. *Id.* at 452–53.

14. *United States v. Bredimus*, 352 F.3d 200, 210 (5th Cir. 2003).

15. 281 F.3d 1046, 1050 (9th Cir. 2002).

16. *Japan Line*, 441 U.S. at 437.

17. *Id.*

18. *Id.*

19. *Id.* at 437–38.

a tax in Japan, they did not have to pay California's state tax.<sup>20</sup> The court thus awarded the Japanese companies a refund.<sup>21</sup>

The Second District Court of Appeals of California, however, reversed.<sup>22</sup> The court rejected the argument that vessels traveling only in foreign commerce could avoid taxation, and further held that the danger of multiple taxation could not restrict California's power to tax.<sup>23</sup> The California Supreme Court agreed and determined that the Commerce Clause could not prevent vessels traveling in foreign commerce from being taxed by the state of California, even if that meant that the vessels were subject to multiple taxation.<sup>24</sup>

The Japanese companies appealed to the U.S. Supreme Court. In determining the constitutionality of California's tax, the Court first analyzed the test set forth in *Complete Auto Transit, Inc. v. Brady*, a Supreme Court case analyzing the validity of a state tax on instrumentalities of interstate commerce.<sup>25</sup> The Court in *Complete Auto* laid out a four-part test to analyze the validity of a state tax.<sup>26</sup> The Court first asked whether the tax applied to an activity tied to the taxing state.<sup>27</sup> Next, the Court asked whether the tax was fair and whether it "discriminate[d] against interstate commerce."<sup>28</sup> Finally, the Court examined whether it was "related to the service[] provided by the State."<sup>29</sup>

After examining the *Complete Auto* test, however, the Court in *Japan Line* determined that because California's state tax involved "instrumentalities of foreign commerce" and not interstate commerce, additional factors needed to be considered.<sup>30</sup> First, the Court asked whether the state tax created a substantial risk that the company would be taxed multiple times, which was similarly prohibited under the interstate commerce clause.<sup>31</sup> Second, the Court analyzed whether the

---

20. *Id.* at 438.

21. *Id.* at 437.

22. *Id.* at 438.

23. *Id.*

24. *Id.* at 439.

25. 430 U.S. 274 (1977).

26. *Id.* at 279.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445-56 (1979).

31. *Id.* at 451. The court derived the principle that multiple taxation of foreign commerce violated the commerce clause based on *Evco v. Jones*, 409 U.S. 91, 94 (1972), *Central R.R. Co. v. Pennsylvania*, 370 U.S. 607, 612 (1962), *Standard Oil Co. v. Peck*, 342 U.S. 382, 384-85 (1952), and *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1911), all of which determined that double taxes imposed on interstate commerce constituted burdens on interstate commerce that violated the commerce

tax would hinder the government's ability to speak "with one voice when regulating commercial relations with foreign governments."<sup>32</sup> The Court explained that because foreign commerce affected the United States' relationships with other nations, it was a matter of national concern and thus the government needed to regulate it uniformly.<sup>33</sup>

Because Japan also taxed the containers that California had taxed, the Court determined that California's tax on the containers created multiple taxation and violated the Commerce Clause.<sup>34</sup> The Court found that California's tax prevented the United States from speaking with a uniform voice in regulating foreign commerce, explaining that if each state were permitted to impose its own tax on foreign commerce, federal uniformity would never be achieved.<sup>35</sup> The Court noted that because historical evidence and past cases demonstrated the importance of regulating foreign commerce with a unified voice, Congress had greater power to regulate foreign commerce than it did to regulate interstate commerce.<sup>36</sup>

Because California's tax on the Japanese containers hindered Congress's broad powers to regulate foreign commerce, the Court held that the tax was unconstitutional.<sup>37</sup> *Japan Line* thus enumerated the current test that courts use to determine whether a state's taxation of an instrumentality of foreign commerce infringes upon Congress's powers under the Foreign Commerce Clause. More importantly, *Japan Line* granted Congress broad power to regulate foreign commerce.

---

clause. Based on these cases, the court held that no jurisdiction could tax commerce in full. Further, while apportionment of taxes among jurisdictions may work with interstate commerce, it could not work with foreign commerce because the United States government cannot apportion taxes with foreign nations. *Japan Line*, 441 U.S. at 447.

32. *Japan Line*, 441 U.S. at 451.

33. *Id.* at 449.

34. *Id.* at 451–52. California stipulated that the containers were taxed in full in Japan.

35. *Id.* at 450.

36. *Id.* at 449. The Court cited, among other historical evidence, THE FEDERALIST No. 42, at 279–283 (James Madison) (Jacob E. Cooke ed., 1961) and *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 465–475 (1941). The Court also cited *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904), which stated that Congress had absolute power over foreign commerce, and *National League of Cities v. Usery*, 426 U.S. 833 (1976), where the Court noted that regulation of interstate commerce may be restricted by federalism concerns, but no such limit has been placed on Congress's power to regulate foreign commerce. Many other courts have supported the idea that Congress has broader power to regulate foreign commerce than interstate commerce. See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999); *United States v. Cummings*, 281 F.3d 1046, 1050 (9th Cir. 2002).

37. *Japan Line*, 441 U.S. at 454.

*C. Cases Allowing Congress to Regulate Conduct of U.S. Citizens Abroad Under the Foreign Commerce Clause*

In the second line of cases examining Congress's power to regulate foreign commerce, courts have analyzed statutes that prohibit U.S. citizens from traveling in foreign commerce with the intent to commit a crime. Although the Supreme Court in *Japan Line* enumerated a clear test for courts to use when determining whether a state tax impedes Congress's power under the Foreign Commerce Clause, no clear guidelines for determining the constitutionality of a statute that restricts a U.S. citizen's conduct in foreign commerce have emerged.

Though courts interpreting congressional statutes that regulate a United States citizen's or alien's conduct in foreign commerce do not have a test for determining whether the statute exceeded Congress's power under the Foreign Commerce Clause, courts have consistently looked to interstate Commerce Clause tests for guidance. Circuits analyzing the constitutionality of Foreign Commerce Clause statutes have discussed the framework adopted by the Supreme Court in *United States v. Lopez*.<sup>38</sup>

In *Lopez*, an interstate Commerce Clause case, the Supreme Court determined that Congress had the power to regulate three categories of activities under its commerce power.<sup>39</sup> The categories were: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may have come from intrastate activities," and (3) "activities having a substantial relation to interstate commerce."<sup>40</sup>

1. *U.S. v. Bredimus*: Prohibiting Travel with the Intent to Engage in Illicit Sex Acts

The Fifth Circuit used the *Lopez* test as a guide to analyze the constitutionality of a statute enacted under Congress's Foreign Commerce Clause power in *United States v. Bredimus*.<sup>41</sup> In *Bredimus*, the defendant traveled to Thailand for business.<sup>42</sup> While there, he "videotaped himself engaged in sexually explicit conduct" with a young

38. 514 U.S. 549 (1995). See also *United States v. Bredimus*, 352 F.3d 200 (5th Cir. 2003); *United States v. Han*, 230 F.3d 560 (2d Cir 2000); *United States v. Brockdorff*, 992 F. Supp. 22 (D. D.C. 1997); *Cummings*, 281 F.3d at 1049 n.1 (stating that "[a]lthough *Lopez* dealt with interstate commerce, we apply its analytical framework in the foreign commerce area as well").

39. *Lopez*, 514 U.S. at 558–59.

40. *Id.*

41. 352 F.3d 200 (5th Cir. 2003).

42. *Id.* at 202.

boy and attempted to find other children to videotape engaging in sex acts.<sup>43</sup> The defendant was convicted under 18 U.S.C. § 2423 (b).<sup>44</sup> Like the section of the PROTECT Act at issue in *U.S. v. Clark*, § 2423 (b) forbade United States citizens or aliens who are traveling in foreign commerce from engaging in illicit sexual conduct. Section 2423 (b), however, required that the defendant travel in foreign commerce with the intent to engage in illicit sexual conduct.<sup>45</sup>

Bredimus argued that the statute exceeded Congress's power under the Foreign Commerce Clause.<sup>46</sup> The district court, however, determined that the statute was a valid exercise of Congress's power because Congress could prevent immoral or injurious uses of foreign commerce.<sup>47</sup>

On appeal, Bredimus maintained that the test the Supreme Court set forth in *U.S. v. Lopez*<sup>48</sup> to determine the scope of Congress's power to regulate interstate activities should also be used to determine the activities in foreign commerce that are subject to congressional regulation. Specifically, he argued that because his conduct in Thailand was not substantially related to foreign commerce, Congress did not have the power to regulate it.<sup>49</sup>

Relying on a Second Circuit opinion that applied § 2423(b) to interstate commerce,<sup>50</sup> the court determined that unlike the regulation in question in *Lopez*, the statute that prohibited Bredimus's conduct should not be analyzed under the substantial effects test.<sup>51</sup> The court instead found that § 2423(b)'s prohibition on travel in foreign commerce with the intent to engage in illicit sexual conduct constituted a regulation on the "use of the channels of interstate commerce" because by enacting it, Congress was keeping the channels of commerce free from immoral or

43. *Id.*

44. *Id.* at 203.

45. *Id.* at 202 n.2. The statute punishes the conduct with a fine, up to thirty years in prison, or both.

46. *Id.* at 202–03.

47. *Id.* at 203.

48. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

49. *Bredimus*, 352 F.3d at 204.

50. *United States v. Han*, 230 F.3d 560 (2d Cir. 2000). In *Han*, the defendant used the internet to engage in explicit sexual conversation with a girl he thought was thirteen. *Id.* at 562. They planned to meet, but when he arrived, he learned that he had been talking to a police officer posing as a thirteen year old girl. *Id.* Upon arrest, he admitted that he knew sex with the girl was a possibility, even though she was underage. *Id.* He was convicted and sentenced by the district court. *Id.* On appeal, he made the same challenge to the constitutionality of § 2423 as Bredimus, which the court rejected. *Id.* at 562–63.

51. *Bredimus*, 352 F.3d at 206.

injurious uses.<sup>52</sup> The court thus determined that it did not need to examine whether the statute had a substantial effect on commerce.<sup>53</sup>

Bredimus next contended that although other statutes similar to § 2423(b) had been upheld as valid under Congress's Foreign Commerce Clause power,<sup>54</sup> § 2423(b) could be distinguished because the other statutes also required commission of a crime.<sup>55</sup> For example, Bredimus pointed to 18 U.S.C. § 2262(a)(1), which criminalized crossing state lines with the intent to contravene a protective order only if the defendant also violated the order.<sup>56</sup> Bredimus argued that because § 2423(b) required only intent and not the actual commission of a crime, the statute exceeded Congress's powers under the Foreign Commerce Clause.<sup>57</sup>

The court, however, rejected this argument by pointing to 18 U.S.C. § 1958, a murder for hire statute that was deemed constitutional even though it required only that the defendant travel in interstate or foreign commerce with the intent to commit a murder for hire and not that he actually commit the murder.<sup>58</sup> Based on the murder for hire statute, the court determined that once the defendant traveled in commerce with the requisite intent, his conduct fell within Congress's regulatory power.<sup>59</sup>

52. *Id.* at 205 (quoting *Han*, 230 F.3d at 562).

53. *Id.* at 205–06. Although the Second Circuit in *Han* adopted this approach with interstate commerce, the Fifth Circuit found it applied to foreign commerce as well. *Id.* The court also noted, however, that activities can fall into more than one of the *Lopez* categories. *Id.* at 206.

54. Similar statutes include 18 U.S.C. § 2261, which makes it illegal for people to cross state lines with the intent to injure or harass a spouse or intimate partner and then actually harm the spouse or significant other and 18 U.S.C. § 2262(a), which prohibits crossing a state border with the intent of violating a protection order and then actually violating it.

55. *Bredimus*, 352 F.3d at 206. *See also supra* note 46.

56. Appellant Bredimus' Brief on Appeal, *United States v. Bredimus*, 352 F.3d 200 (5th Cir. 2003).

57. *Bredimus*, 352 F.3d at 207, 204.

58. *Id.* at 207. The Fifth Circuit's decision in *Bredimus* marked the first time a circuit court broadened Congress's powers under the Foreign Commerce Clause. The murder-for-hire statute the Fifth Circuit relied on was distinguished from the statute in *Bredimus*, even though both statutes only required that the defendant travel in interstate or foreign commerce with the intent to commit a crime. Planning a murder for hire is in itself a criminal act; a murder does not need to be committed for a crime to occur. 18 U.S.C. § 373(a) (2006). Traveling in foreign commerce with the intent to commit a crime (other than a murder for hire) by itself, however, is not a punishable criminal act.

59. *Bredimus*, 352 F.3d at 207. The Fifth Circuit further expanded Congress's power under the Foreign Commerce clause by determining that Congress could regulate travel with the intent to commit a crime. *Id.* at 208. The *Bredimus* court purported to rely on the Second Circuit decision in *U.S. v. Han*. *Id.* at 206–07. However, the *Han* court specifically set aside the question of whether Congress could regulate travel when the defendant intended to commit the crime, but did not actually commit the crime. *United States v. Han*, 230 F.3d 560, 563 (2d Cir. 2000). The defendant in *Han* argued that Congress was attempting to punish 'mere thought,' by regulating travel with intent to commit a crime. *Id.* The court stated that "[a]ppellant's 'mere thought' argument is based on the claim that one cannot, constitutionally, be charged under § 2423(b) for doing nothing more than crossing state lines with the



Finally, the court noted that even though the previous statutes regulating interstate commerce had been enacted and upheld in relation to interstate commerce, § 2423(b) was a valid exercise of Congress's power under the commerce clause because Congress had broader discretion in regulating foreign commerce than in regulating interstate commerce.<sup>60</sup> The court thus upheld *Bredimus*'s conviction.<sup>61</sup>

## 2. *U.S. v. Cummings*: Prohibiting Travel with the Intent to Interfere with Lawful Parental Custody

Like the Fifth Circuit in *U.S. v. Bredimus*, the Ninth Circuit used the *Lopez* framework to interpret a congressional statute regulating foreign commerce in *U.S. v. Cummings*.<sup>62</sup> In *Cummings*, the defendant and his ex-wife had three children together. When they divorced, his ex-wife retained custody, but Cummings gained temporary custody when the wife's new husband hit one of the children.<sup>63</sup> Cummings took the children to Germany.<sup>64</sup> When he refused to return them to the United States, his wife filed a civil action against him in Washington, and he was indicted under 18 U.S.C. § 1204(a), the International Parental Kidnapping Crime Act ("IPKCA").<sup>65</sup> The district court ordered that Cummings pay his wife's attorney's fees and sentenced him to six months in prison.<sup>66</sup>

On appeal, Cummings maintained that Congress did not have authority under the Foreign Commerce Clause to prevent a parent from retaining an American child in a foreign country.<sup>67</sup> In analyzing the statute at issue, the Ninth Circuit determined that so long as the

---

intent prohibited by § 2423(b)." *Id.* The defendant in *Han*, however, engaged in more than 'mere thought.' *Id.* He called a thirteen year old numerous times, formulated a plan, and expressed his intent to cross state lines and engage in sex acts with the girl and thus Han could not argue that the court punished mere thought. *Id.* The *Bredimus* court expanded the *Han* court's decision by determining that Congress could regulate travel with the intent to commit a crime.

60. *Bredimus*, 352 F.3d at 208.

61. *Id.* at 211.

62. *United States v. Cummings*, 281 F.3d 1046 (9th Cir. 2002).

63. *Id.* at 1047-48.

64. *Id.* at 1048.

65. The statute reads that:

Whoever 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.

18 U.S.C. § 1204(a) (2006).

66. *Id.* at 1048.

67. *Id.*

regulation fell into one of the categories of commercial activity listed in *Lopez*, Congress could regulate it.<sup>68</sup> The court explained that the defendant used the channels of commerce to wrongfully remove his child from the United States, thus satisfying the first prong of the *Lopez* test.<sup>69</sup> Because the conduct regulated in the statute satisfied *Lopez*, the court held that the statute fell within Congress's powers.<sup>70</sup>

Cummings, however, argued that because the District Court for the Eastern District of Washington convicted him for wrongfully retaining the children in Germany, his use of the channels of foreign commerce had ceased and thus Congress could not regulate his conduct.<sup>71</sup> The Ninth Circuit rejected Cummings's argument by relying on an earlier decision, *U.S. v. Rambo*.<sup>72</sup> The court in *Rambo* upheld a ban on machine guns that were not lawfully possessed prior to a certain date.<sup>73</sup> The regulation prohibited intrastate possession as "an attempt to prohibit the interstate transportation of a commodity through the channels of commerce."<sup>74</sup> Essentially, the court determined that Congress could regulate both sides of the illegal activity—transferring and possessing machine guns—to control the commerce of the guns.<sup>75</sup>

The court in *Cummings* adopted the *Rambo* court's reasoning and determined that because Congress had authority to prohibit a parent from taking a child to a foreign country with the intent to interfere with the custodial rights of the other parent,<sup>76</sup> it had the power to ban conduct after the travel in foreign commerce occurred.<sup>77</sup> Thus, Congress had the power to prohibit Cummings from retaining his children in Germany.<sup>78</sup>

Finally, the court upheld Cummings's conviction on the ground that § 1204(a) was a valid exercise of Congress's power under the Foreign Commerce Clause to prevent persons from impeding the use of

68. *United States v. Cummings*, 281 F.3d 1046, 1049 (9th Cir. 2002).

69. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

70. *Cummings*, 281 F.3d at 1049.

71. *Id.*

72. *United States v. Rambo*, 74 F.3d. 948 (9th Cir 1996).

73. *Id.* at 952.

74. *Id.* (quoting *Lopez*, 514 U.S. at 559). The *Rambo* court reasoned that "[b]y regulating the market in machineguns, including regulating intrastate machinegun possession, Congress has effectively regulated the interstate trafficking in machineguns." *Id.* at 952.

75. *Id.*

76. Cummings conceded that Congress had the right to prohibit a parent from using the channels of interstate or foreign commerce to obstruct the custodial rights of the other parent and thus did not question this on appeal.

77. *United States v. Cummings*, 281 F.3d 1046, 1050 (9th Cir. 2002). In other words, without use of the channels of foreign commerce, there would be no unlawful retention of people in foreign commerce, so Congress can regulate both types of conduct.

78. *Id.*

2006] *TAKING THE BALL AND RUNNING WITH IT* 851

commerce.<sup>79</sup> The court reasoned that because parents prevented children from using the channels of commerce to return to the country, they interfered with the use of the channels of commerce.<sup>80</sup> Because § 1204(a) removes an impediment to the channels of commerce, Congress validly enacted the statute under its commerce clause power.<sup>81</sup> The court thus upheld Cummings's conviction.<sup>82</sup>

### III. *U.S. v. CLARK* AND § 2423(C)

#### A. *The Majority Opinion*

##### 1. Clark's Conduct in Cambodia

In *U.S. v. Clark*,<sup>83</sup> Michael Lewis Clark lived primarily in Cambodia from 1998 to 2003 but maintained property, bank accounts, and a driver's license in the United States.<sup>84</sup> On occasion, he visited his family in the United States.<sup>85</sup> After one of these visits, he returned to Cambodia, where several young boys reported that Clark had molested them.<sup>86</sup> A short time later, Cambodian police caught Clark engaged in illicit sex acts with two young boys.<sup>87</sup> Clark was arrested, extradited to the United States, and charged with a violation of section (c) of the illicit sex acts statute.<sup>88</sup>

##### 2. The Elements of the Illicit Sex Acts Statute

The court first turned to an analysis of section (c) of the illicit sex acts statute, which made it illegal for any United States citizen or alien

---

79. *Id.* The court based this analysis on *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), which allowed Congress to regulate racial discrimination under Title II of the Civil Rights Act because discrimination impeded travel through the channels of commerce. *Cummings*, 281 F.3d at 1048.

80. *Id.* at 1050.

81. *Id.*

82. *Id.* at 1053.

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

84. *Id.* at 1103.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1104. See *supra* note 4 for the text of the statute. In 2003, the statute was amended. Before the amendment, section (c) required that the government prove that a person traveled in foreign commerce "for the purpose of engaging in" illicit sexual acts with minors. *Clark*, 435 F.3d at 1105. The intent requirement was removed from the statute, now only requiring the government to prove that the defendant engaged in a sex act with a minor in a foreign county. *Id.*

admitted for permanent residence to travel in foreign commerce and engage in any illicit sexual conduct with another person.<sup>89</sup> The court noted that the statute provided two definitions of illicit sexual acts, one for commercial sex acts, and one for non-commercial sex acts.<sup>90</sup> The court analyzed the first, non-commercial prong by determining the definition of an “illicit sex” act. “Illicit sex,” the court held, combined the definition of sexual act and aggravated sexual abuse, which included sex by force, threat, or sexual abuse of a minor.<sup>91</sup>

For the second, commercial prong of “illicit sexual conduct,” the court turned to section (f) of the illicit sex acts statute, which stated that a commercial sex act was “any sex act, on account of which anything of value is given to or received by any person.”<sup>92</sup> Thus, section (c) of the illicit sex acts statute prohibited a U.S. citizen or alien from traveling in interstate or foreign commerce and engaging in sex acts by force, threat, or other means, sexually abusing a minor, or engaging in a sex act for which anything of value is exchanged.

Because Clark paid the young boys for sex, the district court convicted him under commercial prong of the illicit sex acts statute.<sup>93</sup> On appeal, he argued that the illicit sex acts statute exceeded Congress’s Foreign Commerce Clause power. In analyzing Clark’s conviction, the Ninth Circuit examined the history and purpose of section (c) of the illicit sex acts statute.<sup>94</sup> The language of section (c) first appeared as a proposal to the Sex Tourism Prohibition Improvement Act in 2002,<sup>95</sup> but the provision was not adopted until a year later as part of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, or the PROTECT Act.<sup>96</sup>

Before sections (c) through (f) were added to the illicit sex acts statute as part of the PROTECT Act, section (b) made it illegal for a defendant to travel in foreign commerce for the purpose of engaging in a sex act with a minor.<sup>97</sup> While Congress kept the intent requirement for illegal use of commerce in § 2423(b) under the newly amended PROTECT Act,

89. 18 U.S.C. § 2423(c) (2006)

90. *Clark*, 435 F.3d. at 1105.

91. *Id.* See also *id.* § 2246 (2006), which defined “sexual act,” and *id.* § 2241 of chapter 109A, which defined “aggravated sexual abuse.”

92. *Id.* § 2423(f) (citing 18 U.S.C. § 1591(c) (2006)).

93. *Clark*, 435 F.3d at 1105.

94. *Id.* at 1104–05.

95. *Id.* at 1104. The language authorizing the bill explicitly stated that the Commerce Clause authorized its enactment

96. The act became law in 2003. When the bill was adopted, Congress did not state that it was enacted under its Commerce Clause power.

97. See 18 U.S.C. § 2423(b) (2006).

it determined that intent was not required under either the commercial or non-commercial prong of section (c); thus, in order to prove a violation of either prong of section (c), the government needed only to show that the defendant traveled in foreign commerce and then engaged in illicit sexual conduct.<sup>98</sup>

### 3. Discussion of the Commerce Clause

The Ninth Circuit explained that in analyzing whether a statute could be regulated as part of Congress's interstate Commerce Clause power, the Supreme Court in *U.S. v. Lopez*<sup>99</sup> asked whether the statute regulated one of the following categories: "(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; [or] (3) activities that substantially effect interstate commerce."<sup>100</sup>

The majority concluded its discussion of interstate Commerce Clause jurisprudence by examining the latest development in commerce clause analysis,<sup>101</sup> *Gonzales v. Raich*.<sup>102</sup> In *Raich*, California enacted a law allowing patients to use marijuana for a variety of medical reasons without fear of prosecution.<sup>103</sup> Congress, however, enacted the Controlled Substances Act,<sup>104</sup> which made it illegal to possess any controlled substance.<sup>105</sup> Using the three-part framework established in *Lopez*, the Supreme Court analyzed the constitutionality of the Controlled Substances Act's measures forbidding medical patients from using home-grown and home-consumed marijuana.<sup>106</sup> The Court determined that the high demand for marijuana would draw home-grown marijuana into the market and would affect the supply, demand and price of marijuana in commerce.<sup>107</sup> The Court thus held that because Congress had a rational basis for concluding that marijuana grown and consumed intrastate had a substantial effect on interstate commerce,

98. *Clark*, 435 F.3d at 1105.

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

100. *Clark*, 435 F.3d at 1112. This framework was first used in *Lopez*, 514 U.S. at 558–59. The Court also used this method to uphold a statute regulating marijuana in *Gonzales v. Raich*, 545 U.S. 1, 15–16 (2005). The Court noted, however, that these restrictions developed because of concerns that Congress would encroach on state power. *Clark*, 435 F.3d at 1112.

101. *Clark*, 435 F.3d at 1112.

102. *See Raich*, 545 U.S. at 1.

103. *Id.* at 5.

104. 21 U.S.C. § 801 (2006).

105. *Raich*, 545 U.S. at 12–13.

106. *Id.* at 32–33.

107. *Id.* at 2207.

Congress could regulate the drug under its Commerce Clause power.<sup>108</sup>

In analyzing section (c) of the illicit sex acts statute, the Ninth Circuit strayed from the framework enumerated by the Supreme Court in *Lopez* by arguing that the Supreme Court has never applied the *Lopez* categories in relation to foreign commerce, nor have they been deemed binding on all Commerce Clause cases.<sup>109</sup> The majority recognized that courts examined interstate Commerce Clause statutes under the three-part framework<sup>110</sup> because the framework protected state sovereignty, but no such federalism concern arises in Foreign Commerce Clause cases.<sup>111</sup> The court further noted that past cases, including *Japan Line*, have recognized broader congressional authority to regulate foreign commerce than interstate commerce.<sup>112</sup> Because of Congress's broad authority to regulate foreign commerce, the Ninth Circuit determined that statutes enacted under the Foreign Commerce Clause did not need to fit into a *Lopez* category to be deemed constitutional.<sup>113</sup>

After rejecting the application of *Lopez* to the illicit sex acts statute, the Ninth Circuit loosely interpreted the question the Supreme Court asked in *Raich*.<sup>114</sup> In *Raich*, the Court asked whether Congress had a rational basis for concluding that home-grown marijuana had a substantial effect on interstate commerce.<sup>115</sup> The majority in *Clark*, however, asked whether the statute had "a rational relationship to Congress's authority under the Foreign Commerce Clause."<sup>116</sup> The court concluded that because the broad definition of commerce includes "every species of commercial intercourse between the United States and foreign nations,"<sup>117</sup> paying young boys for sex constituted commerce.<sup>118</sup> Thus, the majority reasoned that the commercial prong of the illicit sex acts statute fell within Congress's power to regulate foreign commerce.<sup>119</sup>

108. 435 F.3d at 1114.

109. *Id.* at 1116.

110. *Id.* at 1112.

111. *Id.* at 1111. The court in *United States v. Lopez* expressed the fear that a broad reading of the commerce clause power "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 514 U.S. 549, 557 (1995).

112. *Clark*, 435 F.3d at 1113.

113. *Id.* at 1116.

114. *Id.* at 1115–16.

115. *Gonzales v. Raich*, 545 U.S. 1, 20–21 (2005).

116. *Clark*, 435 F.3d at 1114.

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

118. *Clark*, 435 F.3d at 1115.

119. *Id.* at 1116.

*B. The Dissent*

The dissent argued that section (c) of the illicit sex acts statute was an illegal exercise of Congress's Foreign Commerce Clause power because the statute only regulated illicit sexual conduct, which constituted private conduct, not commerce with foreign states.<sup>120</sup> The dissent further argued that the Supreme Court had struck down similar statutes that neither regulated a commercial activity nor required the illegal activity to be connected to interstate commerce in *U.S. v. Morrison*<sup>121</sup> and *U.S. v. Lopez*.<sup>122</sup>

The dissent next asserted that the majority should not have discounted the *Lopez* test in analyzing the constitutionality of a statute enacted under Congress's Foreign Commerce Clause powers.<sup>123</sup> Although the majority determined that the purpose of analyzing a statute under the *Lopez* framework was to ensure that Congress did not evoke federalism concerns in regulating interstate commerce, the dissent maintained that while the *Lopez* framework protected federalism concerns, it also helped define Congress's enumerated power "to regulate Commerce" and thus provided a useful mechanism for courts that needed to determine the constitutionality of a statute regulating foreign commerce.<sup>124</sup>

The dissent next turned to an analysis of the illicit sex acts statute under the *Lopez* framework and determined that it could not be regulated under Congress's Foreign Commerce Clause powers because it was not linked to the channels of commerce.<sup>125</sup> The dissent pointed to the statute at issue in *Bredimus* that prevented travel in commerce with the intent to engage in illicit sexual conduct and explained that it contained a link to the channels of commerce because it required the defendant's travel to have "illegitimate ends."<sup>126</sup> Section (c) of the illicit sex acts statute, however, only regulated conduct in a foreign country that occurred after some travel in foreign commerce.<sup>127</sup> It did not require that the defendant travel with the intent to commit illicit sex acts; thus, it regulated conduct committed abroad and not the use of the channels of foreign commerce.<sup>128</sup>

---

120. *Id.* at 1117.

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

122. *United States v. Lopez*, 514 U.S. 549 (1995); *Clark*, 435 F.3d at 1118.

123. *Clark*, 435 F.3d at 1118.

124. *Id.*

125. *Id.*

126. *Id.* at 1119.

127. *Id.*

128. *Id.*

The dissent further argued that section (c) of the illicit sex acts statute was not related to the channels of commerce by analyzing the Ninth Circuit's earlier decision in *U.S. v. Cummings*.<sup>129</sup> In *Cummings*, the court determined that Congress could regulate crimes U.S. citizens and aliens commit abroad as long as the crimes were tied to travel in foreign commerce.<sup>130</sup> The dissent noted that in *Cummings*, the defendant used the channels of commerce to take his children to Germany and keep them there.<sup>131</sup> His actions were tied to the channels of commerce because by keeping his children in Germany, he was prohibiting them from lawfully using the channels of commerce to come back to the United States.<sup>132</sup> Because section (c) of the illicit sex acts statute only prohibited illicit sex acts in a foreign country that occurred some time after the use of channels of commerce was completed, it did not regulate the use of the channels of commerce.<sup>133</sup>

Finally, the dissent reiterated that Congress enacted section (c) of the illicit sex acts statute to regulate criminal conduct in a foreign nation.<sup>134</sup> The dissent pointed to *U.S. v. Morrison*,<sup>135</sup> where the Supreme Court struck down a congressional statute regulating crimes of violence against women. There, the Court determined that gender motivated crimes did not constitute an economic activity merely because they contained a bare economic component and thus Congress did not have the power to regulate them.<sup>136</sup> The dissent argued that like the statute at issue in *Morrison*, the illicit sex acts statute was an example of a statute with a bare economic component that regulated criminal activity, not commerce; thus, illicit sex acts cannot be regulated under Congress's Foreign Commerce Clause powers.<sup>137</sup>

#### IV. UNCHARTED TERRITORY: THE DANGER OF ANALYZING FOREIGN COMMERCE CLAUSE CASES WITHOUT ANY GUIDANCE

Courts analyzing the constitutionality of statutes that regulate the conduct of U.S. citizens or aliens who travel in foreign commerce have given Congress wide discretion in regulating foreign commerce.<sup>138</sup>

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1120.

134. *Id.*

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

136. *Id.* at 613.

137. *Id.* at 1121.

138. *See United States v. Cummings*, 281 F.3d 1046 (9th Cir. 2002); *United States v. Bredimus*,



When the Supreme Court recognized this congressional power, however, it did so considering international trade and U.S. trade relationships with other nations.<sup>139</sup> These concerns do not exist in the context of the illicit sex acts statute that the Ninth Circuit interpreted; thus Congress should not have the same discretion to regulate the conduct of U.S. citizens or aliens who travel in foreign commerce.

Even if one accepts the argument in *Clark* that Congress has broad discretion under its Foreign Commerce Clause power, the Ninth Circuit allowed Congress unchecked authority to regulate foreign commerce when it decided *Clark*. The Ninth Circuit's decision marked the first time a court did not use the *Lopez* test to determine whether Congress overstepped its bounds under its foreign commerce power when it enacted a statute that regulated the conduct of U.S. citizens or aliens abroad.<sup>140</sup>

Not only did the Ninth Circuit determine that it did not need to analyze section (c) of the illicit sex acts statute under the *Lopez* framework, it developed a new, broad standard for determining whether a statute enacted under Congress's Foreign Commerce Clause powers was constitutional.<sup>141</sup> Further, the court's decision that section (c) of the illicit sex acts statute was constitutional represented the first time a court upheld a criminal statute enacted under Congress' Foreign Commerce Clause without requiring that the perpetrator have intent to commit a crime.<sup>142</sup>

*A. Courts Should Not Recognize Broad Congressional Power to Regulate a United States Citizen's Conduct Abroad*

When the Supreme Court determined that Congress had broader power under the Foreign Commerce Clause than under the interstate Commerce Clause, it emphasized the importance of Congress speaking with a unified voice in matters of foreign trade and taxation.<sup>143</sup> These matters affected the United State's relations with other countries.

The statute in question in *Clark*, however, does not give rise to the same concern. Essentially, the illicit sex acts statute is regulating the conduct of a U.S. citizen abroad. While a United States citizen's

---

352 F.3d 200 (5th Cir. 2003).

139. *Japan Line Ltd. v. Los Angeles County*, 441 U.S. 434, 450–51 (1979).

140. *United States v. Clark*, 435 F.3d 1100, 1114 (9th Cir. 2006).

141. *Id.*

142. *Id.* at 1116.

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

conduct abroad does, to an extent, affect U.S. relations with other nations, a single person's conduct does not rise to the same level of international concern as U.S. trade relationships with other nations. Thus, it makes sense for Congress to have broad power to regulate foreign trade and the taxation of instrumentalities of foreign commerce because of international relations concerns. However, it is arguably not as important for Congress to act in a unified manner in regulating the illicit sex acts of a U.S. citizen abroad because this conduct can be regulated by each individual state or by the foreign nation in which the crime occurs. Because a United States citizen's conduct in a foreign nation does not give rise to the same foreign relations concerns that the Supreme Court articulated in *Japan Line*, Congress should not have broader power to enact a Foreign Commerce Clause statute regulating a U.S. citizen's criminal conduct abroad than it has in regulating the citizen's interstate conduct.

*B. Straying From Lopez and Losing Interpretive Guidelines*

Even if Congress possesses broader power to regulate foreign commerce than interstate commerce, this wide discretion does not give Congress free reign to enact any statute under its Foreign Commerce Clause power. Even if the Ninth Circuit justifiably recognized Congress's broad authority under the Foreign Commerce Clause, the Ninth Circuit stepped outside the realm of prior Foreign Commerce Clause jurisprudence when it decided *Clark*. Unlike its earlier decision in *Cummings*<sup>144</sup> or the Fifth Circuit's decision in *Bredimus*,<sup>145</sup> the Ninth Circuit allowed Congress to regulate the conduct of a defendant after he traveled in foreign commerce without requiring that the perpetrator use the channels of commerce with the intent to commit a crime. The Ninth Circuit justified this leap by arguing that Clark engaged in an economic activity while abroad.<sup>146</sup>

144. United States v. Cummings, 281 F.3d 1046 (9th Cir. 2002).

145. United States v. Bredimus, 352 F.3d 200 (5th Cir. 2003).

146. United States v. Clark, 435 F.3d 1100, 1115 (9th Cir. 2006). In *Raich*, the Court defined economic as "the production, distribution, and consumption of commodities." *Gonzales v. Raich*, 545 U.S. 1, 25-26 (2005) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). The Ninth Circuit, however, noted that the online version of the Merriam Webster dictionary included services in its definition of economic. In the same online dictionary, commodity is defined as "an economic good." *Id.*, available at <http://www.m-w.com/dictionary/commodity>. Whether paying young boys for sex would constitute an "economic" activity that can be regulated without an examination of the *Lopez* categories, or whether the illicit sex acts statute is a criminal statute with a bare economic component is outside the scope of this Casenote.

In *Raich*, the Court noted that if a statute clearly regulated an economic activity, its constitutionality did not need to be examined under the *Lopez* categories.<sup>147</sup> Assuming that the Ninth Circuit correctly determined that Clark's actions constituted an economic activity, then the court should not have analyzed his conduct under the *Lopez* standard.

However, by stating that "forcing foreign commerce cases into the domestic commerce rubric is a bit like one of the stepsisters trying to don Cinderella's glass slipper," and that "[t]he [*Lopez*] categories are a guide, not a straightjacket,"<sup>148</sup> the court opened the door for future courts to loosely interpret or even ignore the *Lopez* categories in determining the constitutionality of a non-commercial Foreign Commerce Clause statute. Although the *Lopez* test was developed to protect federalism concerns, which do not exist in the Foreign Commerce Clause arena, *Lopez* remains the only guidance courts have to interpret Foreign Commerce Clause statutes regulating the conduct of U.S. citizens or aliens abroad after their travel in foreign commerce; thus the Ninth Circuit began a dangerous precedent by allowing courts broad authority to interpret congressional statutes regulating foreign commerce.

### C. The Ninth Circuit's Abolition of Any Standard

The Ninth Circuit chose not to use the *Lopez* test as a guide for analyzing the constitutionality of section (c) of the illicit sex acts statute, but it purported to follow the Supreme Court's reasoning in *Raich* in determining that section (c) of the statute did not exceed Congress's Foreign Commerce Clause powers. In *Raich*, the Supreme Court asked whether Congress had a rational basis for concluding that the statute had a substantial effect on interstate commerce, which incorporated the *Lopez* test under a rational basis review.<sup>149</sup> The *Clark* court, however, asked whether section (c) of the illicit sex acts statute had a rational relationship to "Congress'[s] authority under the Commerce Clause,"<sup>150</sup> clearly a different, broader question that ignored guidance from interstate Commerce Clause jurisprudence.<sup>151</sup>

---

147. *Raich*, 545 U.S. at 25.

148. *Clark*, 435 F.3d at 1116.

149. "We need not determine whether respondents' activities, taken in the aggregate, substantially effect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Raich*, 545 U.S. at 22.

150. *Clark*, 435 F.3d at 1114.

151. This question fails to examine the statute as it relates to any of the three categories enumerated in *Lopez*.

The Supreme Court has never examined a Foreign Commerce Clause statute regulating a U.S. citizen's or alien's travel in foreign commerce. Because there is no binding authority regulating Congress's authority under the Foreign Commerce Clause, the Ninth Circuit considered a moot question when it analyzed whether a statute has a rational relationship to Congress's power under the Foreign Commerce Clause. As of today, in the Ninth Circuit at least, Congress has unchecked authority under its Foreign Commerce Clause powers.

The only guidance that courts have to analyze these statutes comes from the established fact that Congress has broader authority to enact regulations under the Foreign Commerce Clause than under the interstate Commerce Clause and narrow, non-binding decisions from the Ninth, Fifth, and Second Circuits.<sup>152</sup> Thus, the question that the *Clark* court posed, whether a statute has a rational relationship to Congress's power under the Foreign Commerce Clause, effectively grants Congress unlimited authority to regulate under its Foreign Commerce Clause powers.

Arguably, the narrow interpretations of *Bredimus* and *Cummings* provide future courts with some help interpreting the constitutionality of statutes regulating non-commercial acts in foreign commerce.<sup>153</sup> However, both the statutes at issue in *Bredimus* and *Cummings* required travel in foreign commerce with intent to commit a crime.<sup>154</sup> Further, in both *Bredimus* and in *Cummings*, the courts analyzed the constitutionality of the intent-based statutes under the "channels of commerce" category from *Lopez* and recognized that Congress has the power to regulate a channel of commerce to keep that channel free from immoral or injurious uses, such as when a defendant travels for the purpose of committing a crime.<sup>155</sup> These decisions provide no guidance to courts analyzing a statute that does not require intent.

Courts have incentive to analyze a Foreign Commerce Clause statute under the *Lopez* test. The Supreme Court articulated the *Lopez* framework, and it has been workable in the lower courts for ten years. Thus, a Foreign Commerce Clause statute that could clearly be deemed constitutional under the *Lopez* test would likely face less opposition than a statute not analyzed under *Lopez*. However, after the *Clark* court determined that Foreign Commerce Clause statutes do not fit neatly into the *Lopez* categories, and affirmed that Congress has more authority to

---

152. See *Japan Line Ltd. v. Los Angeles County*, 441 U.S. 434 (1979).

153. See *United States v. Bredimus*, 352 F.3d 200, 238 (5th Cir. 2003); *United States v. Cummings*, 281 F.3d 1046 (9th Cir. 2002).

154. See 18 U.S.C. §§ 1204(a), § 2423(b).

155. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

2006]      *TAKING THE BALL AND RUNNING WITH IT*      861

regulate foreign commerce than interstate commerce, a court adjudicating cases in the Ninth Circuit is no longer required to analyze the constitutionality of a Foreign Commerce Clause statute under the *Lopez* test, which leaves Congress wide discretion to regulate foreign commerce.

*D. The Effect of the Clark Decision on Commercial and Non-Commercial Statutes*

If the Supreme Court were to uphold the Ninth Circuit's holding that a Foreign Commerce Clause statute does not need to be interpreted under the *Lopez* categories, and must have only a rational relationship to Congress's power under the Foreign Commerce Clause, Congress would be left with few limits on its power to enact statutes regulating foreign commerce. A court following *Clark* and faced with determining the constitutionality of a non-commercial statute that does not require intent to commit a crime is thus left with broad discretion on how to interpret the regulation.

For example, what will happen when a court has to determine whether the non-commercial prong of the illicit sex acts statute is constitutional? Unlike the statutes at issue in *Bredimus* and *Cummings*, the non-commercial illicit sex acts statute does not require intent. Unlike the statute in *Clark*, the non-commercial illicit sex acts statute would not constitute an economic activity. Because of the Ninth Circuit's determination that courts interpreting statutes regulating foreign commerce clause do not have to analyze the statute under *Lopez*, the court has no guidance for its analysis, except that Congress has broad power to regulate foreign commerce. The court could thus easily determine that Congress can regulate a non-commercial statute that requires travel in foreign commerce but not intent to commit a crime. This could lead to Congress regulating private, non-commercial conduct under the guise of its Foreign Commerce Clause powers. Congress could decide, for example, that smoking abroad is illegal and prevent a U.S. citizen from traveling to Spain and then smoking a cigarette. When given broad discretion and no guidance to regulate foreign commerce, Congress's power is potentially unlimited.

V. CONCLUSION

Courts analyzing the constitutionality of statutes regulating a U.S. citizen's travel in foreign commerce cannot ignore the guidance that the *Lopez* test provides. When the Supreme Court enumerated the *Lopez*

test, it considered over 100 years of Commerce Clause jurisprudence. *Lopez* cannot be disregarded based on a determination that Congress has broad authority to regulate foreign trade. The *Lopez* test is the only guidepost a court currently has to measure whether Congress is exceeding its power under the Foreign Commerce Clause. Under a *Lopez* analysis, federal legislation seeking to regulate activities of U.S. citizens abroad would be held constitutional only if the regulated activities use a channel or instrumentality of commerce or substantially affect interstate or foreign commerce. Ignoring this test would allow Congress to exceed its constitutional power and regulate any activity a United States citizen could engage in while abroad—regardless of whether such activity used a channel or instrumentality of commerce or substantially affected interstate or foreign commerce. Courts should recognize that the Constitution does not grant such unlimited power to Congress.