

1-1-2008

Regulating Unsettled Issues in Latin America Under the Treaty Powers and the Foreign Commerce Clause

Joanna Doerfel

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Joanna Doerfel, *Regulating Unsettled Issues in Latin America Under the Treaty Powers and the Foreign Commerce Clause*, 39 U. Miami Inter-Am. L. Rev. 331 (2008)

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COMMENTS

Regulating Unsettled Issues in Latin America Under the Treaty Powers and the Foreign Commerce Clause

Joanna Doerfel*

I. THE FEDERAL GOVERNMENT'S POWERS TO REGULATE EXTRATERRITORIALLY	334
a. <i>The Foreign Commerce Clause</i>	335
b. <i>The Necessary and Proper Clause</i>	336
II. TREATIES REGULATING SEX TOURISM	338
a. <i>U.N. Convention on the Rights of the Child</i>	339
b. <i>Optional Protocol to the Convention on the Rights of the Child, on the sale of Children, Child Prostitution and Child Pornography</i>	340
III. LEGISLATION GOVERNING SEX TOURISM	342
a. <i>The PROTECT Act – 18 U.S.C.A. §2423</i>	342
i. <i>The PROTECT Act and Extraterritoriality</i>	344
ii. <i>Amending the PROTECT Act</i>	345
IV. THE INTERPRETATIONS OF 18 U.S.C. A. §2423 BY UNITED STATES' COURTS	348
a. <i>United States v. Bredimus</i>	348
b. <i>United States v. Clark</i>	350
c. <i>United States v. Frank</i>	353
d. <i>Interpreting the Court's Interpretations of Sex Tourism</i>	356
V. LATIN AMERICAN REGULATIONS	358
a. <i>The Standard Penal Code of Latin America</i>	358
b. <i>Sex Tourism in Latin America</i>	359
i. <i>The Foundation for Sexual Exploitation</i>	360
ii. <i>Current Sexual Exploitation</i>	361
A. <i>The General Trend in Latin America</i>	361

* J.D. Candidate, University of Miami, 2008; B.A. University of Louisville, 2005. I owe special thanks to Andrew Thomson and Marilyn Doerfel for their crucial analysis and critique at all stages of this article, to Judge Adalberto Jordan for inspiring for this article, and to the editors and staff of the Inter-American Law Review for their efforts in preparing this piece for publication.

B. <i>A Closer Look at Latin America and Sex</i>	
<i>Tourism</i>	363
<i>Argentina & Brazil</i>	364
<i>Colombia</i>	364
<i>Costa Rica</i>	365
<i>Cuba</i>	366
<i>Honduras</i>	367
<i>Mexico</i>	368
VI. CONFLICT BETWEEN LATIN AMERICAN REGULATIONS AND UNITED STATES REGULATIONS	368
VII. CONCLUSION	369

“The whole question of what is a child – one that we may think beyond dispute – is actually a sensitive and contentious issue. The definition established by the United Nations Convention on the Rights of the Child – ‘a child means every human being below the age of eighteen years’ – is a useful guideline, but custom and culture in different parts of the world are unlikely to modify the habits of centuries overnight to comply with this view.”¹

Ten years old. Twelve years old. Fifteen years old. What is a child? What makes each individual mentally, physically, and emotionally a child? How old must one be to make an informed decision regarding where to live, where to work, and when to have a child? The question of who is a child is most poignant when faced with child prostitution and child sex tourism. Most countries agree that both child prostitution and child sex tourism are degrading and immoral practices that demand an international response.² To this end, governments have attempted to use various means of regulation to prohibit and control child sex tourism. However, because of difficulties in creating and enforcing those laws,³ many countries have failed to provide sufficient means to monitor and punish those responsible for child sex tourism within

1. JEREMY SEABROOK, *NO HIDING PLACE: CHILD SEX TOURISM AND THE ROLE OF EXTRATERRITORIAL LEGISLATION* xii (2000).

2. See generally Ann Barger Hannum, *Sex Tourism in Latin America*, *RE VISTA – HARVARD REVIEW OF LATIN AMERICA* (Winter 2002), <http://drclas.fas.harvard.edu/revista/articles/view/53> (“Only through international cooperation can the sex tourism industry be regulated successfully and millions of children be protected against exploitation.”).

3. See Naomi L. Svensson, *Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws*, 28 *LOY. L.A. INT’L & COMP. L. REV.* 641, 641 (Summer 2006) (“[G]overnments routinely fail to prosecute the perpetrators of these crimes for their abhorrent conduct.”).

their borders.⁴ Because of the ineffectiveness of many governments' internal measures, some countries, including the United States, have enacted extraterritorial legislation – statutes extending the power of a nation's laws to its citizens abroad – to fill the void.

Whenever the United States Congress exercises its legislative power, it must abide by the parameters set forth in the United States Constitution.⁵ Compared to its rather broad power to legislate domestically, Congress's ability to regulate conduct outside the United States is much more limited. There are, however, constitutional mechanisms through which Congress can regulate foreign activities, the most prominent being the Foreign Commerce Clause and the Necessary and Proper Clause.⁶

In legislating extraterritorially, Congress must exercise caution to ensure that it does not significantly interfere with the regulations of other sovereign nations. Conflicts arise between U.S. laws and other nations' laws over critical issues such as how to define crimes, and who has jurisdiction over certain criminal offenders. Many Latin American countries have built into their penal code deference in their international jurisdiction to the regulated act's situs country, providing an explicit check on Latin American countries' authority.⁷ The situs country is often granted the first opportunity to prosecute the offender, and only if that country declines does the Latin American country step in to prosecute its own national. Congress arguably has similar checks (in that it has limited authority and precise parameters in which to legislate), but no country can step in to enforce the checks built into the U.S. system. Rather, the courts must intervene and strike down a statute when it exceeds the boundaries of Congress's authority.⁸

4. See generally *id.* at 641-642 ("Reasons such as inadequate laws, ineffective law enforcement, lack of resources, corruption, and immature legal systems frequently enable child sex tourists to escape prosecution in countries where the exploitation occurs.").

5. See Christine L. Hogan, *Touring Commerce Clause Jurisprudence: The Constitutionality of Prosecuting Non-Commercial Sexually Illicit Acts Under 18 U.S.C. §2423(c)*, 81 ST. JOHN'S L. REV. 641, 642 (Summer 2007) (discussing constitutional restraints on Congress's commerce power).

6. The Foreign Commerce Clause provides an independent basis for Congress to enact legislation abroad, while the Necessary and Proper Clause requires Presidential action under a treaty. Compare U.S. CONST. art. I, § 8, cl. 3 with U.S. CONST. art. I, § 8, cl. 18.

7. See discussion, *infra* Part V.

8. For example, if Congress enacts a statute under its Foreign Commerce Clause that has no relation to commerce because it is a thinly veiled attempt to legislate

Courts thus confront a plethora of questions: If Congress enacts a statute pursuant to a treaty, can it create its own definitions? Can the United States punish its own citizens when they act abroad to violate the laws of the United States, even when the conduct does not violate the laws of the situs country? In order to answer these questions, the courts must look both to where Congress derives its power and to how broad that authority is under the U.S. Constitution. As a legislative body of limited powers, it would behoove Congress to designate explicitly which powers it is exercising. If Congress conveys that it is using one means, in the interest of legislative efficiency, courts should be able to find the same legislation valid by substituting other means in lieu of Congress's stated basis.

This comment will argue that the U.S. Congress should not legislate extraterritorially over issues that have not achieved international consensus. As a survey of Latin American law will show, the salient details regarding issues such as age of consent for child sex tourism are far from settled in the international arena; and Congress should not attempt to legislate over the gray areas by using extraterritorial legislation. Part I of this Comment discusses the power of the United States government to regulate extraterritorially. Part II addresses a treaty ratified by the executive branch under its treaty powers and that treaty's addendums. Part III delves into the legislative branch's statutory enactments in reference to those treaties. Part IV examines the statutory construction through which the judiciary has extended the statutes promulgated by Congress. Part V gives a brief synopsis of Latin American Regulations, and Part VI enumerates the conflicts that arise between Latin American regulations and United States extraterritoriality of its criminal law.

I. THE FEDERAL GOVERNMENT'S POWERS TO REGULATE EXTRATERRITORIALLY

"[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of

crimes committed abroad, the courts must strike down the statute as unconstitutionally exceeding Congress' constitutional authority.

*another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.*⁹

The United States government has a broad range of powers to regulate outside the country, but all authority the government wields must spring from the Constitution.¹⁰ In order to constitutionally regulate extraterritorially, the government must reach conduct under the Foreign Commerce Clause, by regulating foreign commerce, or under the Necessary and Proper Clause, by creating a statute that supplements a current treaty of which both it and the target country are signatories.¹¹

a. The Foreign Commerce Clause

*“Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce ‘with foreign Nations’ and ‘among the several States’ in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.”*¹²

The Foreign Commerce Clause gives Congress the power “to regulate Commerce with Foreign Nations.”¹³ It has generated relatively little controversy, and even less caselaw, particularly in comparison with the abundance of caselaw discussing the Interstate Commerce Clause.¹⁴ That the Framers of the Constitution intended for Congress’s power under the Foreign Commerce Clause to be more extensive in scope than that of the Interstate Commerce Clause is evidenced by the Supreme Court’s treatment of this area.¹⁵ The authority to legislate over foreign commerce is

9. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (citing *Slater v. Mexican Nat. R. Co.*, 194 U.S. 120, 126 (1904); *Phillips v. Eyre*, L.R. 6 Q.B. 1, 28 (1870)).

10. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 136 (Winter 2007) (“As a general matter, nothing in the Constitution prohibits Congress from legislating extraterritorially. While important Supreme Court decisions involve questions . . . centering on congressional *intent* that a statute apply extraterritorially, scant attention has been paid to the power of Congress . . . to regulate conduct abroad under . . . [its] legislative authority.”).

11. As a practical matter, the Necessary and Proper Clause requires conjunction with the Executive’s Article I powers in order to enact legislation to supplement a treaty.

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

13. U.S. CONST. art. I, § 8, cl. 3.

14. See *United States v. Clark*, 435 F.3d 1100, 1102 (9th Cir. 2006) (“Cases involving the reach of the Foreign Commerce Clause vis-à-vis congressional authority to regulate our citizens’ conduct abroad are few and far between.”).

15. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824) (holding that the power of the government to regulate commerce extends to every species of commercial intercourse

limited only by the requirement that Congress not interfere with the internal or local trade or commerce of another nation.¹⁶

But while the Foreign Commerce Clause is a liberal grant of power to Congress, it does not allow Congress the authority to regulate everything. It must be commerce. And it must be commerce abroad. In *United States v. Morrison*¹⁷ the Court declared, “[E]ven under our modern, expansive interpretation of the Commerce Clause, Congress’s regulatory authority is not without effective bounds.”¹⁸ Additionally, under the tradition of looking to the Founders’ intent, it is clear that there is no such purpose to allow the rampant creation of extraterritorial laws:

[T]he idea that the Foreign Commerce Clause might license Congress with the broad ability to extend U.S. laws extraterritorially into the jurisdictions of other nations would have been anathema to the founders given their driving belief in the sovereign equality of states and its accompanying rigid conception of territoriality [T]o borrow yet again from Chief Justice Marshall . . . ‘no [state] can rightfully impose a rule on another[,] [e]ach legislates for itself, but its legislation can operate on itself alone.’¹⁹

As a result, Congress should exercise careful consideration before legislating extraterritorially under the Foreign Commerce Clause. Not only must the subject of the legislation be commercial, but the subject should also be a matter of some international consensus. Otherwise, Congress would be disregarding the notion of sovereign equality by substituting its judgment for that of another sovereign nation within that sovereign’s territory.

b. The Necessary and Proper Clause

“Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as

between the United States and foreign nations); *United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006) (reiterating that Congress’ power over foreign commerce is exclusive and plenary); *Matter of Arbitration Between Trans Chem. Ltd. and China Nat’l. Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266 (S.D. Tex. 1997) (concluding that Congress’s power to regulate foreign commerce is broader than its authority to regulate interstate commerce).

16. See *David Cabrera, Inc. v. Union de Choferes y Duenos de Camiones Hermanados de Puerto Rico*, 256 F. Supp. 839 (D.P.R. 1966).

17. 529 U.S. 598 (2000).

18. *Id.* at 608. *Morrison* addressed a domestic criminal law issue, which is clearly outside the scope of the Foreign Commerce Clause.

19. Colangelo, *supra* note 10, at 149-150 (citing *The Antelope*, 23 U.S. (10 Wheat.) 66, 122-23 (1825)).

*equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.*²⁰

Congress's authority to enact supplemental legislation in conjunction with a treaty²¹ signed by the United States is contained in Article 1, section 8, clause 18, of the United States Constitution. Under that section, Congress has the authority "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Unlike its use of the Foreign Commerce Clause, when Congress legislates to implement a treaty, it can regulate conduct that might otherwise fall outside its enumerated powers: "if the treaty is valid there can be no dispute about the validity of [a] statute [passed] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government."²²

Statutes passed under Article 1, Section 8 are often supplemental legislation created to implement non-self-executing treaties.²³ Under most non-self-executing treaties, additional legislation is required to incorporate the treaty provisions into domestic law, and traditionally each country is left to its own devices to determine the domestic legal status of treaties made under international law.²⁴ A problem arises, however, when one country determines that its domestic law will extend to include acts committed in the territory of other treaty signatories:

Even assuming that the defendant-alien's country has consented to this law on the international plane, there is no

20. *Foster v. Neilson*, 27 U.S. 253, 314 (1829). Chief Justice Marshall went on to limit this statement, noting, "[b]ut when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court." *Id.*

21. See Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 320 (November 1997) (stating that treaties generally are express agreements made between or among nations, which "impose binding obligations on nations on the international plane.").

22. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

23. See *United States v. Frank*, 486 F. Supp. 2d 1353 (S.D. Fla. 2007). Non-self-executing treaties are treaties which require accompanying legislation in order to make the treaty effective. By contrast, a self-executing treaty is a treaty that does not require additional legislation, and any rights created by the treaty attach without statutory implementation. See also Bradley & Goldsmith, *supra* note 21, at 349 (noting that treaties are not self-executing unless they are expressly declared to be so or are accompanied by implementing federal legislation).

24. See generally *Kent v. Dulles*, 357 U.S. 116 (1958).

evidence that this consent extends to domestic enforcement in the United States or any other country. Indeed, it is the absence of an agreed-upon customary law of domestic enforcement that requires federal courts in so many human rights cases to imply a cause of action as a matter of U.S. law.²⁵

A signatory to a treaty, commonly known as a State Party, might not consent to the United States exercising its domestic law and jurisdiction under the treaty power over a foreign national, even if the State Party agrees with the basic precepts set forth in the treaty.²⁶ Congress must be aware of this possible disagreement and enact its legislation so as to avoid interfering with other sovereign nations. In fact, Congress should not only be aware of this disagreement when enacting legislation under the Necessary and Proper Clause, but it should keep foreign sovereigns in mind when passing *any* legislative act, *particularly* if it contradicts or replaces treaty-based international law.²⁷ The recent treaties regulating sex tourism provide useful insights into Congress's authority to act before and after the creation of a treaty.

II. TREATIES REGULATING SEX TOURISM

"Treaties furnish the relevant evidence of customary law since they may provide for [a] . . . procedural rule through their jurisdictional provisions. Specifically, treaties that contain prosecute or extradite provisions mandating each state party on whose territories offenders are "present" or "found" both (i) to "establish its jurisdiction over the offence" and (ii) either to prosecute or to extradite (to another state party), create a comprehensive adjudicative jurisdiction among the states parties to the treaty."²⁸

Child sex tourism is widely recognized as a universal crime. Accordingly, a number of international treaties have emerged that address this issue in some detail, although they largely leave the specifics to be enacted and enforced under the domestic laws of the State Party.

25. Bradley & Goldsmith, *supra* note 21, at 346 (emphasis in original).

26. See generally Colangelo, *supra* note 10, at 152.

27. See *United States v. Yousef*, 327 F.3d 56, 110 (2d Cir. 2003) (holding that "legislative acts trump treaty-made international law" if those acts are passed after the treaty is ratified and contradict treaty obligations (citing *Breard v. Greene*, 523 U.S. 371, 376 (1998))); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that if a treaty and a federal statute conflict, "the one last in date will control the other.").

28. Colangelo, *supra* note 10, at 183-184 (citations omitted).

a. *U.N. Convention on the Rights of the Child*

*"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."*²⁹

The 1989 U.N. Convention on the Rights of the Child (UNCRC) was the first legally-binding international agreement that required its signatories to protect children from sexual exploitation.³⁰ After ten years of drafting and redrafting,³¹ the treaty entered into force in 1990; and currently 190 countries have signed and ratified it.³² Focusing specifically on children's right to be free from sexual exploitation,³³ Article 34 provides in part:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.³⁴

Article 32 recognizes "the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous . . . or to be harmful to the child's health or physical, mental, spiritual, moral, or social development."³⁵ Prostitution, by its very nature, can be defined as "hazardous or harm-

29. See Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (1969).

30. See Sara K. Andrews, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 J. CRIM. L. & CRIMINOLOGY 415, 44. Enacted in 1989, the UNCRC has become "the most widely accepted human rights treaty ever." *Id.*

31. "For the first time, non-governmental organizations oriented toward human rights and child advocacy participated in the drafting." Karene Jullien, *The Recent International Efforts to End Commercial Sexual Exploitation of Children*, 31 DENV. J. INT'L L. & POL'Y 579, 589 (2003).

32. See Andrews, *supra* note 30, at 442. As of 2004, the United States was one of two signing countries who had not yet ratified the UNCRC. *Id.* at 445.

33. *Id.* ("The UNCRC defines a child as anyone under eighteen years of age.")

34. Convention on the Rights of the Child art. 34, Nov. 20, 1989, 1155 U.N.T.S. 331, available at <http://www2.ohchr.org/english/law/pdf/crc.pdf>.

35. *Id.* at art. 32.

ful.”³⁶ Additionally, the UNCRC created a Committee on the Rights of the Child to oversee and monitor the progress made by each Member State.³⁷ Each Member State must submit reports to the Committee regarding the progress made toward ensuring the rights of the child in its respective country.³⁸ However, this Committee does not have the authority to punish violations of the UNCRC, nor does the treaty itself specify preventative measures that each country must take.³⁹

Another notable weakness of the UNCRC is that Member States themselves must undertake “national, bilateral, and multi-lateral measures” in order to address the problem.⁴⁰ Thus, every Member State is required to “create new laws prohibiting the sexual exploitation of children in their home country, criminalizing any person benefiting from child prostitution, as well as extending jurisdiction to cover citizens’ actions abroad, using children for sex or pornography.”⁴¹ In order to clarify some of the terms and definitions introduced in the UNCRC, the U.N. created an Optional Protocol to the treaty in 2003.

b. Optional Protocol to the Convention on the Rights of the Child, on the sale of Children, Child Prostitution and Child Pornography

“Child sex tourism is defined as the commercial sexual exploitation of children by persons who travel from their own country to another usually less developed country to engage in sexual acts with children.”⁴²

As a counterpart to the UNCRC, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (the “Optional Protocol”) was adopted by the U.N. General Assembly on May 25, 2000, and came into force on January 18, 2002.⁴³ The

36. Jullien, *supra* note 31, at 589.

37. See Andrews, *supra* note 30, at 443.

38. See *id.*

39. *Id.*

40. See Jullien, *supra* note 31, at 590. (“The Convention is mostly oriented towards cooperation. It is up to State Parties to establish and implement measures for the protection of the children.”).

41. *Id.*

42. Amy Fraley, *Child Sex Tourism Legislation under the PROTECT Act: Does it Really Protect?*, 79 ST. JOHN’S L. REV. 445, 449 (2005) (quoting ECPAT International, *Frequently Asked Questions about CSEC*, <http://www.ecpat.net/eng/CSEC/faq/faq3.asp> (last visited Jan. 30, 2008)).

43. See U.S. Department of State, *Fact Sheet: The Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child*

Optional Protocol expanded on its predecessor, the UNCRC, and more specifically defined how signing countries should protect their children from sexual exploitation.⁴⁴ The Optional Protocol explicitly expanded the scope of criminality for certain offenses applying regardless of “whether such offen[s]es are committed domestically or transnationally or on an individual or organized basis,” including “offering, obtaining, procuring or providing a child for child prostitution.”⁴⁵

In addition to expanding the scope of crimes, the Optional Protocol was the first instrument of international law to define the sale of children, child prostitution and child pornography, and it protects children up to the age of eighteen.⁴⁶ State Parties are required to provide victims with counseling and rehabilitation, and must “afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth [within the Protocol].”⁴⁷ Those countries that agreed to this mutual assistance currently number 115 who have signed the Optional Protocol and 121 who have ratified it.⁴⁸ Most Latin American countries have signed and ratified the Optional Protocol,⁴⁹ and the United States

Prostitution, and Child Pornography, Dec. 24, 2002, <http://www.state.gov/r/pa/prs/ps/2002/16216.htm>.

44. See generally Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography, May 16, 2000, 39 I.L.M. 1285 [hereinafter Optional Protocol].

45. Andrews, *supra* note 30, at 444 (quoting Optional Protocol, *supra* note 44, art. 3, § 1, 1(b)).

46. See Fraley, *supra* note 42, at 448 (“In spite of this declaration, most states have not incorporated this standard into their national legislation.”).

47. Optional Protocol, *supra* note 44, art. 6, § 1; see also Andrews, *supra* note 30, at 444-45.

48. Office of the United Nations High Commissioner for Human Rights, *Fact Sheet: Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Nov. 12, 2007, <http://www2.ohchr.org/english>.

49. *Id.* Antigua and Barbuda signed the treaty on December 18, 2001, and ratified it on April 30, 2002. Argentina signed the treaty on April 1, 2002, and ratified it on September 25, 2003. Belize signed the treaty on September 6, 2000, and ratified it on December 1, 2003. Bolivia signed on November 10, 2001, and ratified on June 3, 2003. Brazil signed on September 6, 2000, and ratified on January 27, 2004. Colombia signed on September 6, 2000, and ratified it on November 11, 2003. Costa Rica signed on September 7, 2000, and ratified on April 9, 2002. Cuba signed on October 13, 2000, and ratified on September 25, 2001. Dominica ratified on September 20, 2002; the Dominican Republic ratified on December 6, 2006. Ecuador signed on September 6, 2000, and ratified on January 30, 2004. El Salvador signed on September 13, 2002 and ratified on May 17, 2004. Guatemala signed on September 7, 2000, and ratified on May 9, 2002. Haiti signed on August 15, 2002. Honduras ratified on May 8, 2002. Jamaica signed on September 8, 2000. Nicaragua ratified on

officially became a State Party to the Optional Protocol on December 24, 2002.⁵⁰

With the advent of the UNCRC and the Optional Protocol, a coalition of nations took a firm stance in condemning child prostitution, particularly as it is affected by foreigners engaging in sex tourism. The growing consensus among nations of the world that child prostitution and child sex tourism must end has prompted the United Nations to become engaged on the issue, resulting in the creation of these widely-accepted treaties.

While both the UNCRC and the Optional Protocol treaties are non-self-executing treaties, requiring enacting legislation, Congress did not act as expected here. Congress never explicitly implemented the UNCRC or Optional Protocol with supplemental legislation. Rather, Congress created a statute four years after the UNCRC to regulate sex tourism under its *Foreign Commerce Clause* powers. It included the familiar language “traveling in foreign commerce,” and it arguably was directed at some of the same goals as the UNCRC. However, Congress amended that sex tourism statute in 2003⁵¹ – the same year the Optional Protocol emerged – removing the one part of the statute that tied *traveling* with *the United States* and made the statute constitutional under the Foreign Commerce Clause: Congress removed the *intent*.

III. LEGISLATION GOVERNING SEX TOURISM

a. *The PROTECT Act – 18 U.S.C.A. §2423*

Unlike statutes that are enacted pursuant to a treaty, 18 U.S.C.A. §2423 attempts to draw its powers from the Foreign Commerce Clause.⁵² This legislation was necessary because most sex tourists are not arrested in the country where they engage in criminal acts.⁵³ Additionally, many of these receiving countries suffer from corrupt or underdeveloped legal systems, ineffective laws, and corrupt or ineffective law enforcement.⁵⁴ Because sex

December 2, 2004. Panama signed on October 31, 2000, and ratified on February 9, 2001. Paraguay signed on September 13, 2000, and ratified on August 18, 2003. Peru signed on November 1, 2000, and ratified on May 8, 2002. St. Vincent and the Grenadines ratified on September 15, 2005. Suriname signed on May 10, 2002. Uruguay signed on September 7, 2000, and ratified on July 3, 2003. Venezuela signed on September 7, 2000, and ratified on May 8, 2002.

50. *Id.*

51. *See* 18 U.S.C. § 2423 (2006).

52. *See id.* § 2423(c).

53. *See* Andrews, *supra* note 30, at 416.

54. *See id.* (“According to the U.S. House of Representatives Committee on the

tourism brings in revenue for Latin American countries, the incentives to find and prosecute those individuals who are boosting the economy are low,⁵⁵ and the need for §2423 becomes clearer.

As originally enacted in 1994, the sex tourism statute prohibited, *inter alia*, traveling in foreign commerce “for the purpose of engaging in any illicit sexual conduct with another person.”⁵⁶ The prohibition limited itself to citizens of the United States or to aliens who were admitted for permanent residence within the United States, and included the scienter requirement of *purposefully* traveling to engage in illicit sexual conduct.⁵⁷ This language “focuses on the *intentions* of the accused, not the accused’s act itself.”⁵⁸

In 2002, Congress revised the 1994 Act under the Sex Tourism Prohibition Improvement Act (the “2002 Act”).⁵⁹ In enacting this legislation, the House of Representatives expressly stated that “child-sex tourism is a major component of the worldwide sexual exploitation of children and is increasing”⁶⁰ because “ineffective law enforcement, lack of resources, corruption, and generally

Judiciary, ‘sex tourists often escape prosecution in the host countries’ because of factors ‘ranging from ineffective law enforcement, lack of resources, corruption, and immature legal systems.’” (quoting H.R. REP. NO. 107-525, at 3 (2002)).

55. *See id.* (“Most developing nations have little incentive for domestic enforcement because tourism is one of the main driving forces behind their economies.”).

56. 18 U.S.C. § 2423(b) (2002) (emphasis added). The statute provides more fully that:

A person who travels in interstate commerce, or conspires to do so, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any illicit sexual act . . . with a person under 18 years of age . . . shall be fined under this title, imprisoned not more than 10 years, or both.

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title XVI, § 160001(g)(2), 108 Stat. 1796 (1994) (codified as amended at 18 U.S.C. § 2423 (2006)).

57. *See id.* § 2423(b) (2006). The 1994 Act extended the Mann Act, amended in 1986, which had previously criminalized travel in interstate or foreign commerce for any immoral purpose (including prostitution or any sexually-based criminal offense). *See* Mann Act, 18 U.S.C. § 2421 (1998); Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5(b), 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251(2006)).

58. Andrews, *supra* note 30, at 431 (emphasis added). The government has interpreted this language to require that “the accused’s intention must be formed prior to the actual encounter with the child, either in the U.S. or the destination country. The actual crime occurs during the travel where the accused has the intent to commit a forbidden sexual act with a minor.” *Id.*

59. *See* Fraley, *supra* note 42, at 458.

60. *Id.* (quoting H.R. REP. NO. 197-525, at 2 (2002)).

immature legal systems have allowed sex tourists to escape prosecution.⁶¹ On April 30, 2003, President George W. Bush signed the Prosecuting Remedies and Tools Against the Exploitation of Children Today Act (PROTECT Act), which removed the intent requirement⁶² from previous legislation, prohibiting merely *traveling* in foreign commerce *and engaging* in sex with a minor.⁶³ By removing the intent requirement, Congress was able to make the prosecution of sex tourism more straightforward⁶⁴ and easier to prosecute.⁶⁵ But by removing this intent requirement, Congress removed its own authority to legislate the Act under its Foreign Commerce Clause powers because the individual no longer was traveling in commerce connected with the prohibited activity; and it created an unjustified and unconstitutional intrusion into other sovereign territories.

i. The PROTECT Act and Extraterritoriality

*"Because sexual exploitation of a child is a crime that offends the entire international community, it . . . empower[s] every state with the right to arrest, convict, and punish offenders in its own courts."*⁶⁶

The text of the legislation itself expresses Congress's intent that the statute has extraterritorial affect. Additionally, the law did not include a double criminality requirement,⁶⁷ which would

61. *Id.*

62. See Hogan, *supra* note 5, at 647 ("[A] significant number of sex tourists do not intend to commit an illicit sex act before they leave the United States. Instead, they take advantage of the opportunity while abroad.")

63. See Fraley, *supra* note 42, at 459. See also Hogan, *supra* note 5, at 648 ("Due to lack of prosecutorial success . . . the PROTECT Act added subsection (c), which eliminated the intent requirement.")

64. See Hogan, *supra* note 5, at 648 ("Since the enactment of this Act, there have been approximately 55 indictments and 36 convictions, with more than 60 additional investigations currently underway.")

65. See James Asa High, Jr., *The Basis for Jurisdiction Over U.S. Sex Tourists: An Examination of the Case Against Michael Lewis Clark*, 11 U.C. DAVIS J. OF INT'L L. & POL'Y. 343, 350 (Spring 2005) ("[T]he Bureau of Immigration and Customs Enforcement reported that while in the decade prior to the PROTECT Act, U.S. authorities made only three 'child sex tourism arrests,' since the Act's passage, the Bureau had made ten such arrests." (quoting Press Release, U.S. Immigration and Customs Enforcement, ICE Marks Milestone in Fight Against Global Child Sex Tourism: Makes Agency's 10th PROTECT Act Arrest Against International Child Sex Predators (Nov. 23, 2004), <http://www.ice.gov/graphics/news/newsreleases/articles/112304sextourism.htm>)).

66. Margaret A. Healey, Note, *Prosecuting Child Sex Tourists At Home: Do Laws in Sweden, Australia, and the United States Safeguard the Rights of Children as Mandated by International Law?*, 18 FORDHAM INT'L L.J. 1852, 1880 (1995).

67. See Fraley, *supra* note 42, at 465 ("Double criminality requires that 'the crime

mandate that no crime could occur unless the act in question was defined as a crime in both the United States and the country in which the act occurred.⁶⁸ Thus, the United States could prosecute any U.S. national who engaged in the sexual exploitation of children in a foreign locale under federal law, independently of whether the act was considered a crime in the situs country.⁶⁹ This exclusion of any double criminality requirement broadened the scope of §2324's reach, which is only limited in one way: the statute applies only to those traveling in interstate or foreign commerce who are citizens or aliens admitted for permanent residency.⁷⁰ Because the 2003 Amendments excluded the previous scienter requirement,⁷¹ Congress expanded its own authority and began to regulate beyond the realm of its proper constitutional authority.

ii. Amending the PROTECT Act

"[Congress] is not empowered to regulate foreign commerce which has no connection to the United States."⁷²

In 2003, Congress amended 18 U.S.C.A. §2423 by inserting sections (c)-(g), which significantly detracted from the previous scienter provision in §2423(b): "Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both."⁷³

When Congress removed the "purpose" requirement – which

committed abroad must be considered an offence in both countries." (quoting JEREMY SEABROOK, *NO HIDING PLACE: CHILD SEX TOURISM AND THE ROLE OF EXTRATERRITORIAL LEGISLATION* 125 (2000)).

68. See 18 U.S.C. § 2423 (2006).

69. See Kathy J. Steinman, Note, *Sex Tourism and the Child: Latin America's and the United States' Failure to Prosecute Sex Tourists*, 13 *HASTINGS WOMEN'S L.J.* 53, 68-69 (2002). See also Daniel Edelson, Note, *The Prosecution of Persons who Sexually Exploit Children in Countries Other Than Their Own: a Model for Amending Existing Legislation*, 25 *FORDHAM INT'L L.J.* 483, 498 (2001) (noting that in some countries, a conviction or acquittal in a receiving country will bar subsequent prosecution in the sending country for the same crime. "Other sending countries reserve the right to prosecute a defendant regardless of whether a court in another country tried the defendant for the same crime. In the absence of a treaty, countries are generally not bound to recognize the decision of another country's court.").

70. See 18 U.S.C. § 2423 (2006).

71. "[F]or the purpose of engaging in any illicit sexual conduct with another person." 18 U.S.C. § 2423(b) (2006).

72. Colangelo, *supra* note 10, at 149 (quoting *United States v. Yunis*, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988)).

73. 18 U.S.C. § 2423(c) (2006). Here, instead of criminalizing travel for the

required that a certain action, namely the formation of intent, occur within the boundaries of the United States – it removed the hook that granted it jurisdiction in the first place.⁷⁴ Removing that requirement allowed the statute to apply to a greater number of individuals, and included situational sex tourists who did not plan to engage in sex tourism until the situation presented itself.⁷⁵ But in essence, by regulating only “travel” and “engaging in illicit acts,” Congress was expanding its jurisdiction to encompass criminal acts occurring in another country, with the only nexus between the act and the statute being the nationality of the offender.⁷⁶

By adhering to the nationality principle⁷⁷ in asserting its jurisdiction over crimes committed abroad, Congress grabbed hold of the only life-preserver – or statute-preserver – it could find. “Without this component, states would lack the ability to prosecute nationals for crimes committed abroad because, in most cases, states could not create jurisdiction.”⁷⁸ However, even in recognizing this tenuous jurisdictional hook, since the early 1900s, “criminal jurisdiction over U.S. nationals abroad based solely on their citizenship” has been in disfavor.⁷⁹ Overlooking this disfa-

purpose of engaging in illicit sexual conduct (intent), the crime has now become traveling . . . and engaging (no intent at all).

74. See *United States v. Tykarsky*, 446 F.3d 458, 471 (3d Cir. 2006).

[18 U.S.C. § 2423(c)] does not simply prohibit traveling with an immoral thought, or even with an amorphous intent to engage in sexual activity with a minor in another state. The travel must be *for the purpose of engaging in the unlawful sexual act*. By requiring that the interstate travel be “for the purpose of” engaging in illicit sexual activity, Congress has narrowed the scope of the law to exclude mere preparation, thought or fantasy; the statute only applies when the travel is a necessary step in the commission of a crime.

Id. (emphasis in original) (citation omitted).

75. See Steinman, *supra* note 69, at 72.

76. *Id.* at 69-70. The Third Restatement of Foreign Relations Law allows a state to have jurisdiction “to prescribe law with respect to . . . the activities . . . of its nationals outside as well as within its territory.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987). However, reading on in the Restatement, it is unclear what the domestic “effect” or “harm” is. The Third Restatement additionally requires that for extraterritorial jurisdiction, there must be some domestic effect or harm. *Id.* at §403(2).

77. See Andrews, *supra* note 30, at 435 (“This principle relies on the nationality of the criminal perpetrator, rather than the place where the crime was committed, to establish jurisdiction. In the United States, Congress must establish national jurisdiction over a particular crime legislatively.”).

78. Fraley, *supra* note 42, at 463.

79. High, *supra* note 65, at 352.

vor, Congress reasoned, and the District Court in *United States v. Clark* accepted,⁸⁰ that the nationality idea was sufficient to sustain §2423(c)'s constitutionality.

Unless Congress is validly utilizing its Foreign Commerce Clause or Necessary and Proper Clause powers when it regulates sex tourism, it is unconstitutionally projecting "its criminal law beyond its territorial borders."⁸¹ This creates a risk that the United States government will unconstitutionally interfere with separate sovereign nations in their enactment and prosecution of their domestic criminal law. However, without jurisdiction, a state has no legal authority to subject others to its own laws and legal practices.⁸² Because a state has unquestionable authority to enact laws within its own borders, and every state has "absolute power within its own territory,"⁸³ how can a state extend this power into the realm of a separate state sovereign's absolute power?

While the federal government retains its authority to "represent the U.S. nation as a unified and, indeed, sovereign whole on the world stage"⁸⁴ while not infringing upon state sovereignty, the United States cannot impose a rule or condition on foreign nations. "[T]he text of the Foreign Commerce Clause, as well as the founders' notions of jurisdiction, oppose Congress disparaging the sovereignties of foreign states by purporting to legislatively 'impose a rule *on*' these states via a Clause that permits only the power to regulate commerce 'with' them."⁸⁵ Any extension would be an unconstitutional infringement into another state's sovereignty and would contravene that state's authority:⁸⁶ "foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States."⁸⁷

Not only is this overstepping of the boundaries in the Foreign Commerce Clause unconstitutional, but it is regulating among foreign sovereigns – an area in which Congress should tread lightly.

80. See *United States v. Clark*, 315 F.Supp.2d 1127, 1132-33 (W.D. Wash. 2006).

81. Colangelo, *supra* note 10, at 121.

82. See *id.* at 123.

83. *Id.* at 127.

84. *Id.* at 150.

85. *Id.* (quoting *The Antelope*, 23 U.S. (10 Wheat.) 66, 122-23 (1825); U.S. CONST. art. I, § 8, cl. 3 (emphasis added)).

86. See *id.* at 127-28 ("Crimes are in their nature local, and the jurisdiction of crimes is local." (quoting *Huntington v. Attrill*, 146 U.S. 657, 669 (1892))).

87. *United States v. Yunis*, 681 F. Supp. 898, 907 n.24 (D.D.C. 1988).

Intrusions into the realm of other sovereigns must be legitimate exercises of power and must be taken with the utmost consideration towards the situs nation. Here, not only has Congress encroached upon the realm of another sovereign, but it has done so through an unconstitutional exercise of authority. Courts have since struggled to find §2423(c) constitutional since the 2003 Amendment removed the jurisdictional element, and in one court, *United States v. Frank*,⁸⁸ §2423(c) was found constitutional – not under its original claim for authority in the Foreign Commerce Clause – but under the Necessary and Proper Clause.

IV. THE INTERPRETATIONS OF 18 U.S.C. A. §2423 BY UNITED STATES' COURTS

Although President Clinton signed 18 U.S.C. A. §2423 into law in 1994, it was not until 1999 that the United States first prosecuted and convicted a child sex tourist.⁸⁹ One of the most well-known cases under §2423 was *United States v. Bredimus* in 2003.

a. *United States v. Bredimus*

In 2003, Defendant Bredimus was convicted of violating then-18 U.S.C.A. §2423(b), by knowingly and willfully traveling in foreign commerce for the purpose of engaging in a sexual act with a person under 18 years of age.⁹⁰ Bredimus challenged the statute on the grounds that it exceeded the scope of the Foreign Commerce Clause because Congress was exercising a general police power; he also claimed that the prohibited activity (sexual exploitation of minors) was not substantially related to the foreign commerce (travel by U.S. citizens abroad).⁹¹ The Court there began by noting that the legislative powers that the Constitution

88. 486 F. Supp. 1353 (S.D. Fla. 2007).

89. See Steinman, *supra* note 69, at 55. The first conviction involved the sexual exploitation of a boy from Honduras by a professor from Florida Atlantic University. Professor Hersh had a seven-year sexual relationship with the boy, beginning when the child was only eight. He was sentenced to 105 year-sentence for multiple crimes. See *United States v. Hersh*, 297 F.3d 1233 (11th Cir. 2002).

90. See *United States v. Bredimus*, 352 F.3d 200 (5th Cir. 2003), *rehearing and rehearing en banc denied*, *United States v. Bredimus*, 89 Fed. Appx. 905 (5th Cir. 2004); *cert. denied*, *Bredimus v. United States*, 541 U.S. 1044 (2004). At that time, 18 U.S.C. § 2423(b) read, “[A] United States citizen. . .who travels in foreign commerce. . .for the purpose of engaging in any sexual act. . .with a person under 18 years of age” is guilty of an offense punishable by up to 15 years in prison.

91. See *id.* at 204. Indeed, Bredimus’ attorney, Thomas Mills, tried to claim the sexual encounter was a business transaction: “What you see is as much a financial

granted to Congress *necessarily implied* “that the Framers denied Congress a ‘general police power.’”⁹² While Congress had been granted considerable deference in exercising legislation under its commerce clause powers, there are certain “outer limits” beyond which Congress cannot act.⁹³

After noting this lack of a Congressional police power, the Court then exclusively analyzed *Bredimus*’ claim under caselaw addressing the Interstate Commerce Clause.⁹⁴ The court found that Congress had broader powers to regulate under the Foreign Commerce Clause than they had under the Interstate Commerce Clause⁹⁵ because no federalism concern was present.⁹⁶ Then the Court turned to the crux of the issue and rejected *Bredimus*’ claim that the statute criminalizes “mere thought” and “mere travel” because crossing state or international lines with the intent to commit a crime is sufficient to bring one within the realm of Congress’s Foreign Commerce Clause powers.⁹⁷ The Court found there to be no requirement that the defendant engage in any preparatory acts, because the defendant in that case admitted to the requisite intent.

The Court greatly emphasized the fact that the state only criminalizes travel when it is done with an illicit *purpose*.⁹⁸ The Court never addressed, and at the time had no need to address, whether the statute would continue to be constitutional if the intent requirement were removed. The Court held that “if it was established that he formed the requisite intent while he was in the United States or its territorial jurisdiction, his subsequent travel between two independent sovereign nations was of no moment.”⁹⁹ Further, the Court found that because the statute did

transaction as it had to do with a sexual encounter.” Andrews, *supra* note 30, at 433-34.

92. *Bredimus*, 352 F.3d at 204 (quoting *United States v. Ho*, 311 F.3d 589, 596 (5th Cir. 2002)) (emphasis added).

93. *Id.* at 205.

94. *See id.* (citing *United States v. Lopez*, 514 U.S. 549 (1995) (regulating the possession of firearms within 1,000 feet of a school had no substantial affect on interstate commerce); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Violence Against Women Act, which criminalized crossing a state line with the intent to violate a protection order, had no substantial affect on interstate commerce); and *United States v. Han*, 230 F.3d 560 (2000) (addressing 18 U.S.C. § 2324(b)’s constitutionality in its interstate commerce capacity)).

95. *See id.* at 207-08.

96. *Id.* at 208 n.10.

97. *Id.* at 208.

98. *Bredimus*, 352 F.3d at 208-209.

99. Richard P. Schafer, *Validity, Construction, and Application of 18 U.S.C.*

not criminalize “sexual conduct in a foreign country” but instead criminalized “travel in foreign commerce for the purpose of engaging in prohibited sexual conduct,” it was a valid exercise of Congress’s Commerce Clause powers.¹⁰⁰ Thus, the Court stressed the scienter requirement of the statute as providing the critical link with the constitutional enforcement of the statute.

In the same year as *Bredimus*, Congress amended 18 U.S.C.A. §2324 to allow for the prosecution of a defendant who traveled in foreign commerce *and* engaged in illicit sexual acts with a minor.¹⁰¹ This deletion of the intent requirement had the effect of removing Congress’s Foreign Commerce Clause powers to enact that statute and made any application of 18 U.S.C.A. §2423(c) unconstitutional. Once this purpose requirement was deleted, Congress lost its authority to regulate, because the statute no longer tied travel to foreign commerce. Section 2423(c) does not regulate commerce. It simply prohibits *criminal activity* – not commerce – in a foreign country, as the Court in *Bredimus* implicitly realized would occur once the purpose requirement was lost. If courts were to adopt the rationale of §2423(c), they would have to find that Congress could regulate *any* event, so long as it preceded the activity with the phrase “traveling in interstate or foreign commerce.”¹⁰²

b. United States v. Clark

In one of the only cases to construe 18 U.S.C.A. §2324(c) since the 2003 Amendment, the District Court in *United States v. Clark* upheld the constitutionality of the statute under the Foreign Commerce Clause.¹⁰³ Clark, a 69-year-old U.S. citizen, lived in Cambodia for a period of five years.¹⁰⁴ After a trip through Japan, Singapore, Malaysia, and Thailand, Clark returned to Cambodia, and was indicted under 18 U.S.C.A. 2423(c) for illicit sexual conduct because he was a U.S. citizen traveling in foreign com-

§ 2423, *Making it Criminal Offense to Transport Minor in Foreign Commerce for Sexual Purposes or to Travel in Foreign Commerce to Engage in Sexual Act with Minor*, 186 A.L.R. FED. 555, §4 (2003).

100. *See id.* at §§ 3-4.

101. *See* 18 U.S.C. § 2423(c) (2006).

102. Thus, for example, Congress could prohibit “travel in foreign commerce and chewing gum” – no matter when it occurred or how innocuous it was in the situs country.

103. *United States v. Clark*, 315 F.Supp.2d 1127 (W.D.Wash. 2006), *aff’d*, 435 F.3d 1100 (9th Cir, 2006), *cert. denied*, 127 S. Ct. 2029 (2007).

104. *See id.* at 1129.

merce.¹⁰⁵ On March 27, 2004, Clark pled guilty to the charges levied against him, retaining the right to challenge the constitutionality of the statute.¹⁰⁶

The Court found that §2423(c) was a constitutional exercise of Congressional authority under the Commerce Clause, even while acknowledging the limits of *United States v. Lopez*¹⁰⁷ and *United States v. Morrison*¹⁰⁸ to deny Congress the power to have broad police powers. As in *Bredimus*, the Court recognized that the case before it did not deal with the Interstate Commerce Clause, so federalism concerns were not present, and Congress's powers were at their peak when using the Foreign Commerce Clause.¹⁰⁹

Clark then argued that the extraterritorial application of the statute violated – not principles of constitutional law, but principles of international law.¹¹⁰ In enumerating the bases for extraterritorial jurisdiction and bypassing Clark's claim, the Court relied on the nationality principle¹¹¹ and the universality principle.¹¹² Clark insisted that international law required that an

105. Clark was charged with sexual activity with two boys, ages 10 and 13, while in Cambodia. *Id.* Clark's arrest occurred only one day after President Bush delivered his address to the U.N. General Assembly – an address which largely addressed the problem of the international sex trade. Bush declared that “the Department of Justice is actively investigating sex tour operators and patrons’ under the PROTECT Act, and announced that ‘the American Government is committing fifty million dollars to support the good work of organizations that are rescuing women and children from exploitation.’” See Andrews, *supra* note 30, at 453 (quoting the President's Address to the UN General Assembly, Financial Times, Sept. 23, 2003).

106. See High, *supra* note 65 at 346-347. Clark was arrested as part of Operation Predator, a part of the Department of Homeland Security, which has resulted in the deportation of a number of several foreign nationals, convicted of sex offenses against children. *Id.* at 346.

107. 514 U.S. 549, 552 (1995).

108. 529 U.S. 598, 608 (2000).

109. See High, *supra* note 65, at 347.

110. *Clark*, 315 F. Supp. 2d at 1131.

111. The nationality principle allows extraterritorial jurisdiction based on the offender's nationality.

112. The universality principle allows extraterritorial jurisdiction based on crimes “so heinous as to be universally condemned.” *Clark*, 315 F. Supp. 2d at 1131 The complete list of extraterritorial jurisdictional bases includes the following:

- (1) the objective territorial principle, under which jurisdiction is asserted over acts performed outside the United States that produce detrimental effects in the United States;
- (2) the protective principle, under which jurisdiction is asserted over foreigners for acts committed outside the United States that may impinge on the territorial integrity, security, or political independence of the United States;
- (3) the nationality principle, under which jurisdiction is based on the nationality or national character of the offender;
- (4) the universality principle, which provides jurisdiction over

application of the law to him must be reasonable – requiring, *inter alia*, a link between the activity to the “territory of the regulating state.”¹¹³ In response, the Court again relied upon Clark’s United States citizenship, as well as finding that he used American sources of financing and military benefits to fly between Asia and the United States.¹¹⁴ The Court mentioned, without much discussion, that there was very little likelihood of “conflict with regulation by other states.”¹¹⁵

Finally, the Court recognized that Congress intended 18 U.S.C.A. §2324(c) to fall under its Foreign Commerce Clause powers to regulate the “channels of commerce.”¹¹⁶ In order to justify upholding this statute’s constitutionality, the Court referenced cases that upheld the constitutionality of statutes that prohibited the active misuse or wrongful prevention of using the channels of

extraterritorial acts for crimes so heinous as to be universally condemned; and

(5) the passive personality principle, under which jurisdiction is based upon the nationality of the victim.

Id. (citing Restatement (Third) of Foreign Relations of Law of the United States §402 cmt. a (1987)).

113. *Id.* at 1132. The entire list of factors includes the following:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

Id. (citing Restatement (Third) of Foreign Relations of Law of the United States §403(2)).

114. *Id.* at 1131. Unlike in *Bredimus*, for example, Clark’s violation took place entirely outside the United States, as opposed to on the border. *See High, supra* note 65, at 366.

115. *Clark*, 315 F. Supp. 2d 1127, 1132 (citing *United States v. Vasquez-Velasco*, 14 F.3d 833, 840 (9th Cir. 1994)).

116. *Id.* at 1133-34.

commerce.¹¹⁷ In examining prior channels of commerce cases, the Court concededly expanded Congress's powers under the Foreign Commerce Clause further than the courts had ever before allowed.¹¹⁸ Relying upon the fact that no previous court had invalidated a criminal statute for "exceeding the bounds of Congress's authority to regulate foreign commerce,"¹¹⁹ the Court declined to recognize the unconstitutionality of the statute here.

The Court in *Clark* followed precedent insofar as it did not invalidate the statute for exceeding Congress' foreign commerce powers, while still expanding Congress's powers under that clause. Recognizing the growth of power that the Court allowed Congress is merely the first step. Simply because a problem is international and demands national legislation proscribing it¹²⁰ does not mean that Congress can overstep its constitutional boundaries to achieve those results. However, under the reasoning provided in *Clark*, along with the extreme degree of deference that the Court afforded to Congress's Foreign Commerce Clause powers, it is highly unlikely that any statute will exceed the scope of Congress's authority to legislate extraterritorially.

c. United States v. Frank

In one of the most recent cases to address this issue, *United States v. Frank*, the United States prosecuted a man who had allegedly traveled to Cambodia and engaged in illicit sexual conduct in that country.¹²¹ He was then charged with violating §2423(c) and went to trial.¹²² The defendant argued: (1) that Congress exceeded its powers under the Foreign Commerce Clause; (2) that 18 U.S.C.A. §2324(c) violated international law because it failed to recognize the age of consent in the visiting country (in the instant case, 15 years); and (3) that the extraterritoriality of §2324(c) violates the due process clause of the Fifth Amendment.¹²³

The Court, in holding that §2324(c) was constitutional under

117. *Id.* at 1135 (referencing *United States v. Cummings*, 281 F.3d 1046 (9th Cir. 2002); and *United States v. Shahani-Jahromi*, 286 F.Supp.2d 723 (E.D. Va. 2003)).

118. *Id.* ("[These cases] do not establish the outer limit of congressional authority to regulate channels of foreign commerce. Rather, those opinions are more properly viewed as setting guideposts regarding such congressional authority.")

119. *Id.*

120. *See id.* at 1136.

121. *United States v. Frank*, 486 F. Supp. 2d 1353, 1354 (S.D. Fla. 2007).

122. *Id.*

123. *Id.* at 1355.

the Necessary and Proper Clause even if unconstitutional under the Foreign Commerce Clause, set out into uncharted territory.¹²⁴ Never before had a judge substituted an alternate justification for Congress' legislation than the one apparent in the statute. The Supreme Court summarized the clear-cut parameters of congressional authority under the treaty power in *United States v. Lara*:¹²⁵ "The treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, to make Treaties."¹²⁶ However, the Court went on to hold that the treaty power *can* authorize Congress "to deal with matters with which otherwise Congress could not deal."¹²⁷

After outlining the extent of the treaty power, District Judge Adalberto Jordan, went on to discuss the Optional Protocol, which was signed by President Clinton in July of 2000.¹²⁸ Although no court in the nation had ever mentioned the idea before, Judge Jordan upheld §2423(c) under Congress's treaty powers in supplementing the Optional Protocol. While §2423(c) was enacted as part of the PROTECT Act of 2003,¹²⁹ the House of Representatives promulgated the Act under Foreign Commerce Clause authority.¹³⁰ Upon close examination, the Court found that the legislative history of the PROTECT Act contains no reference to the constitutional authority behind the enactment of §2423(c), which was an amendment to the original act.¹³¹

Without reference to any Congressional authority for the statute's amendment, and with the phrase "traveling in interstate or foreign commerce" so prominent in the original and amended text,

124. See generally High, *supra* note 65, at 361-62.

125. 541 U.S. 193 (2004).

126. *Id.* at 201.

127. *Frank*, 486 F. Supp. 2d at 1356 (citing *Missouri v. Holland*, 252 U.S. 416 (1920)); see also *United States v. Ferreira*, 275 F.3d 1020, 1027-28 (11th Cir. 2001) ("Congress's authority under the Necessary and Proper Clause extends beyond those powers specifically enumerated in Article I, [§] 8, [and it] may enact laws necessary to effectuate the treaty power, enumerated in Article II of the Constitution." (citation and internal quotation marks omitted)).

128. *Frank*, 486 F. Supp. 2d at 1356 (citing Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, opened for signature May 25, 2000, S. TREATY DOC. NO. 106-37, 39 I.L.M. 1285 [hereinafter *Optional Protocol*]).

129. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended at 18 U.S.C. 2423 (2006)). "The provision that [ultimately] became § 2423(c) was first proposed as part of the Sex Tourism Prohibition Improvement Act of 2002." *Frank*, 486 F. Supp. 2d at 1357.

130. *Frank*, 486 F. Supp. 2d at 1357 (citing H.R. REP. NO. 107-525, at 5 (2002)).

131. See generally H.R. REP. NO. 108-66, at 51 (2003) (Conf. Rep.), as reprinted in 2003 U.S.C.C.A.N. 683, 686.

it would seem apparent what the basis was upon which Congress created and amended the Act. Nevertheless, the Court in *Frank*, using rational basis review, began to tackle the question of whether Congress could enact §2423(c) under the Necessary and Proper Clause to implement the Optional Protocol.¹³² In holding that Congress did not overstep its powers, the Court found that the Optional Protocol itself calls for its signatories to take appropriate legislative action to establish individual liability for the offenses contained in the treaty.¹³³

In confronting the difficult issue of defining a minor, Judge Jordan found that defining a minor as one under the age of 18¹³⁴ is consistent with the Optional Protocol,¹³⁵ and the United Nations' analysis supports the assertion that "[d]uring the negotiations the term 'child' was understood to mean anyone under the age of 18."¹³⁶ The Court also found that defining a minor as one under the age of 18 as an international standard is consistent with "protecting the young and defenseless" and is commonly understood as one who has not attained the age of majority.¹³⁷ Additionally, the extraterritorial exercise of jurisdiction in this case did not exceed the scope of congressional authority because, under international law, a country is allowed to regulate the conduct of its own citizens, so long as that exercise of jurisdiction is reasonable.¹³⁸

Finally, the Court dismissed the notion that §2423(c) infringed upon the domestic law of Cambodia for two primary reasons: (1) the statute does not regulate the nationals of any country

132. *Frank*, 486 F. Supp. 2d at 1358; *see, e.g.*, *United States v. Yian*, 905 F. Supp. 160, 163 (S.D.N.Y. 1995) (finding that rational basis review applies to determine whether supplemental legislation properly implements a treaty).

133. Optional Protocol, *supra* note 130, at arts. 3(4), 4(2); *see also* *United States v. Strevell*, 185 F.App'x 841, 845 (11th Cir. 2006) (holding that § 2423(c) applies extraterritorially: "Congress realized the potential effects of domestic harm that come with foreign sex trafficking of minors. Congress purposefully passed this statute in order to stop United States citizens from traveling abroad in order to engage in commercial sex acts with minors.").

134. *See* 18 U.S.C. § 2423(f)(2) (2006).

135. The Optional Protocol does not attempt to define the words "child" or "children."

136. *Frank*, 486 F. Supp. 2d at 1358 (alteration in original) (quoting Optional Protocol, Article-by-Article Analysis, Summary of Article I, *opened for signature* May 25, 2000, S. TREATY DOC. NO. 106-37, 39 I.L.M. 1285). *See generally* *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 542-46 (1991) (reviewing a treaty's negotiating and drafting history to determine the meaning of disputed treaty terms).

137. *Frank*, 486 F. Supp. 2d at 1359; *see, e.g.*, BLACK'S LAW DICTIONARY 254 (8th ed. 2004) (defining "child" as "a person under the age of majority").

138. *Frank*, 486 F. Supp. 2d at 1359 (citing *United States v. Plummer*, 221 F.3d 1298, 1307 (11th Cir. 2000)).

other than the United States; and (2) Cambodia ratified the Optional Protocol in May 2002. By ratifying this treaty, Cambodia consented to an international agreement which allowed the treaty's signatories to enact legislation to forbid commercial sex by their own citizens.¹³⁹

Frank took a novel approach to the constitutionality of §2423(c), bypassing completely the issue of its legitimacy under the Foreign Commerce Clause, and simply holding that if Congress had enacted the same statute under the Necessary and Proper Clause, it would be a legitimate exercise of its powers. While this is plausible in theory, the treaty under which Congress would be enacting supplemental legislation would have to be the Optional Protocol since the United States never ratified the UNCRC. The problem arises, then, that when Congress created the original statute in 1994, there was no Optional Protocol and the U.S. was not party to the UNCRC. When Congress amended §2423(c) in 2003, the Optional Protocol had not yet or was only just coming into effect. Thus, the claim that Congress could have enacted it under a treaty becomes weaker as the treaty was not yet in force, and courts are forced to stretch even further to find that the Congressional legislation is constitutional.

d. Interpreting the Court's Interpretations of Sex Tourism

That the courts' musings on §2423(c) have filtered through a number of different interpretations and rationales is apparent, even if examining just the three preceding cases. *Bredimus* is largely moot as it pertains to §2423(c), given that §2423(c) was not in existence at the time the case emerged. However, it does reveal the importance of the intent requirement in the court's finding that then-2423(b), was constitutional. Only when the intent requirement was removed in 2003 did the courts' contortions begin. *Clark* stretched to find enough contacts with the United States to alleviate jurisdictional and due process concerns, ultimately resting its holding on a showing of nationality and a lack of federalism concerns: "The absence of concern for principles of federalism does not imply the presence of a provision in the U.S. Constitution granting Congress power to regulate."¹⁴⁰

The *Clark* court's reasoning overlooks the Supreme Court's

139. *Id.* at 1359-60.

140. High, *supra* note 65, at 369.

statement in *Morrison* that – “[t]he powers of the legislature are defined and limited.”¹⁴¹ If Congress can legislate extra-territorially based strictly on the nationality of the offender, why have the Foreign Commerce Clause at all? It would be superfluous, and the nationality principle could easily allow Congress to overstep its bounds and interfere with separate sovereigns and reach almost any conduct of its nationals. Congress’s powers would be greatly expanded from concepts of traditional federal law,¹⁴² and “[t]he only U.S. nationals unreachable by such a formula would be domestic residents who have never crossed a state or national boundary and foreign-born U.S. citizens who never leave the countries of their births.”¹⁴³

This is clearly not the intention of the Founders who drafted the Constitution, and it overlooks the boundaries contained both in the Constitution and in the Court’s interpretations thereof. The court takes a novel approach in *Frank*, bypassing the question of constitutionality under the Foreign Commerce Clause, and instead focusing upon the legitimacy of the legislation under the Treaty Powers. The intent requirement was removed in the PROTECT Act of 2003 – the same year that the Optional Protocol was ratified. The Optional Protocol mandates that the State Parties, including the United States, criminalize the “sexual exploitation of children by U.S. nationals anywhere in the world.”¹⁴⁴ Because treaties are the supreme law of the land, and because the language in the Protocol directs itself at Congress,¹⁴⁵ the Optional Protocol appears to be non-self-executing. “Section 2423(c) can be seen as fulfilling, or, rather, implementing, the United States’ obligations under the Protocol. Section 2423(c) would thus be a proper exercise of Congress’s power to pass implementing legislation.”¹⁴⁶

If courts are to follow the *INS v. St. Cyr* doctrine (that courts fulfill their duty to avoid an unconstitutional interpretation of an

141. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)).

142. High, *supra* note 65, at 369.

143. *Id.* High also states that “[t]he Court in *Lopez* disallowed regulation under the Commerce Clause of guns in school zones as insufficiently connected to any ‘economic activity.’ If there are any meaningful limitations on Congress’s power under the Commerce Clause, section 2423(c) does not constitute a permissible use of the Commerce Clause.” *Id.*

144. *Id.* at 370.

145. *Id.* (Asserting that “States Parties shall . . . take all appropriate . . . measures.”)

146. See High, *supra* note 65, at 365.

ambiguous statute if another plausible reading is constitutional¹⁴⁷), then finding another source of Congressional authority upon which to base the statute is exactly what courts should do.

While sex tourism presents a problem around the globe, it is especially prevalent in Latin America – particularly based on a recent shift in popular sex tourism locales. While Asia was previously the epicenter for child sex tourism, recent revamping of Asian laws and enforcement protocols have forced sex tourists to look somewhere else – somewhere with fewer regulations and less stringent enforcement. A place like Latin America.

V. LATIN AMERICAN REGULATIONS

a. *The Standard Penal Code of Latin America*

The Latin American Standard Penal Code provides its jurisdiction in the first six articles – the first, third, and fourth being relevant to this comment.¹⁴⁸ Article One posits that most Latin American countries regulate only within their own territory and locations subject to their jurisdiction.¹⁴⁹ While this general jurisdictional limitation is not unusual by itself, the contrast with the United States' exercise of extraterritorial legislation is stark. While Article One evinces the strong rights of sovereigns over their nationals, it also reveals an implicit deference to other nations' laws.

Article Three provides jurisdiction over nationals who commit crimes abroad, *but only when extradition requested by another State is refused*.¹⁵⁰ Article Three only reaches the conduct of state officials who commit crimes abroad when they are not prosecuted at their place of commission – avoiding any double jeopardy issues with other states.¹⁵¹ Like Article One, Article Three represents a high degree of deference to other countries, allowing foreign nations to have the first option to prosecute both their own nationals (on a request for extradition) and Latin Americans who commit crimes abroad. This is in direct contrast with how the United States exercises its jurisdiction.

147. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001).

148. See Jose M. Canals & Henry Dahl trans., *Standard Penal Code for Latin America*, 17 AM. J. CRIM. L. 263 (1990), available at <http://wings.buffalo.edu/law/bclc/Latspc.htm> (last visited Nov. 14, 2007).

149. *Id.* (Quoting art. 1: "The penal laws of the State apply to criminal acts committed within its territory and in other places subject to its jurisdiction.")

150. *Id.* (Quoting art. 3.)

151. *Id.*

Finally, Article Four of the standard Latin American penal code confronts the issue of international law and criminal acts which are subject to the state based on international covenants.¹⁵² Article Four notes that “[p]riority shall be given, however, to the foreign Nation in whose territory the criminal act was committed”¹⁵³ Article Four ends by stating, “[t]he laws of the foreign Nation where the criminal acts were committed will apply in cases covered by Article Three, whenever they are less severe than applicable State laws.”¹⁵⁴ This suggests an even stronger deference than Articles One and Three to other Nations wherein a crime might be committed. The United States law has no such deference to the other Nation’s criminal law, particularly laws which are less severe (e.g., lower age of consent) than its own.

The deference that the Latin American penal codes grant to other nations is commendable, and the United States would be wise to imitate it, so as not to interfere with the authority of other sovereign nations.¹⁵⁵ Extraterritorial legislation by definition is going to affect another country. Before Congress enacts this legislation, it should ensure first that it is acting constitutionally in its own right, and second that the law of the situs country does not seriously conflict with the legislation it is passing – either or both of which could produce unjust results.¹⁵⁶ Because the age of consent for sex tourism is unsettled, regulating child sex tourism in Latin America has the potential to produce these inequitable results.¹⁵⁷

b. Sex Tourism in Latin America

*“International child sex tourists face little fear of repercussion for their acts because there is a relatively low risk of prosecution in the countries where they commit their crimes.”*¹⁵⁸

Sex tourism commonly occurs in major Latin American cities,

152. *See Id.* (quoting art. 4.)

153. *Id.*

154. *Id.*

155. *See SEABROOK, supra* note 1, at 5 (“In most countries, a court applies the law of the country in which the offence is tried.”).

156. For example, a United States citizen smoking marijuana in Holland (where marijuana is legal) could be punished upon his return to the United States because marijuana is illegal here.

157. Regulating sex tourism for children clearly under any country’s age of consent (e.g. six years old) would not present a compelling problem. The issue arises primarily in dealing with children between the ages of twelve and eighteen.

158. Andrews, *supra* note 30, at 426.

such as Rio de Janeiro, and has increased over the past twenty years, as travelers and businessmen from Europe, Canada, and the United States “seize the opportunity offered by the sex market.”¹⁵⁹ While many sex tourists claim that they are only helping the children financially,¹⁶⁰ both sending countries (those countries from which sex tourists originate) and receiving countries (those countries hosting sex tourists) recognize sex tourism as an abhorrent crime.¹⁶¹ Several countries have recognized the influx in child sex tourism and have recently changed their laws so that they can prosecute their own nationals for offences committed against children abroad.¹⁶² The practice and terminology has become so widespread that the New Oxford Dictionary included “sex tourism” in its 1998 publication.¹⁶³

i. The Foundation for Sexual Exploitation

*“The imposition of Roman and later Moorish conquests on Spain imported common Mediterranean attitudes of women as the property of men, to be guided, controlled and limited in their freedom throughout life by fathers, brothers and husbands.”*¹⁶⁴

To understand sex tourism in Latin America, it is important to grasp the significant cultural differences between the United States and Latin American countries.¹⁶⁵ For example, while the United States bases its legal system primarily upon the English common law, Latin American legal systems utilize the Napoleonic (Roman) code.¹⁶⁶ While the United States was primarily populated with English migrants, most Latin American countries were settled by Spanish men only.¹⁶⁷ Both because of their roots in Roman

159. Jullien, *supra* note 31, at 585.

160. See Fraley, *supra* note 42, at 450 (explaining that one sex tourist from Orlando, Florida, traveling through Latin America, noted that “[i]f they don’t have sex with me, they may not have enough food. If someone has a problem with me doing this, let UNICEF feed them. I’ve never paid more than \$20 to these young women, and that allows them to eat for a week.”).

161. See Andrews, *supra* note 30, at 418-19.

162. SEABROOK, *supra* note 1, at 2 (“Twenty countries now have such laws”).

163. See Andrews, *supra* note 30, at 418.

164. See Charles M. Goolsby, Jr., *Dynamics of Prostitution and Sex Trafficking from Latin America into the United States* (2003), http://www.libertadlatina.org/LL_LatAm_US_Slavery_Report_01_2003.htm (last visited November 10, 2007).

165. See SEABROOK, *supra* note 1, at xii (explaining that cultural differences must be addressed if effective cooperation is to be found between officials and law enforcement personnel from a variety of cultures, traditions, and backgrounds).

166. See Goolsby, *supra* note 166.

167. See *id.*

law and the concentration of only Spanish men coming to Latin America, the idea of women as property came to be a common theme, known as *machismo*.¹⁶⁸ Many of Latin America's rural, "traditionalist feudal cultures" have preserved the "machismo's power" over women and female children.¹⁶⁹

ii. Current Sexual Exploitation

*"When the children of the poor are expected to work for a living, to contribute to the maintenance of their families, it is only a short step to the perception of them as adults. That some such children will become sex workers, partly in response to a demand by relatively wealthy Western sex tourists, is not surprising."*¹⁷⁰

A. The General Trend in Latin America

*"The reasons for weak enforcement are many, but chief among them is that the tourism industry, which is intimately connected with the sex trade, is a financial windfall for some developing countries. Low-paid law enforcement officials are prime targets for bribery."*¹⁷¹

Child prostitution is widespread and can be considered a major problem in every Latin American country.¹⁷² What commonly drives children in these countries into prostitution are "poverty, materialism and consumerism, consumer demand, dysfunction and sexual abuse, gender discrimination, and the Internet."¹⁷³ Further, partly due to the history of machismo in Latin America, the laws continue to reflect limited rights for women.¹⁷⁴ "Most of these countries allow a rapist to evade prosecution, even for raping a 13-year-old girl, provided that the rapist marry the victim."¹⁷⁵ It is unquestionable that female children face a higher level of violence and are poorly educated in Latin American countries, and over 80,000 children die annually because of family violence.¹⁷⁶ "Across Latin America, an estimated

168. *Id.*

169. *Id.* ("Honduran men have a saying that "Women are like shotguns; they should be kept loaded [pregnant] and indoors.").

170. Seabrook, *supra* note 1, at xii.

171. See Healey, *supra* note 66, at 1871.

172. See Goolsby, *supra* note 166.

173. Steinman, *supra* note 69, at 56.

174. See Goolsby, *supra* note 166.

175. *Id.*

176. See *id.*

20% to 40% of women are raped on an annual basis."¹⁷⁷ This violence drives girls "as young as 10 into street prostitution by the thousands in any given Latin American country."¹⁷⁸ Approximately 80-85% of child prostitutes "were sexually abused in the home before turning to the streets."¹⁷⁹

Not only do the laws in Latin American countries reflect the history of machismo, but also the governments of Latin American countries may be hesitant to enforce sex tourism laws for other reasons.¹⁸⁰ Because child sex-tourism is extremely lucrative,¹⁸¹ many of these countries rely on sex tourism as a vital part of their economic development: "revenues from sex tourism, now an unfortunate part of many countries' tourist attractions, form a significant portion of many national economies."¹⁸² Thus, extraterritorial legislation becomes essential to the effective enforcement of sex tourist laws.¹⁸³

Although Asia was formerly the destination of choice for sex tourists, because of the increase in child exploitation laws and stricter enforcement of those laws, recently Central and South America have become "the new playground for sexual predators seeking children as their prey."¹⁸⁴ Additionally, "the passing of Megan's Laws in the United States has also driven American pedophiles overseas in their quest for younger sex objects."¹⁸⁵ The close proximity between the United States and Latin America adds to the countries' appeal to sex tourists.¹⁸⁶ Latin America is closer to many sending countries, and it has fewer laws and more lax enforcement of those laws than currently exists in Asia. Not only do the governments of these countries fail to enact legislation, they fail to train their law enforcement officers to deal with

177. *Id.*

178. *Id.*

179. Steinman, *supra* note 69, at 58.

180. "[T]here appears to be a glaring disconnect between the prostitution laws on the books and the actions taken by government officials to enforce those laws." See Andrews, *supra* note 30, at 426.

181. See Healey, *supra* note 66, at 1871.

182. Svensson, *supra* note 3, at 645.

183. See *id.*

184. Steinman, *supra* note 69, at 54.

185. *Id.* at 59.

186. See *id.* at 59-60 ("An average of 750 direct flights leave from Miami International Airport for destinations throughout the region. Furthermore, flights from Miami to Latin America are of shorter duration than many domestic flights and often comparable in price.").

the influx of sex tourism now bombarding their borders.¹⁸⁷ The laws on the books are not always known or properly applied by law enforcement officers,¹⁸⁸ and often officers are under pressure to allow the economic boost brought to their country's economy by sex tourists.¹⁸⁹ Finally, this shift towards Latin America is evidenced in the number of reports received by humanitarian organizations regarding the sexual abuse of local children by foreigners, as well as sex tourist newsletters expanding their "coverage" to include Latin America.¹⁹⁰

B. A Closer Look at Latin America and Sex Tourism

*"National case studies indicate that the sex sector continues to flourish partly because it is protected and supported by corrupt politicians, police, armed forces and civil servants who receive bribes, demand sexual favors and are themselves customers or owners of brothels."*¹⁹¹

Argentina, Brazil, Colombia, Costa Rica, Cuba, Honduras, and Mexico are some of the most popular American countries for sex tourists.¹⁹² These Latin American countries are "fertile areas for the growth of sex tourism" because "tourism has experienced considerable support from [these countries'] government[s]."¹⁹³ It is true that the total number of visitors to Latin America has risen to over 57.6 million, and countries "such as Guatemala, El Salvador, Costa Rica, and Nicaragua have increased efforts to promote tourism on a wide scale," but this concomitantly increases sex

187. *See id.* at 66 ("Law enforcement officials in these countries are not trained to deal with this crisis.").

188. *See Andrews, supra* note 30, at 427-28 ("Frequently the victims, rather than the offenders, are punished. Law enforcement officials are more likely to crack down on and imprison child sex-workers than their adult clients.").

189. *See id.* at 428-29 ("A report by the Judiciary Committee of the U.S. House of Representatives asserts that '[b]ecause poor countries are often under economic pressure to develop tourism, those governments often turn a blind eye toward this devastating problem [of commercial sexual exploitation of children] because of the income it produces.'").

190. Steinman, *supra* note 69, at 60 ("One sex tourism newsletter, 'Asia Files,' which once provided information to sex tourists concerning travels and exploits in Asia, expanded its coverage to include Latin America and is now titled 'The Erotic Traveler.'").

191. *Id.* at 65.

192. *See generally*, CHRIS RYAN & C. MICHAEL HALL, *SEX TOURISM: MARGINAL PEOPLE AND LIMINALITIES* (2001); *see also*, DENISE BRENNAN, *WHAT'S LOVE GOT TO DO WITH IT? TRANSNATIONAL DESIRES AND SEX TOURISM IN THE DOMINICAN REPUBLIC* (Walter D. Mignolo, Irene Silverblatt, & Sonia Saldivar-Hull, eds., Duke University 2004).

193. Hannum, *supra* note 2.

tourism to the same degree.¹⁹⁴

Argentina & Brazil

Brazil has become a known leader in child prostitution, reporting between 500,000 and two million child prostitutes under the age of 16.¹⁹⁵ Argentina follows close behind it, with close to 500,000 children under the age of 16 participating in prostitution.¹⁹⁶ In Brazil, shortly after these staggering numbers emerged, the Brazilian government began a "No Child Sex Tourism" campaign, in order to stop sex tourism and "enforce laws imposing jail sentences on foreigners caught purchasing sex from children."¹⁹⁷ More recently, the Brazilian government has begun asking hotels to discourage child prostitution on their premises, in exchange for receiving a higher quality rating. The Brazilian government has also begun distributing brochures to tourists, which makes them aware of the penalties of sex tourism. Attempting to reach tourists even before they get to Brazil, the government has placed brochures on flights into the country, explaining the country's laws against the sexual exploitation of minors. Law 8069-90, Article 244(a) of 2000, imposes sanctions (including the revocation of licenses for travel agencies or hotels) upon facilities that encourage travel for the purpose of sex tourism.

Colombia

In Colombia, the government reported an estimated 25,000 child prostitutes roaming the streets.¹⁹⁸ Colombia has been involved in sex trafficking young girls to Japan and Europe for over 20 years.¹⁹⁹ To combat the rise of the sex tourism industry, the government recently enacted legislation addressing sex tourism: "The promotion, collaboration, permission, or aid, direct or indirect, of the prostitution of minors within the developing activities, will be considered as an infraction by the lenders of tourist services that are acting against the sound development of the country's tourism industry."²⁰⁰ The law continues to allow sanc-

194. *See id.*

195. *Id.*

196. *See Goolsby, supra note 166.*

197. *See Hannum, supra note 2.*

198. *Id.*

199. *See Goolsby, supra note 166.* ("The Mafia in the U.S. and Europe, yakuza in Japan and major drug cartels in Colombia and Mexico have all added Colombian women to their list of illegal merchandise for sale.")

200. Mohamed Y. Mattar, Adjunct Professor of Law and Co-Director of The

tions by the Ministry of Economic Development to “lenders of tourist services who incur an infraction . . . without prejudice to the penal sanctions at that place.”

Costa Rica

In Costa Rica, tourism has flourished, which concomitantly “attracts a small but growing percentage of sex tourists, primarily from the United States, Canada, and Germany, who prey on children.” The Costa Rican government has provided estimates that “5% of the 1 million western tourists traveling to Costa Rica annually are pedophile sex tourists who have targeted Costa Rican girls and boys for sexual abuse in the wake of sex tourism crack-downs in Asia.”²⁰¹ In the capital city of San Jose, approximately 5,000 children live and work as prostitutes.²⁰²

In 1929, Costa Rica created an organization to aid children entitled the *Patronato Nacional de la Infancia* (PANI), and the Costa Rican government set aside 7% of all tax income to fund PANI’s endeavors.²⁰³ However, ever since its creation, PANI has been terribly under-funded, receiving only 4-6% of the tax income.²⁰⁴ Additionally, only six investigators are currently on staff with the prosecutor for PANI, and “[t]hey must cover the entire country, yet they have no vehicles, no travel budget, and no video cameras with which to collect evidence.”²⁰⁵ Finally, after receiving extensive pressure from other countries, PANI coordinated the Commission Against the Commercial Sexual Exploitation of Boys, Girls, and Adolescents in Costa Rica. Even though the Commission was able to assist in reforming the Costa Rican criminal code; again, due to lack of funding and ineffective leadership, it has been largely ineffective.²⁰⁶

Despite this lack of funding and the difficulty in enforcement, in 1998, both governmental and nongovernmental organizations developed another body, the National Action Plan Against the Commercial Sexual Exploitation of Children (NAPCSEC) in order

Protection Project at Johns Hopkins University, School for Advanced International Studies, Address at the III Bilateral Conference on “Parallel Worlds” Tijuana - San Diego: *Child Sexual Tourism and Other Forms of Trafficking* (August 26-27, 2003) (transcript available online at <http://www.protectionproject.org/tul.htm> (last visited October 12, 2007)).

201. Goolsby, *supra* note 166.

202. *Id.*

203. Steinman, *supra* note 69, at 66.

204. *Id.*

205. *Id.*

206. *Id.* at 66-67.

to curtail the influx of sex tourism in Costa Rica.²⁰⁷ While the NAPCSEC is comprehensive, seeking to monitor child exploitation and raise awareness, it lacks detail, and does not provide any timelines for implementation.²⁰⁸ It was not until the middle of 2002 that those sexually exploiting children could be prosecuted at all. And, “[c]harges of ‘corruption of minors’ were dropped by the judiciary when the accused adult proved that he was not the first man to pass over the 13 or 14 year old girl and so ‘she was already corrupt!’”²⁰⁹

Even when legislation is on the books, it does not necessarily mean these laws are enforced – especially on tourists.²¹⁰ Corruption in the judicial system and among law enforcement officials is rampant and has allowed for greater impunity among sex offenders.²¹¹ “One young prostitute explains that police officers that detain them often force the girls to perform oral sex on them. Furthermore, when judicial authorities raided ‘an illegal operation where foreigners sexually exploit children, a high ranking police official [was] inside the building helping the American owner to escape over the back wall.’”²¹² The Costa Rican government has only jailed two foreign nationals for the sexual exploitation of minors as of March of 2000.²¹³

Cuba

In Cuba, similar to other Latin American countries, the sexual exploitation of minors occurs in connection with the state-run tourism industry. While the number of children who are sexually exploited is small, most of the sexual exploitation that takes place occurs at the hands of sex tourists.²¹⁴ The Cuban slang for “prostitute” is *jinteras*, which literally means, “jockey,” because the women are perceived as riding the tourists.²¹⁵ These *jinteras* are

207. *See id.* at 66.

208. *Id.*

209. Steinman, *supra* note 69, at 67.

210. Healey, *supra* note 66, at 1870 (“Although many of the developing countries have passed legislation that ostensibly protects children from sexual exploitation, the laws are often not enforced against tourists.”).

211. *See* Steinman, *supra* note 69, at 67-68.

212. *Id.* at 67.

213. *See id.* at 67-68.

214. *See* EPCAT, *Child Prostitution and Sex Tourism: Cuba*, a research paper prepared for ECPAT by Dr Julia O’Connell in preparation for the World Congress Against the Commercial Sexual Exploitation of Children (September 1995), available online at http://www.ecpat.net/eng/ecpat_inter/Publication/Other/English/Pdf_page/ecpat_prostitution_and_sex_tourism_cuba.pdf (last visited November 5, 2007).

215. *Id.*

coerced into sexual favors or economic exploitation by the threat of being reported to the police or by threats from the police themselves.²¹⁶ In one doctor's research of child sex tourism in Cuba, she found that almost 40% of the men she interviewed had "sexually exploited girls under the age of 16."²¹⁷

The state-run tourism industry and independent operators encourage foreign tourists to engage in the sexual exploitation of minors, and the industry reached its peak in the 1940s and 1950s.²¹⁸ Although it became illegal for a number of years after the revolution, in the 1990s, Fidel Castro reopened the sex tourist industry to benefit the national economy.²¹⁹ Today, the Cuban government ignores child exploitation because it produces money for state-run enterprises.²²⁰ "There is no known law enforcement against traffickers who make available state-controlled public facilities for the sexual exploitation of minors."²²¹ Additionally, Cuba has no extraterritorial laws that reach the sex tourist once he goes back to his home country.²²²

Honduras

In Honduras, the sexual abuse of children is not absolutely considered a crime, unless the child is under the age of 12. "A sex tourist will only be prosecuted for exploiting a minor between the ages of 12 and 18 when the child or his parents have denounced the offense."²²³ Often, a child's parents will be unaware of the sex tourist's intentions, and will welcome the tourist, even as he engages in sexual encounters with the host's children.²²⁴ After 1998, when Hurricane Mitch destroyed the local economy and killed 11,000 people, Honduran women and children "became a major component of the sex trafficking victim population that is

216. *See id.* ("One sex tourist coerces under-age girls into this type of act by threatening to report them to the police for theft if they do not comply with his wishes. . . . [T]hey are frequently intimidated by plain clothes policemen, as well as by their snitches, who demand dollars and/or clothing from them.")

217. *Id.*

218. *See* Hannum, *supra* note 2.

219. *See id.*

220. *See* Mattar, *supra* note 202.

221. *See id.*

222. *See* EPCAT, *supra* note 216.

223. *See id.*

224. *See, e.g.,* United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002) (where a sex tourists regularly traveled to Honduras to engage in sexual relations with a young man and his younger brothers, and the mother agreed to have her sons travel with the tourist, unaware of his intentions).

trafficked through Central America, Mexico, and into the United States.”²²⁵

Mexico

In Mexico, it was not until January of 2000 that the government first enacted a law, amending the penal code, to declare sex tourism to be a crime meriting punishment.²²⁶ The United States, through ninety-four members of Congress, has only recently “urged Mexican president Felipe Calderon to investigate murders and disappearances of women in Ciudad Juarez.”²²⁷

This overview of Latin American countries’ regulations and practices reveals that most of these countries suffer from a struggling economy that presents fertile ground for an increase in sex tourism. Because of the economic and cultural backdrop that promotes sex tourism, and generally the lack of agreement in the age of consent, Congress might be encouraged to regulate extra-territorially into the domain of other sovereign countries to protect children abroad. Before doing so, Congress must ensure that it is acting within the United States Constitution and that it is not overstepping its boundaries and intruding on another country’s criminal laws.

VI. CONFLICT BETWEEN LATIN AMERICAN REGULATIONS AND UNITED STATES REGULATIONS

*“If there is a problem with national law, it is the question of the age of consent and its interrelationship with child prostitution.”*²²⁸

Many jurisdictional differences exist between United States regulations and Latin American regulations, particularly in the area of age of consent. Until this is settled, the United States should hesitate to extend its own law into the territory of other

225. Goolsby, *supra* note 166.

226. *See id.*

227. Letter from members of U.S. House of Representatives, to Felipe Calderón, President of Mexico (Aug. 2007) (on file with author) available at http://www.lawg.org/docs/calderon_letter.pdf (last visited on November 11, 2007).

228. Statement by the Special Rapporteur on the Rights of the Child, Sale of Children, Child Prostitution and Child Pornography. *See* Eva J. Klain, Nat’l Ctr. for Missing and Exploited Children, *Prostitution of Children and Child Sex Tourism: An Analysis of Domestic and International Responses* (April 1999), http://www.missingkids.com/en_US/publications/NC73.pdf (last visited November 12, 2007). *See also*, Edelson, *supra* note 69, at 488 (“The legal definition of a child varies among countries, therefore, a universal definition of a child does not exist.”).

sovereigns who may not agree with the age of consent that the United States utilizes. The Convention on the Rights of the Child does not specify the age of sexual consent, even though the Committee on the Rights of the Child has delineated that eighteen is the "preferred age of consent for protecting children from sexual exploitation."²²⁹ Additionally, while the United Nations Convention on the Rights of the Child (UN Convention) also sets the age of protection at 18, it does not preclude countries from establishing a lower threshold.²³⁰

Indeed, many countries set the age of protection in their national laws between 13 and 17. For example, in Argentina, the minimum age of consent is 13;²³¹ in Brazil, the age of consent is 14 with parental approval and 18 otherwise; in Colombia, the age of consent is 14; and in Mexico, the age of consent varies from state to state, between 12-18 years.²³² In considering the age of consent in different countries, it is important to bear in mind cultural differences between Latin America and the United States regarding sexually exploited women.²³³ Ultimately, the differences in the age of consent from country to country can prohibit the prosecution of sex tourists, if the defendant claims that the child consented, and the child is above the age of consent in the receiving country.

These Latin American countries have made it clear that what age a child is able to consent to sexual relationships depends upon cultural differences and individual perceptions, thus making the scope of the prohibited behavior different depending on the culture. If there is no consensus between Latin American countries as to the age of consent, how can the United States legislate extra-territorially as to a definitive declaration of what age of consent must be accepted by other sovereign nations?

VII. CONCLUSION

Over the last twenty years, the international community has spoken. The heinous practice of child prostitution has been universally condemned. As part of their commitment to combat these

229. Fraley, *supra* note 42, at 465.

230. See Edelson, *supra* note 69, at 489-490.

231. With some minimal restrictions that are inapplicable to our study here.

232. Ages of consent generally: Argentina (12/15/16); Brazil (14/18); Colombia (12/14); Costa Rica (15/16); Cuba (16); Dominican Republic (18); Ecuador (unclear); Haiti (18); Honduras (14/17); Mexico (12); Peru (14); Panama (12); Puerto Rico (14).

233. See Goolsby, *supra* note 166.

evils, nations have banded together under various international treaties to help combat and overcome the practice of child prostitution. While a virtual consensus exists as to the odiousness of child sex tourism, the details are far from resolved. Critical definitions in these pronouncements – like what *is* a child – are still in dispute. As it stands now, each signatory country has the responsibility of defining this term within its own borders. Such a model, while noble, can be problematic. When a signatory country decides to enact legislation that extends beyond its own borders, it may begin to interfere with other sovereigns. Myriad books, articles, reports, and cases have crystallized the fact that extra-territorial legislation and treaty agreements are necessary in order to ensure that offenders of international crimes are punished.²³⁴ However, the United States, in particular, must guard against exceeding the limitations of the Foreign Commerce Clause and the Necessary and Proper Clause.

When utilizing the Foreign Commerce Clause, Congress must make certain it has a constitutional grant of authority under which to act – both in enacting initial legislation, and in *amending* that legislation at a later time. When enacting legislation under the Necessary and Proper Clause, Congress must ensure that it is not overstepping its authority under the treaty provisions. In both cases, Congress must not thrust its own criminal law onto the territory or the nationals of another sovereign that does not consent to the exercise of that jurisdiction.

Congress's goals are undoubtedly legitimate – preventing sex tourism and protecting children around the globe. However, Congress must stay within the strictures of the Constitution in order to adequately address and ultimately remedy the evils prevalent currently. Although it is not required,²³⁵ in order to ensure that it is acting within the scope of its constitutional authority, Congress should expressly delineate what grant of authority it is using to enact legislation – if only to explicitly focus itself upon its constitutional limitations. While constitutional grants of authority to

234. Jullien, *supra* note 31, at 581. (“Currently, there are over twenty countries with extraterritorial legislations prohibiting the sexual exploitation of children. Simultaneously, developing countries such as Brazil and Thailand have reinforced their laws and social programs to protect children, to treat them as victims rather than offenders.”).

235. *See Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) (“The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”).

Congress are not mutually exclusive²³⁶ and Congress can enact legislation under more than one constitutional power, the courts should neither have to (1) speculate as to the authority under which Congress enacted certain legislation, nor (2) supply Congress with an alternate means by which its legislation is valid.²³⁷

Courts typically strive to find Congressional legislation constitutional,²³⁸ but ultimately they have a duty “to invalidate an unconstitutional practice when it is finally challenged in an appropriate case.”²³⁹ Enacting invalid legislation, which the courts will ultimately have to overturn, would be a dereliction of Congress’s duty to enact the law; and upholding invalid legislation, which the courts should overturn, is a dereliction of the judiciary’s duty to ensure the constitutionality of the laws. It is well-established that the scope of “the constitutional power of Congress . . . is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”²⁴⁰ Congress must, therefore, make certain that it is acting within its constitutional authority at all times – both in enacting legislation initially and in amending it at a later time. Similarly, the courts must make certain that they are upholding the Constitution and engaging in scrupulous judicial review when Congress enacts laws meant to be applied extraterritorially.

It is true that a temptation to blur the constitutional line always exists when a good cause or noble purpose is before the Legislature, or when creating good policy seems to require cutting corners. But the Constitution was not created for times of peace, when following its dictates would be simple. Laws and constitutions are tested in times of trial. Today we face not only times of trial in international law, but also times of trial in constitutional law. The Constitution was written amid trials and wars of its own, and it has stood the test of time. We are a nation of laws – not a nation of pragmatism. While policy goals may be commendable, we should not ignore the foundation that the Constitution provides us. The Constitution is and has been our anchor, keeping

236. *See generally*, *Simpson v. Texas Dept. of Criminal Justice*, 975 F. Supp. 921 (W.D. Tex., 1997).

237. *See, e.g.*, *United States v. Frank*, 486 F. Supp. 1353 (S.D. Fla. 2007).

238. *See Heller v. Doe by Doe*, 509 U.S. 312 (1993) (“A statute is presumed constitutional.”); *see also, Eldred v. Ashcroft*, 537 U.S. 186, 235 (2003) (“[There is] a presumption of validity that attaches to every Act of Congress.”).

239. *Eldred*, 537 U.S. at 235.

240. *United States v. Morrison*, 529 U.S. 598, 614 (2000) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

us from drifting with every political movement and preventing us from changing course with every change of the wind. Part of the problem may be dealing with other nations that do not have the same structure as the United States' government – the same respect for the individual, the same laws, the same legal procedures – but that does not give us the right to stray from the Constitutional structure that this nation is built upon. No matter how honorable and commendable the goals of Congress, it must abide by the strictures set forth in the Constitution,²⁴¹ or the courts must find that legislation unconstitutional.

241. *Id.* at 607. (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. “The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”) (citing *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (Marshall, C. J.)).