NOTES

THE ILL EFFECTS OF A UNITED STATES RATIFICATION OF THE HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

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I. INTRODUCTION: THE PROBLEMS WITH INTERCOUNTRY ADOPTION

In June 1993, Joyce and Robert Gracie of Santa Maria, California, received the best possible results from their trip to Russia: a little girl named Elena. After six miscarriages, the couple feared they would never be able to provide their biological child, Erin, with a brother or sister. Adoption agencies in the United States offered them little hope. Due to their age and the fact that they already had a daughter, most agencies placed them further down the list in priority for a Caucasian child. So the Gracies turned to international adoption and found three-year-old Elena, orphaned after her mother died from complications from Elena’s premature birth. After approximately eighteen months and $11,000 in expenditures, Elena became a part of the Gracie family on June 19, 1993. Coming up with the money for the adoption was a challenge for the family, but the family agrees that Elena has been well worth the wait and the price.

Joyce and Robert, and thousands of other couples, have success stories about their involvement in international adoption that they can share. The joy and happiness that adoption brings to many families is clear in the numerous achievements touted by adoption agencies across the country and the mothers and fathers that willingly advocate the process to others considering adoption.

The process of international adoption, however, is not without its failures and disappointments; nor is it without persons attempting to take advantage of would-be parents. On the one hand, critics claim that the current international adoption process is too slow and that the variety of adoption laws among the fifty states “[delay] and [interfere] with the future benefit to both parties. The

2 Id.
3 Id.
4 Id.
5 Id. (including spending $3,500 on adoption agency negotiation, $2,500 on a home evaluation, $5,000 on plane tickets, and other various expenses for physical examinations of the family members and paperwork).
6 Id.
law purports to protect the interest of children but instead has become a barrier to many children waiting for homes in the United States."

On the other hand, prospective parents continue to choose international adoption instead of the domestic alternative for a number of reasons. International adoptions often cost less, birth mothers are less likely to reclaim the children, adoptive families that meet the requirements of the child’s home country are guaranteed a child, and the wait for a child will be an average of six months to two years compared to up to ten years in the United States.

Advocates also claim that the inclusion of the state “readoption” step once the couple returns to the United States with the child provides further assurance that the adoption is final.

The purpose of this Note is to highlight the problems with the current international adoption system and to understand why past attempts to reform it have failed. Current reform is necessary to curtail baby-selling, coercion

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9 Jonathan G. Stein, Note, A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should be Modified to Include the Consent Provisions of the Uniform Adoption Act, 24 T. JEFFERSON L. REV. 39, 63-64 (2001) (describing how couples who desire to adopt a Caucasian baby may wait up to ten years).


A second document, the UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally, was adopted by the General Assembly in 1986 to promote domestic adoptions in hopes that this would decrease the abuse of international baby-selling. See generally Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and
of birth mothers, and oppressive adoption processing fees, which challenge the UN's mission to expand human rights to all peoples and discourage the treatment of human beings as commodities.\(^{12}\) In addition, it will analyze the strengths and weaknesses of the newest reforms, the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Convention),\(^{13}\) and the legislation the U.S. Congress has passed to implement that treaty, the Intercountry Adoption Act of 2000 (IAA).\(^{14}\) An evaluation of


\(^{12}\) Pfund, supra note 11, at 54.


Since 1994, efforts have been underway to implement, and thereby ratify, the Hague Convention's requirements within the United States. See id.; U.S. Dep't of State, Preparations for U.S. Implementation of the Hague Convention (Apr. 2005) [hereinafter Preparations], http://travel.state.gov/family/adoption/convention/convention_2322.html. Ratification is dependent upon execution of the provisions set forth in the Intercountry Adoption Act of 2000. Id. The Hague Convention, however, is weak in the areas of prohibitions and enforcement: there are no outright provisions against baby-selling, no means with which to uncover baby-selling schemes masquerading as legitimate adoptions service, and no punishments for violators. See supra note 11; Stein, supra note 9, at 76-77.

\(^{14}\) Passed by Congress in late September 2000, and signed into law by President Clinton on
these two documents will reveal that both could have a detrimental impact on American families and intercountry adoption. A variety of solutions on both the domestic and international levels will be examined, concluding that a combination of actions must be taken in order to prevent disruption of intercountry adoption and to secure the role of the U.S. federal government and American families in this arena.

Because the Hague Convention and the IAA do not adequately address the current problems with international adoption, and indeed will only create more problems, this Note suggests solutions to the inadequacies of the Hague Convention and the IAA. Furthermore, the IAA may prove unconstitutional. To resolve these and other problems relating to intercountry adoption, the United States may either refrain from ratifying the Hague Convention or seek to amend either or both the Hague Convention and the IAA. The latter option would require two steps. First, on the international level, the United States and other member states can look to the Hague Convention itself and add amendments that facilitate uncovering those who traffic in babies and punishing baby-selling schemes. Second, on the domestic level, the United States can continue to allow state control over adoption agency accreditation procedures and limit federal involvement. Limited federal involvement will decrease costs added from having an entirely new level of federal bureaucracy and decrease the amount of government invasion into citizens’ private lives. The decreased costs will continue to encourage the middle class to use Hague Convention adoptions, while privacy protection will safeguard the concerns of the wealthier. The check of state law, in addition to the measures the federal government is already taking, will continue to assure that international adoptions are legitimate.

October 6, 2000, the IAA outlines new procedures for federal and state entities to follow in implementing the Hague Convention. See Background, supra note 13. The IAA creates a Central Authority in the State Department which will administer the accreditation and approval of adoption service providers in the United States. See Preparations, supra note 13.

15 See infra Part III.
16 See Stein, supra note 9, at 77.
17 See Cecere, supra note 7 (noting that larger, fully staffed, accredited agencies have had no better success than smaller, community-based agencies).
18 See id. (stating that the less costly state licensing of agencies in most states is successful).
19 See id. (stating that foreign adoption is successful and suggesting accreditation of only those agencies that handle adoptions from certain high-risk countries).
II. BACKGROUND ON INTERCOUNTRY ADOPTION

As the popularity of intercountry adoption has grown, adoption law has shifted from a domestic to an international focus. If the United States ratifies the Hague Convention and implements the IAA, adoption lawmaking would move from individual states control to federal management.\(^{20}\)

A. Current Status of U.S. Law

The Hague Convention has not yet been ratified by the United States and currently the requirements for intercountry adoption lie primarily with the states with little federal intervention.\(^{21}\) There are, however, some general federal rules imposed on all states by the U.S. Citizenship and Immigration Services (USCIS), formerly the Immigration and Naturalization Services.\(^{22}\) Before a child may enter the United States after adoption proceedings in his home country, USCIS must approve a petition for immigration status by determining that the parents can provide a home for the child and that the child is an orphan.\(^{23}\) The petition will not be granted unless: (1) the prospective parents are deemed fit under their state’s laws and (2) federal officials believe the state court will approve the adoption.\(^{24}\)

In order to satisfy the first requirement, the adoptive family must undergo two separate home studies conducted by both the state and federal officials.\(^{25}\) These home studies not only prepare and counsel the adoptive parents for the

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\(^{23}\) 8 C.F.R. § 204.3(a)(2) (2005).

\(^{24}\) Gold, supra note 8, at 113.

\(^{25}\) Id. at 114.
process of intercountry adoption, but also serve as an opportunity for officials
to assess the home environment.\textsuperscript{26}

After a successful home study, the child must qualify as an orphan under
federal standards.\textsuperscript{27} A child may be considered an orphan when: (1) the child
is coming to the United States to be adopted by a citizen or has been adopted
abroad by a U.S. citizen;\textsuperscript{28} (2) the child had the "death or disappearance of,
abandonment or desertion by, or separation or loss from, both parents, or for
whom the sole or surviving parent is incapable of providing the proper care
and has in writing irrevocably released the child for emigration and
adoption."\textsuperscript{29}

After meeting these two requirements, the adoptive parents may file on
behalf of the child for United States citizenship, which will be granted once
there is proof that:

(1) At least one parent (or, at the time of his or her death, was) is
a citizen of the United States, whether by birth or naturalization.

(2) The United States citizen parent--
(A) has (or, at the time of his or her death, had) been
physically present in the United States or its outlying
possessions for a period or periods totaling not less than
five years, at least two of which were after attaining the
age of fourteen years; or (B) has (or, at the time of his or
her death, had) a citizen parent who has been physically
present in the United States or its outlying possessions for
a period or periods totaling not less than five years, at least
two of which were after attaining the age of fourteen
years.

(3) The child is under the age of eighteen years.

(4) The child is residing outside of the United States in the legal
and physical custody of the applicant (or, if the citizen parent is
deceased, an individual who does not object to the application).

(5) The child is temporarily present in the United States pursuant
to a lawful admission, and is maintaining such lawful status.\textsuperscript{30}

\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.} at 115.
\textsuperscript{29} \textit{Id.}
Finally, the law of the individual states re-enters the picture to approve of the adoption: the adoption must meet the requirements of the home state, which most often consist of the termination of the biological parents’ rights and a court determination of the child’s best interests.31

B. Development of the Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption

In an attempt to streamline the intercountry adoption and avoid abuses and delays during the process, the Hague Conference on Private International Law introduced the issue of intercountry adoption in its seventeenth session in the spring of 1993.32 On May 29, 1993, the Hague Conference adopted the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption.33 The Hague Convention sets out the importance of children as a nation’s priority and that intercountry adoption may be a child’s only opportunity for a permanent family life.34 In order to recognize these concerns, the Hague Convention is designed first and foremost to protect the interests of children and to ensure protection of both the birth and prospective adoptive parents while preventing the practice of child trafficking and other abuses of the intercountry adoption process.35

31 Gold, supra note 8, at 115-16.
34 Hague Convention, supra note 13, pmbl., 1870 U.N.T.S. at 182.
35 Pfund, supra note 11, at 54. The problem of child trafficking is one among several human rights violations that advocacy groups have been trying to solve. See, e.g., UNICEF, Child Protection: Trafficking and Exploitation, http://www.unicef.org/protection/index_exploitation.html (last visited June 26, 2005). As many as 1.2 million children are trafficked each year for labor or sexual exploitation. Id. Child trafficking affects all nations, developing and developed alike. E.g., Woman Sentenced to 18 Months in Adoption Conspiracy, KOMO NEWS, Nov. 19, 2004, at http://www.komotv.com/news/printstory.asp?id=34062 (providing the story of a Hawaiian woman sentenced to prison for helping Americans adopt Cambodian children, many of whom were not orphans).
The Hague Convention provisions apply to every adoption between member states when "a child habitually resident in one Contracting State . . . has been, is being, or is to be moved to another Contracting State . . . either after his or her adoption in the [first State] by spouses or a person habitually resident in the [second State], or for the purposes of such an adoption in the [second or first State]." \(^{36}\) An adoption can only take place after authorities in both the state of origin and receiving state determine that Hague Convention provisions have been satisfied.\(^ {37}\)

The state of origin must determine that the child in question is adoptable, that intercountry adoption is the best choice for that child, and that parents have consented to the child's adoption.\(^ {38}\) Specifically, Article 4(c) of the Hague Convention requires that "the persons, institutions and authorities whose consent is necessary for adoption" have been informed and advised as to the legal consequences of the adoption.\(^ {39}\) The parties must also provide consent freely and in writing only after the birth of the child, and this consent will be valid as long as it is not given in exchange for compensation and has not been withdrawn.\(^ {40}\) Depending on the age and maturity of the child, the origin state must also consult with the child to determine his wishes regarding adoption and explain to him what will happen if he wants to be adopted.\(^ {41}\) Once the state of origin has fulfilled all stated requirements, the adoption will take place once the receiving state has interviewed and established that the adoptive parents will be eligible under law to adopt the child.\(^ {42}\) The receiving state must counsel the prospective parents and also ensure that their child will be authorized to enter the receiving state and permanently reside there with the adoptive parents.\(^ {43}\) Under Article 23, readoption in the receiving state is considered unnecessary when the adoption has already occurred in the state of origin,\(^ {44}\) and the receiving state can only refuse an adoption when "the adoption is manifestly contrary to its public policy, taking into account the best interests of the child."\(^ {45}\)


\(^{37}\) *Id.* arts. 4-5, 1870 U.N.T.S. at 183-84.

\(^{38}\) *Id.* art. 4, 1870 U.N.T.S. at 183-84.

\(^{39}\) *Id.* art. 4(c)(1), 1870 U.N.T.S. at 184.

\(^{40}\) *Id.* art. 4(c)(3), 1870 U.N.T.S. at 184.

\(^{41}\) *Id.* art. 4(d), 1870 U.N.T.S. at 184.

\(^{42}\) *Id.* art. 5(a), 1870 U.N.T.S. at 184.

\(^{43}\) *Id.* art. 5(a)-(b), 1870 U.N.T.S. at 184.

\(^{44}\) *Id.* art. 23, 1870 U.N.T.S. at 189.

\(^{45}\) *Id.* art. 24, 1870 U.N.T.S. at 189.
C. Creation of a Central Authority

In order to facilitate intercountry adoption, the state of origin and the receiving state are to communicate with each other through a designated Central Authority in each state.\(^46\) Articles 6 and 7 require every party to create a Central Authority and each entity to cooperate with each other, exchange information, and promote the aims and goals of the Hague Convention.\(^47\) The Hague Convention does not specifically require one central agency, but it states that "Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions."\(^48\)

The duties of the Central Authority in each state are quite extensive under the Hague Convention. Not only is each state required to communicate and facilitate the goals of the Hague Convention through information exchange with other states' Central Authorities, but there is a long list of functions that each must undertake within its own state. Under Articles 8 and 9, the Central Authority must prevent improper financial gain from activities associated with international adoption, oversee adoption counseling and post-adoption services, exchange evaluation reports, and respond "to justified requests from other Central Authorities" with regard to any shared adoption situations.\(^49\)

Finally, member states accredit adoption service providers within its borders in order to certify them to participate in international adoptions under Hague Convention standards.\(^50\)

D. Intercountry Adoption Act of 2000

Implementation of the Hague Convention is particularly important to the United States because it receives over 20,000 children through international adoption per year.\(^51\) Steps toward implementing the Hague Convention in the United States were not taken until 1998 when President Clinton presented the

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\(^46\) Id. arts. 6-7, 1870 U.N.T.S. at 184-85.
\(^47\) Id.
\(^48\) Id. art. 6(2), 1870 U.N.T.S. at 185.
\(^49\) Id. arts. 8-9, 1870 U.N.T.S. at 185.
\(^50\) Id. arts. 10-12, 1870 U.N.T.S. at 186.
Hague Convention to the Senate for advice and consent to ratification.\textsuperscript{52} During the summer of 2000, the House of Representatives and the Senate both passed bills outlining implementation procedures for the Hague Convention, and these two bills were reconciled as the IAA.\textsuperscript{53} The main purposes of the IAA include:

(1) to provide for implementation by the United States of the Convention;
(2) to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests; and
(3) to improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States.\textsuperscript{54}

President Clinton signed the IAA into law on October 6, 2000, and pending final implementation of IAA requirements, the Senate will ratify the Hague Convention.\textsuperscript{55} Between October 2000 and the present, the U.S. Department of State has been preparing federal regulations:

Department of State promulgation of regulations (1) establishing requirements/procedures for the designation and monitoring of accrediting entities; (2) setting the standards that must be met for non-profit adoption agencies to qualify for Convention accreditation and for other agencies and individuals to qualify for Convention approval; (3) governing the registration of smaller community-based agencies for temporary accreditation; and (4) providing the procedures and requirements for incoming and outgoing Convention adoptions.\textsuperscript{56}

\textsuperscript{52} Background, \textit{supra} note 13.  
\textsuperscript{53} \textit{Id.}  
\textsuperscript{54} 42 U.S.C. § 14901(b) (2000).  
\textsuperscript{55} Background, \textit{supra} note 13.  
\textsuperscript{56} Preparations, \textit{supra} note 13.
The new system will create relationships among all of the traditional actors involved in intercountry adoption in the United States, including the federal government, state governments, adoption service providers, and those wishing to become adoptive parents. The IAA proposes to establish the United States Central Authority (USCA) in the U.S. Department of State. The Office of Children’s Issues in the Bureau of Consular Affairs of the U.S. Department of State performs all USCA functions. It will have supreme authority to act within the United States to implement the requirements of the Hague Convention and to serve as the contact for other Central Authorities wishing to communicate with the United States on intercountry adoptions. The actual adoption services will still be provided and coordinated by individual adoption service providers and adoption agencies, the new condition being that these entities must qualify for accreditation through the USCA. All intercountry adoptions will be tracked through the USCA with the Department of Homeland Security. The USCA will track all accredited agencies and persons in order to ensure that the activities they undertake in the intercountry adoption process are in line with both federal and Hague Convention regulations.

In 2001, after the passage of the IAA, the State Department awarded Acton Burnell, Inc. (now CACI AB, Inc.) a contract to create the standards and procedure guidelines for accreditation of adoption service providers. They are entrusted with the job of preparing a draft for public comment and a framework for the contractual relationships which will exist between adoption service providers and the entities that will work to provide them with accreditation. Since receiving the government contract, CACI AB, an information technology consulting firm, has worked with adoptees, adoptive families, agencies, accreditors, advocacy groups, attorneys, and social workers in order to gather comments to better equip itself to draft the accreditation

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57 Pfund, supra note 21, at 321.
60 Id.
61 Id.
62 Id.
63 Id.
65 Id.
The scheduled completion date for the project was July 31, 2001, and although a preliminary draft was completed by that time, the project underwent an extension for final completion. A second draft finally resulted in official publication in the Federal Register on September 15, 2003, more than two years after the scheduled completion date. The process of drafting guidelines for accreditation of adoption services providers is still ongoing, as the State Department reviews the public comments it received following the official publication of the proposed rules.

The United States is on the verge of placing intercountry adoption law within the federal domain. Ratifying the Hague Convention and using the IAA to implement the Hague Convention's requirements in the United States, will change the traditionally state-oriented adoption approval process. The USCA will take the place of the current system, and, supposedly, all international adoptions will meet Hague Convention standards. There are, however, reasons to believe that merging the Hague Convention into U.S. law will not be easy, or perhaps even possible.

III. THE DIFFICULTY OF MERGING THE HAGUE CONVENTION INTO UNITED STATES LAW

Despite serious flaws in the Hague Convention, the United States has proceeded towards its implementation by passing the IAA. The IAA, however, may be unconstitutional. While the federal government has several justifications for the IAA's constitutionality, an unclear future of the Hague Convention in the United States could have severe economic and personal consequences for U.S. citizens. The United States' inability to participate in the Hague Convention could also cause an increase in non-Hague Convention adoptions, or a withdrawal of Hague Convention member countries from the

66 Id.
67 Id.
68 Id.
69 Id.
70 See Stein, supra note 9, at 76.
71 Id.
72 Background, supra note 13.
treaty. In order to avoid this situation, the United States will have to implement solutions on both the international and domestic level.

A. Flaws in the Hague Convention

While the Hague Convention is fairly specific about the general requirements that a party must accede to in order to carry out its goals, it is not without some serious flaws that could render it ineffective: it does not make baby-selling illegal; there are no punishments for those who engage in baby-selling; the Convention does not regulate independent adoptions conducted by private individuals as opposed to adoption service providers; and the Convention provides no methods for uncovering illegitimate adoption service providers.\textsuperscript{75}

First, the Hague Convention proposes to prevent trafficking in children and baby-selling but fails to specifically state that such practices are illegal or require parties to the Hague Convention to punish those that attempt these practices.\textsuperscript{76} Parties to the Hague Convention cannot rely on procedural requirements for intercountry adoption to lead to the prevention of baby-selling because these guidelines are not strong enough to prevent those interested in the lucrative profits to be dissuaded by the threat of any realistic consequences.\textsuperscript{77}

Second, the Hague Convention fails to address the practice of independent adoptions, one of the biggest sources of baby-selling.\textsuperscript{78} Finally, even if the Hague Convention provided some means of deterring baby-selling, it certainly does not lend parties any tools, such as investigative powers, for uncovering baby-selling rings purporting to be legitimate adoption service providers.\textsuperscript{79} These schemes can continue to operate under the Hague Convention.\textsuperscript{80}

Even considering the call of critics for the implementation of a Hague Convention with stricter guidelines in regards to baby-selling,\textsuperscript{81} the United States has slowly pressed forward towards signing and implementing the

\textsuperscript{75} Stein, supra note 9, at 76.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id. Independent adoptions are those that are conducted by private individuals as opposed to adoption service providers or adoption agencies. Id.
\textsuperscript{79} Id. at 76-77.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 77.
Hague Convention in its current form. In order for the United States to ratify the Hague Convention by the proposed deadline of 2006, implementation of the Hague Convention requirements must take place. The lengthy requirements of the Hague Convention have confronted the United States with "difficult legal and political challenges . . . more related to the procedures involved in the implementation of the Convention’s requirements than to the substantive requirements themselves."\(^8\)

### B. Why the Intercountry Adoption Act May Be Problematic and How the Federal Government Will Attempt to Justify the Constitutionality of the Act

Although endorsed by many adoption service providers in the United States and quickly passed through the House and Senate, the IAA presents some problems under U.S. law which will have an impact internationally. First and foremost, the IAA encroaches upon a traditional area of state law.\(^4\) Adoption laws, along with "laws related to marriage, divorce, matrimonial property, child support, [and] child custody . . . are part of the common law or have been enacted by the legislatures of the individual States of the United States and are interpreted and applied by the courts of those States."\(^5\) Before the IAA, there was little federal law on intercountry adoptions, and the federal government was only involved in intercountry adoptions to the extent that it functioned to ensure that parents were eligible to adopt and that the child was eligible under the Immigration and Nationality Act to come to the United States to live with his adoptive parents.\(^6\) Now, the role of the federal government is greatly expanded. The federal government has taken over the traditional activities of the states’ executive and legislative branches, such as state licensing of adoption service providers, by regulating accreditation of adoption services providers.\(^7\) The new law no longer allows state courts to finalize adoptions for children immigrating to the United States who are covered by the Convention without the involvement of the Secretary of State.\(^8\) Additionally, state courts cannot finalize adoptions of children emigrating from the United

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\(^{83}\) Pfund, supra note 21, at 321.

\(^{84}\) Id. at 322-23.

\(^{85}\) Id. at 322.

\(^{86}\) Id. at 323.

\(^{87}\) See Preparations, supra note 13.

\(^{88}\) National Center for State Courts, supra note 20.
States without verifying "that the Convention requirements have been met." The fact that the IAA preempts an area of law traditionally reserved to the states will not go unnoticed by those who wish for that power to remain in the states.

The federal government may face the risk of constitutional attack on its powers to implement the Hague Convention within the United States because the power to regulate adoption has traditionally been a state function. The IAA may be unable to survive an attack based on any of the following challenges: the Commerce Clause, treaty powers, the anti-commandeering principle, and the Tenth Amendment.

1. Commerce Clause

The principal argument advanced by the federal government to support Congress’ encroachment on the area of adoption law is likely to lie within the Commerce Clause. Article I, Section 8 (3) of the U.S. Constitution provides that Congress has the power “[t]o regulate Commerce with foreign nations, and among the several States . . .” The federal government will likely claim that because international adoption is a process that involves traffic and exchanges with foreign governments, the power to regulate rests with Congress. This argument is easily defeated by examining the policy concerns and intentions of the Hague Convention. One of the principal goals of the Hague Convention is to prevent "the sale of, or traffic in children," and Congress cannot simultaneously adhere to the principles of the Hague Convention while claiming that children are articles of commerce fit for its regulation.

Additionally, recent Supreme Court decisions in United States v. Lopez and United States v. Morrison have reined in Congress’s power under the Commerce Clause. According to Lopez, Congress can only pass valid legislation under the Commerce Clause in three categories: (1) the “channels of interstate commerce . . . (2) instrumentalities of interstate commerce, or persons or things in interstate commerce . . . and (3) those activities having a

89 Id.
90 Cecere, supra note 7.
91 Gold, supra note 8, at 121-22.
92 U.S. CONST. art. I, § 8, cl. 3.
93 Gold, supra note 8, at 121-22.
94 Hague Convention, supra note 13, at pmbl., 1870 U.N.T.S. at 182.
96 529 U.S. 598 (2000).
substantial relation to interstate commerce, i.e., those activities that substan-
tially affect interstate commerce." The determination of whether an activity
is considered "commerce" depends upon the economic qualities of the activity.
If an "economic activity substantially affects interstate commerce," then
Congress may regulate it; if not, Congress may not interfere.

The United States Supreme Court's reasoning is that if Congress were free
to regulate in any area remotely related to interstate commerce, the Court
would be "hard pressed to posit any activity by an individual that Congress is
without power to regulate." And the court would be forced to "convert
congressional authority under the Commerce Clause to a general police power
of the sort retained by the States." The Court declared that it would not
longer acquiesce to Congress's use of the Commerce Clause as an instrument
for wide-reaching power. If a challenge to IAA's usurpation of state power
in the area of adoption law were to reach the Supreme Court, there is a distinct
possibility that the legislation could be struck down as unconstitutional on
Commerce Clause grounds. Thus the federal government is unlikely to be
successful legitimizing federal regulation of adoption under the Commerce
Clause.

2. Treaty Power

The IAA could also be challenged under Congress's treaty power. According to Missouri v. Holland, treaties are the supreme law of the land
under Article VI of the Constitution. The federal government could claim
that under the treaty power, Congress is able to impose the rules of the Hague
Convention upon the nation as the law of the land. There are, however,
limitations on congressional treaty making powers. Specifically, "what an act
of Congress could not do unaided, in derogation of the powers reserved to the
States, a treaty cannot do." In other words, when Congress attempts to
regulate in areas not permitted by the Constitution, and then tries to justify its
actions as pursuant to its treaty powers, this legislation will be deemed
unconstitutional. As applied to the Hague Convention, the federal government

97 Lopez, 514 U.S. at 558-59.
98 Id. at 560.
99 Id. at 564.
100 Id. at 564.
101 See id.
103 Id.
is free to enter into treaties with foreign governments and, therefore, the Hague Convention would be considered a valid act of Congress. However, the chosen methods of implementing the Hague Convention are arguably usurpations of powers that Congress could not otherwise do without the Hague Convention treaty. Allowing Congress to do so would be "manifestly contrary to the objectives of those who created the Constitution... to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V."\textsuperscript{104} The IAA would therefore be unconstitutional.

3. The Anti-Commandeering Principle

The IAA would also be deemed unconstitutional if Congress were accused of commandeering the state executive branches. Indeed, "[while] Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions..."\textsuperscript{105} Congress has the ability to encourage States through its power of the purse to pass legislation that it prefers or to preempt contradictory laws through the supremacy clause; it does not, however, have the ability to craft legislation and direct the states to regulate in a way Congress chooses.\textsuperscript{106} State executive branches also cannot be compelled to administer federal programs.\textsuperscript{107} With respect to the IAA, it commandeers both the executive branch of the state governments and state resources by placing the burden of implementation of the new federal licensing procedures on state executive officials.\textsuperscript{108} State instrumentalities that currently are responsible for licensing adoption service providers will now be forced to undertake a list of specified functions for accrediting entities, in addition to their local domestic adoption duties.\textsuperscript{109} These functions include accreditation and approval of agencies and persons; ongoing monitoring of these approved entities; review of complaints against them; enforcement of sanctions; data and record keeping; and regular reports to the Secretary of State, the USCA, state courts, and others.

\textsuperscript{104} Reid v. Covert, 354 U.S. 1, 17 (1957).
\textsuperscript{106} Id. at 166-68.
\textsuperscript{107} Printz v. United States, 521 U.S. 898, 925 (1997).
\textsuperscript{109} 42 U.S.C. § 14922(b).
"to the extent and in the manner that the Secretary requires." The requirements of the IAA will certainly impede state officials from performing their local duties; therefore, precious state resources will be diverted from domestic adoptions and focused on Hague Convention adoptions.

4. The Tenth Amendment

The IAA would also be unable to survive an attack based on the Tenth Amendment. The Tenth Amendment provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Court would probably favor a Tenth Amendment argument stating that the power to regulate adoption is reserved to the states since it was not delegated to Congress by the Constitution. While United States v. Sage recently rejected such a Tenth Amendment argument against the enforcement of the Child Support Recovery Act, where the petitioner argued that family relations were reserved to the states and that the Act usurped state power, this rejection was based upon the fact that the Act "did not regulate domestic relations per se, but only assisted the states' enforcement of state court orders." A challenge to the IAA based on the Tenth Amendment can be easily distinguished because the IAA is not legislation drafted to assist states in enforcing state adoption law; rather, imposes new regulations upon domestic relations within the states and directs them to take new procedures in congruence with the Hague Convention guidelines.

5. The Viability of the Intercountry Adoption Act

The above arguments suggest that the federal government’s power to regulate intercountry adoption is untenable. In the future, states or parents could challenge the IAA’s constitutionality on grounds under the Commerce Clause, treaty power, the anti-commandeering principle, or the Tenth Amendment. At least, the above arguments show several levels on which the IAA can be criticized. However, the legislation currently stands and the effects of its implementation must be examined.

110 Id.
111 U.S. CONST. amend. X.
112 92 F.3d 101 (2d Cir. 1996).
113 Gold, supra note 8, at 122.
C. The Future of the Hague Convention in the United States

The international implications of the failure of U.S. implementation of the Hague Convention could be quite damaging because of the demand for intercountry adoption in the United States. Because of the problems with the IAA, U.S. citizens may seek to avoid the Hague Convention standards by adopting from countries that are not parties to the Convention. This could result in a second track of adoptions where no standards exist;\(^1\) the benefits of operating out from under Hague Convention guidelines could then encourage Hague Convention party countries to withdraw from the treaty, resulting in yet another failure of world-wide regulation of intercountry adoption.\(^1\) Even if the IAA is able to withstand the aforementioned constitutional arguments, litigation surrounding the issue is likely to postpone the scheduled ratification and to place other member countries on notice that Hague Convention implementation in the United States may not proceed smoothly.\(^1\) If any of the arguments succeed in convincing the Supreme Court to find the IAA unconstitutional, the United States will be forced to refrain from ratification date and will have to redraft suitable implementation legislation. This outcome would certainly give rise to concern about the future of the Hague Convention because "many nations are withholding action on the convention until they see what the United States does."\(^1\) A questionable future for the Hague Convention could slow or even halt future ratification by other countries and discourage current member states from continuing to abide by its guidelines.\(^1\) The possibility that the United States may never become a party to the Hague Convention could certainly defeat the Hague Convention's purpose.

The future of the Hague Convention will remain uncertain even if the IAA is successfully implemented in the United States and ratification is able to take place in 2006. The manner in which Congress has interpreted the Hague Convention and drafted the IAA could cause serious domestic problems within the United States. These problems could lead to national protest to withdraw from the Hague Convention altogether.

\(^{114}\) Jenista Testimony, supra note 74.
\(^{115}\) See supra note 11.
\(^{117}\) Id.
\(^{118}\) See id.
1. Economic Consequences of Hague Convention Implementation

Initially, the first changes the American public will recognize will be the economic consequences of implementation. It is estimated that creation and continuing operation of the USCA will cost U.S. citizens four million dollars per year. This estimate is just the expected costs for the hiring of personnel and the creation of a computerized tracking system which will house a database of both Hague Convention and non-Hague Convention adoptions. To recover these costs, the State Department will be allowed to charge fees to adopting parents for its services and to levy fines against violators of IAA provisions. It is projected that the State Department would charge a $200 fee on each of the approximately 20,000 adoptions each year. These are only the beginning of “new fees” that the federal government will be able to charge under the authorization of the IAA. Because Congress chose to have one national Central Authority rather than a number of local Central Authorities, as is allowed by the Hague Convention, the state licenses of adoption service providers will no longer be valid. Instead, all adoption service providers must apply to the USCA designated accreditation entities in order to operate. Under the new USCA standards, operation will entail new procedures and requirements in order to conform to the Hague Convention that will cost adoption service providers to implement. Most significantly, service providers must pay accreditation charges and fees to the Secretary of State, provide parent training programs, and only employ agency approved, licensed social workers. These fees, in addition to other costs accrued because of new requirements for administration, extensive record keeping, and reporting to the USCA, will undoubtedly increase the costs of intercountry adoption. Because “there is not a business or institution that does not pass on the costs of regulation,” we can expect these fees to be passed on to the general public,

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120 Id. at 15.
121 Id.
122 Id.
123 Id.
124 See Hague Convention, supra note 13, art. 6(2), 1870 U.N.T.S. at 185.
126 See id.
128 Id.
specifically to prospective adoptive parents. The cost of intercountry adoption is barely within the reach of most middle class families now, ranging between $20,000 to $35,000. The addition of new costs and fees will probably put the choice of intercountry adoption beyond the reach of the middle class. This presents an issue of elitist adoption where only wealthier American families will be able to afford to participate in the process of international adoption.

2. Impact of Hague Convention Implementation on the Privacy of U.S. Citizens

U.S. citizens who are able to participate in intercountry adoption face potential invasion of their private lives. Currently, the common home study process includes an evaluation of the following information about the prospective adoptive parents: family background, education, employment, relationships, daily life, parenting, the neighborhood in which they live, religion, and feelings about or their readiness for adoption. This information is gathered through the following mechanisms: a home visit (often including a health and fire department inspection), a physical exam, income statements, background checks, an autobiographical statement, and references. This information is collected so that a social worker may write a final home study report, which will serve to introduce a family to adoption agencies and adoption exchange services so that families can be matched to waiting children.

Under section 401(b) of the IAA, there is some ambiguity about record disclosure and who will have access to an individual's sensitive information. Subsection (1) seems to prohibit the disclosure of information while simultaneously allowing an exception when disclosure is "permitted or required by

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129 Id.
130 Id., supra note 74.
131 Id. at 2-3.
132 Id. at 1.
133 Id. at 1-3.
134 Mazzarella, supra note 127.
Subsection (2) describes yet another exception allowing disclosure of sensitive information to many parties "only to the extent necessary to administer the [Hague] Convention or this Act." Section 102(e) allows the Secretary of State to establish a registry of all adoption cases, Hague Convention or non-Hague Convention, and permits "tracking... and retrieval of information on both pending and closed cases." These exceptions increase the potential that sensitive, private information could leak. The registry is a database pool of thousands of immigrating children containing background information on their prospective parents gathered by accredited agencies through the home study requirement. Considering that private information could be released to parties or for purposes that the legislation is unwilling to clearly name, many U.S. citizens that can otherwise participate in the international adoption process may be dissuaded from doing so by such an intrusion.

It is clear that even if the IAA survives all constitutional challenges, as it currently stands it may muddle the international adoption process rather than streamline it. Because of the projected economic consequences and privacy concerns the IAA raises, the act is being positioned for failure before it is even put into operation.


Without the participation of the U.S. in the Hague Convention, it will be difficult for the treaty to be successful. The United States receives over 20,000 children a year through international adoptions. If the United States does not receive children through the Hague Convention standards, states currently part of the treaty that hope to send children to the United States may no longer have an incentive to abide by their duties under the agreement. These countries may withdraw from the Hague Convention, undermining the efficacy of that treaty, and begin working to make children eligible for adoption in other ways.

137 Id. § 14941(b)(2).
138 Id. § 14912(e).
139 Id. § 14921(b)(1).
140 Immigrant Visas, supra note 51.
141 See McMillion, supra note 116, at 94.
This would cause two parallel systems of international adoption in the United States.\textsuperscript{142}

With sections of the American population unable to participate in Hague Convention adoptions because of monetary issues, or unwilling to participate because of government intrusion, the potential for a second track of international adoptions exists. The demand for an alternative to Hague Convention adoptions will encourage someone to seek to meet this demand, and this encouragement will come in the form of economic benefit and efficiency. If adoptions from other countries can come cheaper and quicker than adoptions through the Hague Convention, these will clearly become more appealing to parents who desire to have a child in the fastest and most cost efficient way. This second track will become the first choice among prospective adoptive parents while adoptions from Hague Convention parties fall by the wayside. With the ability to cut through the red tape, paperwork, and extra costs, the second track will also attract other countries considering Hague Convention ratification and negatively influence that decision.

The second track could also become a place where baby-selling continues to thrive unchecked by any sort of regulations that the Hague Convention could potentially offer to dissuade the practice. It is evident that a misstep by the United States in its implementation of the Hague Convention could lead to the creation of this second track of intercountry adoption, the continuation of baby-selling practices that the Hague Convention sought to eradicate, and the eventual collapse of the Hague Convention community.

Additionally, countries that have already become a party to the Hague Convention could decide to withdraw once they realize that Americans no longer desire to adopt children from there. Without access to one of the major receiving states in the world, countries would have no incentives to abide by the more stringent Hague Convention standards. Thus, current member countries would choose to opt out of the Hague Convention and seek participation in the second track of intercountry adoptions.

\textit{E. Possible Solutions to Problems Posed by the Hague Convention and the Intercountry Adoption Act}

The flaws in both the Hague Convention and the IAA can be corrected. At the international level, the Hague Convention can be amended and strengthened. If this does not take place, the United States can make modifications to

\textsuperscript{142} See Jenista Testimony, \textit{supra} note 74.
the IAA so that the flaws in the Hague Convention will not adversely affect U.S. citizens.

1. At the International Level

What can be done to rescue the Hague Convention? At the international level, a number of solutions have been proposed to repair the loopholes in the Hague Convention. One suggestion is to modify the Hague Convention so that it is more similar to the Uniform Adoption Act. The Uniform Adoption Act (UAA) was promulgated in the United States in 1994 by the National Conference of Commissioners on Uniform State Laws as an attempt to bring uniformity and consistency to the domestic adoption laws among the fifty states. The UAA imposes stringent consent requirements upon biological parents, coupled with a fixed 192 hour period of revocation after which freely given consent is irrevocable. Including these standards in the Hague Convention could help to reach the goal of reducing baby-selling. During the time period in which the birth parent has to change his or her mind, officials can work to ensure that the consent given after the baby's birth was indeed proper and freely given. Consent exchanged for any form of consideration would have a higher chance of being discovered and guilty consciences on the part of biological parents would have time to come to the surface. Including within the Hague Convention the UAA requirement of impartial counseling for birth parents prior to their giving consent for the adoption can further reduce baby-selling. Additionally, a third party could be required to witness the transfer by written consent. The UAA requires that the third party be either a government official or professional person. Although such witnesses could be paid off in order to continue the baby-selling scheme, such a
requirement would work more often than not to reduce the possibility of success in baby-selling.\textsuperscript{151}

The UAA’s more rigorous standards on parental consent, impartial adoption counseling, and witnesses of written consent will make the Hague Convention tougher on baby-selling.\textsuperscript{152} While these guidelines are not as strong as specific punishments, they will solve one of the principal problems with the Hague Convention: making it harder on baby-sellers to traffic in children.\textsuperscript{153}

\textbf{2. In the United States}

If the Hague Convention is not altered or amended, the United States can make choices so that the flaws in the treaty will not affect U.S. citizens. The most expensive and time consuming choice would be to pass the IAA as is and have it struck down through lawsuits challenging its constitutionality. A better choice would be not to implement the IAA as it now stands. Intercountry adoptions can still continue to proceed with countries that have not yet signed and ratified or acceded to the Hague Convention, and the United States can simply stop engaging in intercountry adoptions with those states that have done so. A number of the states that have already ratified or acceded to the treaty are not the largest source countries from which United States adopts.\textsuperscript{154} In fact, China and Russia, the largest source countries for the United States, have refrained from ratifying or acceding to the Hague Convention.\textsuperscript{155} In essence, the status quo for intercountry adoption will remain intact, and future action can be taken to draft an agreement that better addresses international adoption and baby-selling.

Furthermore, if the United States makes it clear to the international community that it has no intention of ever becoming a party to the Hague Convention, it could encourage other nations to withdraw or convene in order to reconsider the stipulations of the Hague Convention. The United States could choose to wait until the next meeting of the Hague Conference to reconsider the subject, or, under the statute of the Conference, the United

\textsuperscript{151} Stein, \emph{supra} note 9, at 80.
\textsuperscript{152} \emph{Id.}
\textsuperscript{153} \emph{Id.}
\textsuperscript{154} Immigrant Visas, \emph{supra} note 51 (listing largest source countries by number of U.S. adoption visas issued for Fiscal Year 2004: China, 7044; Russia, 5865; Guatemala, 3264).
\textsuperscript{155} Status Table, \emph{supra} note 13.
States could request an Extraordinary Session.\textsuperscript{156} Reconsideration of the Hague Convention guidelines could then result in a stronger, more global effort to meet the goals of the original agreement.

Alternatively, the United States could amend the IAA to change implementation of the Hague Convention. By taking care of some of the weaknesses of the Hague Convention within the implementing legislation, the United States would be able to better provide its citizens with the assurance that intercountry adoptions will continue to be successful and legal. One of the key problems with the Hague Convention is that it fails to provide strong standards, guidelines, and punishments for international adoption and baby-selling. The United States, however, is free through the IAA to impose more stringent standards upon its own citizens and adoption service providers to assure that every child entering the country is given up for adoption freely and without illegal entanglements.

The Evan B. Donaldson Adoption Institute\textsuperscript{157} has suggested three critical amendments to the IAA and is currently urging the State Department to consider them in its implementation of the IAA.\textsuperscript{158} First, U.S. adoption service providers should be directly responsible for monetary transactions that occur between the United States and adoption service providers' contractors or agents located in foreign countries, while also remaining accountable to parents regarding agency fees.\textsuperscript{159} A complete accounting of all funds exchanged (and for what purposes) would help to limit or extinguish the

\begin{itemize}
\item \textsuperscript{156} Statute of the Hague Conference on Private International Law, \textit{supra} note 32, art. 3, 220 U.N.T.S. at 125. In order to call for an Extraordinary Session, all member nations must approve a request to the government of the Netherlands, the Standing Government Committee of the Hague Conference. \textit{Id.} The government of the Netherlands has the power to make this decision considering that the Hague Conference is under the delegation of the Netherlands Standing Government Committee. \textit{Id.}
\item \textsuperscript{157} “The Evan B. Donaldson Adoption Institute, founded in 1996, is a national not-for-profit organization devoted to improving adoption policy and practice.” The Evan B. Donaldson Adoption Institute, Who We Are, \textit{at} http://www.adoptioninstitute.org/whoew/intro.html (last visited June 27, 2005).
\item \textsuperscript{158} “The Adoption Institute is a reliable, unbiased and respected voice for ethical adoption practices that respect all people touched by adoption.” \textit{Id.} The Institute’s mission is to “improve the quality of information about adoption, enhance the understanding and perception of adoption, and advance adoption policy and practice.” \textit{Id.}
\end{itemize}
possibility of baby-selling. It is logical to connect the large amounts of cash that American couples are recommended to carry abroad with unethical or additional fees or "donations."\textsuperscript{160} Secondly, contracts between adoptions service providers and prospective parents should be reformed to better "create a fair and clear business relationship with respect to services, fees and legal responsibility."\textsuperscript{161} Results from a survey of 1600 adoptive parents revealed that fifteen percent had an agency withhold or give inaccurate information about a child.\textsuperscript{162} Another fifteen percent reported that information was withheld or inaccurately given about the adoption process, and fourteen percent endured higher adoption fees than their agency had quoted.\textsuperscript{163}

Finally, the Institute suggested that parents would be better protected if they were simply offered more information with which to make a more informed choice about the international adoption process and possible adoption service providers.\textsuperscript{164} Their survey also revealed that thirteen percent of families were not pleased with the service they received from their adoption service provider, and fourteen percent would not recommend their adoption service provider to other families.\textsuperscript{165} Accordingly, the Institute recommends that the U.S. State Department consider consumer education, perhaps through an annual publication of a consumer handbook on adoption service providers and the process, along with a report card detailing the advantages and disadvantages of certain types of agencies.\textsuperscript{166} Also, the Institute has outlined a number of additional ways in which the State Department can improve the overall quality of the international adoption experience.\textsuperscript{167}

In addition to the recommendations by the Evan B. Donaldson Adoption Institute regarding the adoption process and the adoption service providers, the provisions of the IAA could be strengthened by imposing severe penalties

\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id. (including strategies such as: (1) mandating liability insurance; (2) guaranteeing parents and adopted persons access to any and all information in their adoption records; (3) requiring providers to bear legal responsibility for their domestic and foreign agents; (4) creating ombudsman or other independent entity to accept complaints about adoption service providers; and (5) identifying adoption service providers whose performance is inadequate and quickly revoking their accreditation). Id.
upon those who do not abide by its guidelines. While the IAA does impose criminal and civil penalties for any violation of the IAA standards, the United States could make it clear that it would work to impose these penalties just as strictly on foreign, as well as domestic, violators of Hague Convention adoptions to the United States.

Perhaps the best way to amend the IAA to achieve these objectives is to disperse the powers of the Central Authority among the fifty states. The current flow of regulatory power in the United States is moving away from the national level and back to the states. The states may be better equipped to handle the job of intercountry adoptions. Because adoption law functions have historically been with the states and a strong constitutional argument exists that they should remain there, Congress should seriously reconsider the arguments for placing Central Authority power in the federal government. By keeping these responsibilities with the states, the federal government will not face the risk of a constitutional attack on its powers to implement the Hague Convention within the United States. By reducing the risk that the Hague Convention will be challenged and subjected to time consuming litigation, the United States will be better prepared to establish consistency in regards to the new adoption laws at home and how it will interact with other party nations.

Additionally, by placing this power with state accreditation agencies that already have licensing procedures in place, few changes to the operating procedures would need to take place. This would help reduce the amount of confusion that would exist not only for state and federal officials but also for prospective adoptive parents. Fewer changes would also mean much lower expenditures for implementing the Hague Convention guidelines. State resources that are already allocated towards intercountry adoption can continue to work for the benefits of their own citizens. Maintaining the current intercountry adoption system structure would be far less expensive and much more efficient. Reducing the amount of money associated with a successful intercountry adoption will help keep that option open for couples who want to

168 42 U.S.C. § 14944 (2000) (including civil penalties that may be any penalty prescribed by law or monetary penalty of not more than $50,000 for first-time violation and not more than $100,000 for any violation after first; criminal penalties may be applied only to those who "knowingly and willfully" violate the act and those persons shall be subject to a criminal fine of not more than $250,000, no more than five years in prison, or both).
169 Cecere, supra note 7.
170 Pfund, supra note 21, at 325.
171 Cecere, supra note 7.
172 Id.
start a family, whether they are middle or upper class individuals.\textsuperscript{173} Reducing the possibility of excessive costs will also help reduce the possibility of a second track adoption arena which would be free from Hague Convention standards and more susceptible to corruption.\textsuperscript{174}

An amendment to the IAA placing powers with the state governments would also induce the wealthy to choose Hague Convention adoptions. While these persons, unlike the middle classes, could have afforded to abide by Hague Convention standards despite the increased costs, the powers of the federal government to invade the privacy of the upper classes might have encouraged them to seek other means of becoming adoptive parents.\textsuperscript{175} They will be able to take comfort in little or no federal involvement that could lead to invasions of their privacy.\textsuperscript{176} Reducing the possibilities of these invasions will encourage the wealthy to use the Convention adoptions system and, therefore, they will turn away from second track adoptions. However, without the resources or the ability to track adopted children after their adoptions are complete and finalized, the federal government cannot randomly enter into the private lives of adoptive families. This positive consequence of maintaining the current intercountry adoption structure will encourage this area of the population to use Hague Convention adoptions and they will pressure the U.S. government to uphold its treaty obligations.

While the need for one Central Authority for communication purposes with other foreign-based centers is a persuasive argument, it is not necessary for a federal Central Authority to do more than act as a liaison between the states and these foreign bodies.\textsuperscript{177} The need for global communication with the United States does make limited federal involvement attractive. As an alternative to no federal Central Authority, perhaps the USCA could act only in this capacity. This would still supply the states with more than enough power to continue with their traditional duties while giving the federal government some involvement and taking pressure off the states to deal with foreign inquiries. This division of power would prevent the need for massive funding of a federal international adoption system and keep the states in control, thereby avoiding constitutional challenges of USCA's validity.

\textsuperscript{173} See Jenista Testimony, \textit{supra} note 74.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} Cecere, \textit{supra} note 7.
If Congress does not amend the IAA and the federal government retains power over intercountry adoptions, there is still a chance to revise the implementing legislation in order to better carry out the objectives of the Hague Convention while meeting the needs of United States citizens and respecting federalism. The process of reviewing public comment on the proposed guidelines for accreditation of adoption service providers is ongoing with the support of CACI AB and the State Department. This gives the adoption community an opportunity to suggest changes to the State Department which were not incorporated in the IAA. It is in this forum that concerned parties will be able to make a change if the powers of intercountry adoption remain at the federal level.

IV. CONCLUSION

Oscar Wilde once said, "It is always with the best intentions that the worst work is done." These wise words apply to the creators of the Hague Convention and the Intercountry Adoption Act of 2000. Their lofty goals and broadly-worded objectives, hastily codified without specific guidelines or strong enforcement measures, may yet set the intercountry adoption community on a road to nowhere, paved with good intentions. However, they cannot be faulted for wanting to stamp out baby-selling and streamline the adoption process in order to work for the best interests of the world’s children and the parents that long to give those children loving families.

In hindsight, the results of their deliberations show that they have failed to supply the international community with the best tools to carry out each document’s purpose. The Hague Convention, as we have seen, is too ambiguous regarding enforcement against baby-selling practices. Likewise, the IAA further exacerbates the confusion and controversy surrounding the international adoption process in the United States. The controversy surrounding the IAA, in a worst case but very possible scenario, could lead to a Supreme Court declaration of unconstitutionality and U.S. withdrawal from the Hague Convention. Such a withdrawal could help destroy the aims of the Hague Convention and plunge the rest of the world into a similar confusion.

178 Hague Adoption Standards Project, supra note 64.
179 Id.
181 Stein, supra note 9, at 76-77.
regarding intercountry adoption. A world with two tracks of adoption would certainly veer towards catering to market demand. This which would still exist despite a virtual collapse of the political institutions created to regulate the demand for babies. This unhappy ending to a story that began with such promise can never offer the successful completion of either document’s mission.

In order to prevent these problems, the United States has a variety of choices. On the international stage, they can directly appeal for amendments to the Hague Convention to call for more specific and stronger guidelines against baby-selling. On the domestic level, the federal government can choose to refrain from Hague Convention ratification. It can also amend the IAA to reduce federal involvement. However, if federal power over intercountry adoption continues, it must have more definite regulations. The chance that constitutional challenges may arise and risk the ability of the United States to comply with its treaty obligations may still exist under this system.

Weighing the risks of these alternatives clarifies that the United States is in a perilous position internationally and domestically if it continues to implement and abide by the IAA as it presently stands, and remains on track to ratify the Hague Convention in 2006. The United States must either refrain from ratifying the Hague Convention and seek its international amendment in an Extraordinary Session of the Hague Conference on Private International Law or seek to amend the IAA at home to repair those aspects that will leave it open to constitutional challenge. If the United States does not make a choice between these two paths and recognize the responsibility it has as the principal destination nation in adoption, the eventual failure of the Hague Convention and disappointment of thousands of prospective adoptive parents and needy children abroad will rest heavily upon it.