

Legal Memorandum

No. 21
February 14, 2008



Published by The Heritage Foundation

Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism

Brian W. Walsh and Andrew M. Grossman

The scourge of human trafficking is a global phenomenon. Widely considered a “modern-day form of slavery,” trafficking occurs when the powerless “are subjected to force, fraud, or coercion, for the purpose of sexual exploitation or forced labor.”¹ Over the past decade, federal and state officials have greatly stepped up their law-making and law-enforcement efforts to punish traffickers and protect victims. Congress, for example, passed the comprehensive Trafficking Victims Protection Act of 2000² and reauthorized it in 2003 and 2005.³ Many of the core provisions of the existing law have proven successful and should be reauthorized once again.

But the latest proposal to reauthorize the Trafficking Victims Protection Act includes new criminal provisions that would undo much of the recent progress federal and state law-enforcement officials have made against trafficking. With very little debate, the House of Representatives in December passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007 (TVPRA, H.R. 3887). The TVPRA trivializes the seriousness of actual human trafficking by equating it with run-of-the-mill sex crimes—such as pimping, pandering, and prostitution—that are neither international nor interstate in nature.

The net effect of this unconstitutional federalization of local crime would be to blur the respective lines of federal and state authority, assert federal supremacy without providing sufficient federal resources, and thus undermine the efforts of state law enforcement against both ordinary sex crimes and the local effects of human trafficking. Likewise, saddling

Talking Points

- Amending trafficking laws to extend federal criminalization to cover prostitution-related offenses that are inherently local in nature would add enormous law-enforcement burdens to over-taxed federal authorities and undermine the primary job of state and local authorities in combating common street crimes.
- The Department of Justice already plays an active—and increasingly successful—role in combating human trafficking that is truly interstate in nature.
- The federal government lacks the resources to investigate, prosecute, and punish any significant percentage of the 70,000 prostitution-related cases that the states handle each year. Requiring this would distract federal law-enforcement officials from combating child pornography and child trafficking offenses that truly are federal in nature.
- The basic non-trafficking offenses criminalized by this legislation are not within the reach of the federal government’s constitutional authority.

This paper, in its entirety, can be found at:
www.heritage.org/Research/LegalIssues/lm21.cfm

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

federal authorities with the enormous job of fighting local sex crimes would divert them from their own anti-trafficking efforts.

The Department of Justice, which operates extensive—and increasingly successful—federal initiatives to combat foreign and domestic human trafficking, sent the chairman of the House Judiciary Committee a 13-page letter in November detailing the bill's serious shortcomings.⁴ Not only did the House apparently disregard this letter and fail to enact any meaningful set of the Department's recommendations, but the chairman who received the Department's letter waived his committee's formal consideration of the bill.⁵ The House Judiciary Committee thus performed little meaningful oversight over the TVPRA before it was passed. The legislation is now before the Senate for consideration, with a vote likely before the end of the session.

Yet the bill is fraught with problems. Indiscriminate federal criminalization disregards the constitutional separation of law enforcement by federal authorities from law enforcement that should be authorized and conducted under the jurisdiction of state and local governments. For years, the American Bar Association (ABA), the Police Executive Research Forum (PERF), and similar nonpartisan organizations have cautioned about the deleterious effects of unconstitutional federalization on state and local law enforcement.⁶ Among other problems, unconstitutional federalization causes great uncertainty among both state and federal officials about the scope of their respective investigative authority.

Even more concerning to those focused on helping trafficking victims, the TVPRA's unconstitutional criminalization creates the illusion that victims can count on extensive federal involvement

in fighting local sex crimes. These unfounded and unrealistic expectations cannot possibly be fulfilled given the lack of federal resources. Nothing could be more vital to the success of federal efforts to aid victims of trafficking for sex acts than to ensure that those victims trust federal law enforcement. Much as the ABA and PERF have additionally cautioned, the TVPRA's implicit promises will result in many trafficking victims becoming disillusioned by unfulfilled promises, placing less trust in federal law enforcement, and ultimately failing to receive the federal assistance they so desperately need.

A broad federal role in fighting ordinary prostitution is unnecessary and likely unconstitutional. In considering any legislation that touches upon crimes that are local in nature and subject to the police power of the states, Congress should always remember the principles of federalism—i.e., the Constitution's structural division of power between the federal government and the states. Constitutional limitations sometimes appear to be unnecessary obstacles to well-intentioned lawmaking. But as would be true if this bill were to be enacted into law, disregarding such limitations almost always undermines the same law-enforcement goals that the TVPRA is apparently crafted to achieve.

Trafficking vs. Prostitution

Estimating the total number of trafficking victims, whether globally or in the United States, is an inherently difficult task that is prone to unreliable results, but the federal government has identified approximately 1,500 victims that have been trafficked into the United States since 2000.⁷ According to the Federal Bureau of Investigation, the money “earned” from human trafficking often is part of the income stream flowing into criminal and

1. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERV., FACT SHEET: HUMAN TRAFFICKING, Jan. 24, 2008, http://www.acf.hhs.gov/trafficking/about/fact_human.html.
2. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1469 (2000).
3. Pub. L. 108-193, 117 Stat. 2887 (2003); Pub. L. 109-164, 119 Stat. 3558 (2005).
4. Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice, to Senator John Conyers, Jr., Chairman, Comm. on the Judiciary, U.S. House of Representatives (Nov. 9, 2007) [hereinafter DOJ Letter].
5. See Letter from Rep. John Conyers, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, to Rep. Tom Lantos, Chairman, Committee on Foreign Affairs, U.S. House of Representatives (Nov. 15, 2007).
6. See, e.g., TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, THE FEDERALIZATION OF CRIMINAL LAW (1998), at 41 (citing and quoting a position paper by the Police Executive Research Forum).

terrorist organizations.⁸ In addition, some U.S. citizens and legal residents travel abroad as “sex tourists” to engage in sex crimes with minors and other victims of trafficking in regions where the laws against such conduct are weak or rarely enforced.⁹

The TVPRA includes a variety of provisions addressing this foreign and domestic trade in persons—typically women and children—who are forced into sexual servitude. The bill would expand the economic penalties imposed on countries whose anti-trafficking efforts fail to meet U.S. standards, require extensive federal reporting on the problem, and enhance the federal government’s provision of protection and assistance to trafficking victims.¹⁰ The bill purports to increase federal efforts to combat trafficking conducted outside the nation’s borders and to prevent such trafficking from spilling over into the United States.

But the TVPRA’s criminal provisions cover a much broader range of conduct than just human trafficking, including many essentially local acts that this nation has invariably addressed at the state and local levels. At most, such conduct is only indirectly related to international trafficking.

Most dramatically, the TVPRA would create a new federal offense, “sex trafficking,” encompassing common prostitution-related offenses.¹¹ Specifically, any person who “persuades, induces, or entices any individual to engage in prostitution” (that is, “any sex act, on account of which anything of value is given to or received by any person”) would face large fines and imprisonment for up to

ten years.¹² An overlapping provision would criminalize “unlawful compelled service,” which it defines to include “caus[ing] or exploit[ing] financial harm or fear of financial harm” for the purpose of “obtain[ing] or maintain[ing] the labor or services of a person...for use in [prostitution].”¹³ Taken together, these provisions would purportedly transform all pandering, pimping, and hiring of a prostitute into federal crimes.

Congress must not sweep aside the long-standing authority of state and local governments to define what immoral conduct should be criminalized and punished.¹⁴ The vast majority of communities across the United States have concluded that they realize a wide range of benefits by criminalizing and punishing prostitution and related conduct at the state and local levels. Wrongdoing that is fundamentally local in nature should continue to be criminalized, investigated, prosecuted, and punished by the same state and local law-enforcement authorities who each year handle 95 percent of all criminal prosecutions across the United States. The TVPRA’s criminal provisions encompassing ordinary local sex crimes afford insufficient constitutional respect for and deference to state and local authority.

The TVPRA would place chief responsibility for enforcement of these new authorities with the Department of Justice’s Child Exploitation and Obscenity Section, which it would rename the “Sexual Exploitation and Obscenity Section.”¹⁵ Currently, this division investigates and prosecutes

7. See Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence*, WASHINGTON POST, Sep. 23, 2007 (discussing the difficulties and unreliability of estimating the number of trafficking victims and reporting that initial CIA estimates of the number of victims trafficked into the United States each year were based on computer models that extrapolated numbers derived from a review of foreign press stories on overseas trafficking incidents).

8. See Fed. Bureau of Investigation, *Human Trafficking*, <http://www.fbi.gov/hq/cid/civilrights/slavery.htm> (last visited Feb. 11, 2008).

9. U.S. Dep’t of Justice, *Child Sex Tourism*, <http://www.usdoj.gov/criminal/ceos/sextour.html> (last visited Feb. 11, 2008).

10. See, e.g., H.R. 3887, 110th Cong. §§ 107, 231, 213 (2007).

11. *Id.* at § 221(f).

12. *Id.* at § 221(a)(1).

13. *Id.* at § 221(b).

14. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring in the judgment) (observing that “[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, ‘*contra bonos mores*,’ i.e., immoral”).

child prostitution, child sex tourism, and child pornography and, according to those familiar with its operations, is already overburdened. Even if its staff were to be increased, enlarging its mandate would distract the division from fighting child exploitation, diverting its valuable resources toward crimes that are already under the purview of state and local police.

Further, the TVPRA's overbroad criminal provisions would criminalize "knowingly" making travel arrangements for those intending to engage in "any commercial sex act."¹⁶ Violators would be subject to significant fines and a sentence of up to ten years.¹⁷ This may sound good, but once again the language of the bill's criminal provisions suffers from a lack of precision that would cause federal law enforcement to be diverted from the worst trafficking crimes. The Department of Justice currently focuses its efforts against "sex tourism" on overseas sex crimes that involve children.¹⁸ These cases are, unsurprisingly, highly resource-intensive.¹⁹ The TVPRA's new definition of sex tourism encompasses adult travel to engage in adult prostitution where such prostitution is legal, thus diverting scarce federal resources from vitally important law-enforcement efforts against trafficking and sex tourism that involves children.

Unnecessary Criminalization

The TVPRA's provisions criminalizing inherently local commercial sex acts are also unnecessary. Except for several counties in Nevada,²⁰ prostitution and associated crimes, such as pandering, pimping, and hiring a prostitute, are punishable by criminal fines and imprisonment everywhere in the United States, including the District of Columbia and all U.S. territories.²¹ In Virginia, for example, penalties run as high as 10 years imprisonment and \$100,000 in fines for pimping and one year imprisonment and \$2,500 in fines for hiring a prostitute.²² These penalties are representative of those imposed across the country.²³

Existing state and local laws banning prostitution are diligently enforced. State and local law-enforcement officers made approximately 70,000 arrests for prostitution-related crimes in 2005, the most recent year for which comprehensive data are available.²⁴ By comparison, in that same year the entire federal criminal-justice system investigated fewer than twice that number of crimes of all types and categories.²⁵ Given the magnitude of state-led efforts to combat prostitution and related offenses, the federal government simply lacks the resources—including investigators, prosecutors, and judicial personnel—to tackle more than a small percentage of the case-load currently handled by state and local officials.

15. H.R. 3887, § 234.

16. H.R. 3887 at § 221(g).

17. *Id.*

18. DOJ Letter, *supra* n. 4, at 9.

19. *Id.* (reporting that prosecution of child "sex tourism" cases require, among other things, "gathering evidence abroad, bringing victims to the United States to testify, and coordination with foreign law enforcement agencies and foreign governments generally").

20. Even in the 13 Nevada counties where prostitution is not per se illegal, it and associated activities are heavily regulated, and violation of those regulations can lead to criminal penalties. See NEV. REV. STAT. § 201.356 (2007) ("It is unlawful for any person to engage in prostitution or solicitation therefor, except in a licensed house of prostitution.").

21. Initiative Against Sexual Trafficking, Prostitution & Sex Trafficking, <http://www.iast.net/ProstitutionSexTrafficking.htm> (last visited Feb. 12, 2008).

22. VA. CODE ANN. § 18.2-357 (2007); *id.* § 18.2-346(B) (2007).

23. See Initiative Against Sexual Trafficking, *supra* note 21.

24. UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2005 tbl. 69 (arrests by State), Sep. 2006, available at http://www.fbi.gov/ucr/05cius/data/table_69.html.

25. Fed. Justice Statistics Resource Ctr., Bureau of Justice Statistics, FY2005 Suspects in Investigations Initiated, available at http://fjsrc.urban.org/analysis/ez/displays/s_freq.cfm.

Even the Department of Justice doubts that federal jurisdiction over local sex crimes is needed or would be productive. In its comments on the TVPRA, the Department states that it “is not aware of any reasons why state and local authorities are not currently able to pursue prostitution-related crimes such that Federal jurisdiction is necessary.”²⁶

Moreover, federal law enforcement already has the criminal laws and other statutory authorities needed to punish traffickers traveling between states and across U.S. borders. By the end of fiscal year 2006, the Department had established 42 human trafficking task forces in the United States. Each task force is composed of a state or local law-enforcement agency, a trafficking victim services provider, the Office of the U.S. Attorney, and other federal investigative agencies. The members of each task force engage in extensive collaboration to prosecute traffickers and to identify and rescue victims.

Traffickers who violate federal statutes against involuntary servitude or forced labor can be punished by severe fines and up to 20 years in federal prison.²⁷ If the involuntary servitude or forced labor involves kidnapping, sexual abuse, or any attempt on the victim’s life, the maximum punishment is a life sentence. Federal criminal law includes similar penalties for debt servitude (peonage) and for recruiting, harboring, transporting, or brokering persons for the purposes of committing another offense.²⁸ Of the 555 human trafficking suspects federal prosecutors investigated between 2001 and 2005, 322 were investigated for violations such as these of the Trafficking Victims Protection Act. In 2007 alone, the Justice Department opened 183 investigations and secured 103 convictions of persons involved in trafficking adults and children.

Local pimping, pandering, or prostitution sometimes is part of an interstate criminal organization.

Such organizations move prostitutes from city to city to evade detection and prosecution. Prostitution may also be part and parcel of a criminal operation that involves interstate drug trafficking or other illicit commercial activities. In either case, the Mann Act criminalizes and provides federal jurisdiction over such interstate crimes involving pimping, pandering, or prostitution. As a result of the Justice Department’s increased anti-trafficking efforts, 809 persons were convicted of Mann Act violations from 2002 through 2006.

The Justice Department’s efforts to combat human trafficking extend well beyond domestic law enforcement. As just one example, in 2006 the Department was involved in combating trafficking in 21 countries, including by providing training and education on trafficking to forensic experts, health professionals, victim service providers, judges, law-enforcement officials, and other government officials.

As the Department of Justice has explained, the bill’s provisions on prostitution also fail to fit within the power granted the federal government in the Thirteenth Amendment to prohibit slavery and involuntary servitude.²⁹ Federal law enforcers already investigate and prosecute cases of prostitution involving severe force, often in concert with interstate and international trafficking, that are tantamount to involuntary servitude.³⁰

The TVPRA is thus duplicative, adding redundant federal criminal laws—and the complication of overlapping law-enforcement jurisdiction—to conduct that is already addressed and heavily enforced by well-understood state and local laws. Given the robust state of U.S. criminal law on sex crimes and human trafficking, the criminal provisions of the TVPRA cannot be likely to bolster existing efforts to combat prostitution and related offenses.

26. DOJ Letter, *supra* note 4, at 8–9.

27. See 18 U.S.C. § 1584 (involuntary servitude); 18 U.S.C. § 1589 (forced labor).

28. See 18 U.S.C. § 1581 (debt servitude); 18 U.S.C. § 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor).

29. DOJ Letter, *supra* note 4, at 8.

30. *Id.* at 8–9.

Over-Federalization Undermines Accountability and Effectiveness

The overbroad criminal provisions of the TVPRA appear to be yet another example of Congress's growing habit of relying on federal criminalization as a panacea to cure all of society's ills.³¹ The phenomenon of over-federalization of crime undermines state and local accountability for law enforcement, undermines cooperative and creative efforts to fight crime (which promotes the states' vital constitutional function of acting as "laboratories of democracy"), and injures America's federalist system of government.

Like existing federal criminal provisions that ignore constitutional federalism, the TVPRA would further erode state and local law enforcement's primary role in combating common street crimes, thereby reducing the effectiveness and success of local prosecutors and law enforcement. Whenever state and local officials can blame federal officials for failure to prosecute crime effectively—and vice versa—accountability and responsibility are significantly diluted. Although this is sometimes unavoidable for the limited set of crimes for which there truly is overlapping state and federal jurisdiction,³² unclear lines of accountability for wholly intrastate crimes—including those related to prostitution—are wholly unnecessary and unacceptable.

Combating common crimes is a governmental responsibility over which the states have historically been sovereign, with little intervention from the federal government.³³ Federal criminal law should be used only to combat problems reserved

to the national government in the Constitution.³⁴ These include offenses directed against the federal government or its interests, express matters left to the federal government in the Constitution (such as counterfeiting), and commercial crimes with a substantial multi-state or international impact.³⁵

The basic non-trafficking offenses contained in the TVPRA do not fall within any of these categories and so are not within the federal government's constitutional reach. For example, the fact that prostitution may (rarely) involve interstate travel or some other incidental interstate connection does not justify federal involvement. In fact, the vast majority of non-trafficking conduct that would be criminalized under the TVPRA would almost never take place in more than one locale in a single state. Such conduct is, at most, only tangentially interstate in nature and does not justify additional federal intervention.

The TVPRA's prostitution-related provisions ignore recent decades' lessons on how to reduce common crime successfully. New York City and Boston in the 1990s and early 2000s demonstrated that when accountability is enhanced at the state and local levels, local police officials and prosecutors can make impressive gains against crime. By contrast, federalizing authority over crime reduces the accountability of local officials because they can pass the buck to federal law enforcement authorities.

The TVPRA also runs counter to the principles of federalism in other ways. For example, it is unclear what impact the vaguely worded provisions of the legislation would have in those Nevada

31. At the conclusion of its study, the American Bar Association Task Force on the Federalization of Criminal Law reported that, as of 1998, the frequently cited estimate of over 3,000 federal criminal offenses scattered throughout the 49 titles of the United States Code was certainly outdated and understated. Task Force on Federalization of Criminal Law, *supra* note 6, at app. C 94. Since 1998, these numbers have only increased. See generally JOHN BAKER, JR. & DALE E. BENNETT, FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION, May 2004.

32. One among many possible examples would be a person in Virginia who extorts another person in Virginia but uses a federal facility, such as the United States Postal Service, to communicate the unlawful threats and demands.

33. See *United States v. Morrison*, 529 U.S. 598, 613 (2000).

34. See William Rehnquist, *Remarks on the Federalization of Criminal Law*, 11 FED. SENT. R. 132 (1998). Counterfeiting currency and wiring proceeds of criminal acts across state lines to avoid detection are additional examples of crimes that are appropriately federalized.

35. See generally *id.* (quoting a report of the Judicial Conference of the United States); *cf.*, *United States v. Lopez*, 514 U.S. 549, 587–601 (1995) (Thomas, J., concurring) (suggesting that the Supreme Court "reconsider [its] 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause").

jurisdictions where prostitution is not banned but is instead licensed and operated under close government scrutiny. The TVPRA would place a cloud of legal uncertainty over jurisdictions that have chosen, for good or for ill, not to ban prostitution outright. Whatever the merits of those jurisdictions' choice, this is inherently a matter for local interest and control. As compared with decisions made in Washington, decisions made by local authorities acting locally are far more likely to represent and be responsive to the social, political, and law-enforcement priorities of the affected communities. Historical rationales for federalism—experimentation and creativity, local values and preferences, and division of power between levels of government—argue in favor of maintaining the criminalization, investigation, prosecution, and punishment of this inherently local conduct under the jurisdiction of state and local authorities.

In addition, over-federalization results in the misallocation of scarce federal law-enforcement resources, which in turn leads to selective prosecution. Fighting crimes as common as prostitution, pimping, and pandering would place significant demands on the Federal Bureau of Investigation, the 94 U.S. Attorneys, and other federal law enforcers that would distract them from the truly national problems that undeniably require federal attention, such as the investigation and prosecution of foreign espionage and terrorism.

The federal judicial system also lacks the resources to hear large numbers of additional criminal cases. There are, for example, only about 665 federal judges who preside over criminal trials—a small number compared to the approximately 1,500 state judges who preside over criminal trials in California alone.³⁶

Constitutional Problems

Prostitution is a problem common to many states, so federal involvement may seem like a good idea. To warrant federal involvement, however, an activity must fall within Congress's constitutionally granted powers. There are serious reasons to doubt that the criminal provisions in the TVPRA do so.

In the course of striking down provisions of the Violence Against Women Act of 1994 in *United States v. Morrison*, the Supreme Court in 2000 affirmed the fundamental limits that the Constitution imposes on the federal legislative power:

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.”³⁷

This limitation on Congress's power to legislate is neither arbitrary nor accidental: It was adopted to protect the American people from the ever-expanding power of a centralized national government. As the Court stated, “This constitutionally mandated division of authority ‘was adopted by the Framers to ensure protection of our fundamental liberties.’”³⁸

The drafters of the TVPRA apparently attempt to rely on the Commerce Clause to establish Congress's power to assert federal jurisdiction over run-of-the-mill sex crimes that are essentially local in nature. But to fall within Congress's power to “regulate Commerce...among the several States,” a problem must not merely be common to the states; it must be truly interstate in nature and “substantially affect” interstate commerce.³⁹ For this reason, Congress's power under the Commerce Clause does not include the authority to federalize most

36. TRAC Reports, Federal Judges, http://tracfed.syr.edu/index/fedstaf/fedstafindex_judge.html (last visited Feb. 11, 2008); California Courts, State of California, California Trial Court Roster, Feb. 5, 2008, <http://www.courtinfo.ca.gov/courts/trial/judges.htm>.

37. *Morrison*, 529 U.S. at 607 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.)); accord *Lopez*, 514 U.S. at 552 (“We start with first principles. The Constitution creates a Federal Government of enumerated powers.”); THE FEDERALIST No. 45, at 292–93 (James Madison) (Clinton Rossiter, ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”).

38. *Lopez*, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

non-commercial street crimes, whether or not they have some minor nexus with interstate commerce.

Although broader and broader readings of the Commerce Clause during the latter part of the 20th century allowed the federal government to regulate more and more economic activity,⁴⁰ the Supreme Court has set limits and rejected several recent attempts to federalize common street crimes,⁴¹ even ones that have some interstate impact. The expansive (many would say virtually unlimited) interpretation of the Commerce Clause that is employed to justify the creation of most new federal crimes ignores the original meaning of the Constitution. As Justice Thomas wrote in his concurring opinion in *United States v. Lopez*, if Congress had been given authority over any and every matter that simply “affects” interstate commerce, most of Article I, Section 8 would be superfluous, mere surplusage.⁴²

In *Lopez*, the Supreme Court rejected the government’s “costs of crime” and “national productivity” rationales for asserting federal authority over crime that is essentially local in nature. The government argued that violent crime resulting from the possession of firearms in the vicinity of schools affected interstate commerce by increasing the costs of insurance nationwide and by reducing interstate travel to locales affected by violent crime.⁴³ The government further argued that the possession of guns on or near school grounds threatened educational effectiveness, which would reduce the productivity of students coming from

those schools, which would in turn reduce national productivity.⁴⁴

The Court explained that if it were to accept these attenuated chains of but-for reasoning, the limits on congressional power would be obliterated.

Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under [these] theories...it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.⁴⁵

Congress’s recent proposals to create a new set of federal crimes covering prostitution and similar conduct that does not in reality involve the regulation of interstate commerce raise these same constitutional concerns. The TVPRA lacks the usual legislative “findings” (sometimes nothing more than mere boilerplate assertions of fact) that Congress often uses to demonstrate a link, often tenuous, between a local crime and the national economy. This puts it on weaker constitutional ground than the statutes struck down by the Supreme Court in *Lopez* and *Morrison*, leaving the

39. Local, violent crime that is not directed at interstate commerce is not a proper subject matter for federal legislation. As the Supreme Court reaffirmed in 2000, the “regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the states.” *Morrison*, 529 U.S. at 618.

40. See *Lopez*, 514 U.S. at 555–56 (surveying the genesis and development of the Court’s expansionist view of congressional commerce-clause power starting from the New Deal era).

41. See generally *Morrison*, 529 U.S. 598 (striking down § 13981 of the Violence Against Women Act of 1994 because the predicate crimes the Act created were beyond Congress’s Commerce power); *Lopez*, 514 U.S. 549 (striking down the provision of the federal Gun-Free School Zones Act of 1990 that made it a federal crime to possess a firearm in a school zone because the provision exceeded Congress’s power under the Commerce Clause).

42. 514 U.S. at 589 (Thomas, J., concurring). By contrast, the express powers to coin money and punish counterfeiting granted to Congress in Article I of the Constitution surely do affect interstate commerce.

43. *Id.* at 564.

44. *Id.*

45. *Id.*

bill without any factual or logical basis to support Congress's power to regulate prostitution under the Commerce Clause.

The bill's drafters have attempted to cure the serious problem of its constitutionality by limiting its applicability only to infractions that occur "in or affecting interstate or foreign commerce." In *Morrison*, however, the Supreme Court ruled that this sort of language is not alone sufficient to bring an act within the scope of Congress's commerce power.⁴⁶ The regulated act must have more than *some* effect on interstate commerce; the effect must be a *substantial* one, and the connection between the regulated act and its substantial effect may not be too attenuated.⁴⁷

The Supreme Court's decision in *Gonzalez v. Raich*,⁴⁸ upholding as constitutional the application of federal drug law to intrastate growers and users of marijuana, does not alter this analysis. Unlike in *Raich* and in *Wickard v. Filburn*, on which *Raich* relies, there is no comprehensive federal scheme (nor should there be one) regulating all financial transactions for sexual acts.⁴⁹ In *Raich*, one state had chosen to regulate the possession and use of marijuana in a manner that directly conflicted with the provisions of the federal Controlled Substances Act, but no comprehensive federal regulatory scheme, with "substantial effects" on the national economy, depends on Congress's power to regulate prostitution.⁵⁰

In short, to the extent that there is interstate trade in the providers of prostitution, that activity is human trafficking, and it is already subject to federal criminal laws. Prostitution and closely related offenses that are local in nature and do not involve interstate commerce, however, likely are not.

Conclusion

Despite good intentions on the part of the bill's sponsors and supporters, the current version of the William Wilberforce Trafficking Victims Protection Reauthorization Act is problematic because its criminal provisions aim to turn common crimes—crimes that are inherently local in nature and best handled at the state and local levels—into federal offenses. This would significantly undermine accountability by inviting officials at all levels of government to "pass the buck" on enforcement issues, distract and divert federal law enforcement from actual human trafficking and other responsibilities that are inherently federal in nature, and detract from states' ability to function as "laboratories of democracy." Few if any gains would be realized because prostitution and related activities are illegal in nearly all states and jurisdictions, and existing enforcement is both diligent and extensive.

— Brian W. Walsh is Senior Legal Research Fellow in the Center for Legal and Judicial Studies and Andrew M. Grossman is Senior Legal Policy Analyst in the Center for Legal and Judicial Studies at The Heritage Foundation.

46. *Morrison*, 529 U.S. at 612–13.

47. *Id.*

48. 545 U.S. 1 (2005).

49. *Id.* at 18 (stating that in order for Congress to regulate purely intrastate activities it must first conclude "that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity").

50. *Id.* at 22 (finding regulation of wholly intrastate marijuana cultivation to be "necessary and proper" because "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA [Controlled Substances Act]," a comprehensive regulatory scheme).