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Abusing the Power to Regulate: The Child Support Recovery Act of 1992

Rebecca A. Wistner

COMMENT

ABUSING THE POWER TO REGULATE: THE CHILD SUPPORT RECOVERY ACT OF 1992

Until recently, defendants challenging the constitutionality of federal criminal statutes under the Commerce Clause have experienced little success. In *United States v. Lopez*,[1] Alfonzo Lopez became the first defendant since 1937 to successfully attack a statute on Commerce Clause grounds, as the Supreme Court held that the Gun-Free School Zones Act of 1990[2] was beyond the scope of congressional Commerce Clause power.[3] Since the Court's holding in *Lopez*, criminal defendants have begun challenging many other federal criminal statutes enacted under Congress's commerce power.[4] Interestingly, even given the federal judiciary's longstanding fight to reduce their criminal docket,[5] most of these new challenges have been unsuccessful.[6]

One statute currently under attack is the Child Support Recov-

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1. 115 S. Ct. 1624 (1995).

2. 18 U.S.C. § 922(q) (1990). The Act prohibited the possession of a gun near a local school. *Id.*

3. 115 S. Ct. at 1626.

4. *See, e.g.*, United States v. Bishop, 66 F.3d 569 (3d Cir.), *cert. denied*, 116 S.Ct. 681 (1995) (carjacking); United States v. Collins, 61 F.3d 1379 (9th Cir.), *cert. denied*, 116 S. Ct. 543 (1995) (possession of a firearm by a convicted felon); United States v. Garcia-Salazar, 891 F. Supp. 568 (D. Kan. 1995) (Drug-Free School Zones Act).

5. *See, e.g.*, Renee M. Landers, *Federalization of State Law: Enhancing Opportunities for Three-Branch and Federal-State Cooperation*, 44 DEPAUL L. REV. 811, 812-13 (1995) (discussing the federal judiciary's pressures to limit federal criminal jurisdiction).

6. *See* Deborah Jones Merritt, *Reflections on* United States v. Lopez*: COMMERCE!*, 94 MICH. L. REV. 674, 712-27 (1995) (examining Commerce Clause decisions in the three-month period after *Lopez*, showing that most challenges to laws have been unsuccessful); *see, e.g.*, *Bishop*, 66 F.3d at 571 (upholding federal carjacking statute); United States v. Parsons, 993 F.2d 38, 39 (4th Cir.), *cert. denied*, 114 S. Ct. 266 (1993) (upholding federal arson statute).

ery Act of 1992 (CSRA), which makes it a crime to willfully fail to pay a child support obligation to a child living in another state, if the obligation has been unpaid for more than one year or is over $5,000.[7] Popularly known as the "deadbeat dads" law, the CSRA was enacted to deal with difficult interstate child support nonpayment cases, where states reportedly were not handling successfully through traditional extradition processes.[8] The CSRA is particularly controversial because it potentially affronts federalism in two ways: first, it overreaches Congress's commerce power under the *Lopez* holding; and second, it invades the traditional state area of domestic relations law. A few district courts have recently invalidated the CSRA,[9] while several others have upheld the statute as a valid

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7. 18 U.S.C. § 228(a), (d)(1)(B) (1995). The full text of the CSRA reads,

> (a) Offense. Whoever willfully fails to pay a past due support obligation with respect to a child who resides in another State shall be punished as provided in subsection (b).
>
> (b) Punishment. The punishment for an offense under this section is—
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> (1) in the case of a first offense under this section, a fine under this title, imprisonment for not more than 6 months, or both; and
>
> (2) in any other case, a fine under this title, imprisonment for not more than 2 years, or both.
>
> (c) Restitution. Upon a conviction under this section, the court shall order restitution under section 3663 in an amount equal to the past due support obligation as it exists at the time of sentencing.
>
> (d) Definitions. As used in this section—
>
> (1) the term "past due support obligation" means any amount—
>
> (A) determined under a court order or an order of an administrative process pursuant to the law of a State to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living; and
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> (B) that has remained unpaid for a period longer than one year, or is greater than $5,000; and
>
> (2) the term "State" includes the District of Columbia, and any other possession or territory of the United States.

18 U.S.C. § 228 (1995).

8. *See* H.R. REP. NO. 771, 102d Cong., 2d Sess., at 5-6 (1992) (concluding that parents who willfully refuse to pay child support have markedly increased chances to avoid payment obligations when they cross state lines).

9. *E.g.*, United States v. Parker, 911 F. Supp. 830, 843 (E.D. Pa. 1995); United States v. Bailey, 902 F. Supp. 727, 730 (W.D. Tex. 1995); United States v. Mussari, 894 F. Supp. 1360, 1361 (D. Ariz. 1995); United States v. Schroeder, 894 F. Supp. 360, 362 (D. Ariz. 1995). The *Mussari* and *Schroeder* opinions were both written by Judge Rosenblatt, and the analyses are identical. This Comment will cite only to *Mussari*.

exercise of the commerce power.[10]

This Comment will examine the constitutionality of the CSRA in light of the Court's holding in *Lopez*, concluding that the CSRA is constitutional under current law. However, this Comment will argue that although the CSRA is constitutional and does address a serious national problem, it is an unwise exercise of federal criminal lawmaking power. The CSRA is essentially a measure intended to allow federal resources to be used for a problem that can and should be dealt with by the states. As such, it is a prime example of what is wrong with the recent federalization of criminal law: it is not a principled use of power, but is merely a means for using federal resources to address a traditionally local criminal problem.

I. COMMERCE CLAUSE

Since the New Deal, the Supreme Court has interpreted the commerce power as being virtually limitless. Before *Lopez*, scholars repeatedly struggled to dream up a law that would not fall under the Commerce Clause, as virtually any local activity can be linked with interstate commerce.[11] Although the Court has stressed that there are outer limits to the commerce power,[12] it found none in the cases before it from 1937 to 1995.[13]

Under Commerce Clause jurisprudence before *Lopez*, the CSRA clearly would be a valid exercise of congressional power. Two pre-*Lopez* cases particularly merit discussion, as they exemplify some of the outer bounds of the commerce power. In *Wickard v. Filburn*,[14] the Court upheld wheat quotas in the Agricultural Adjustment Act as applied to a local farmer growing wheat partial-

10. *E.g.*, United States v. Kegel, 916 F. Supp. 1233, 1235 (M.D. Fla. 1996); United States v. Sage, 906 F. Supp. 84, 87 (D. Conn. 1995); United States v. Hopper, 899 F. Supp. 389, 393 (S.D. Ind. 1995); United States v. Murphy, 893 F. Supp. 614, 617 (W.D. Va. 1995); United States v. Hampshire, 892 F. Supp. 1327, 1331 (D. Kan. 1995).

11. *See* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 701 & n.39 (1996); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 647 (1996).

12. *See, e.g.*, NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937) (holding that the commerce power "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local").

13. Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 803 (1996) [hereinafter Brickey, *Crime Control*].

14. 317 U.S. 111 (1942).

ly for home consumption.[15] This holding established the principle that the Court may view individual activities in the "aggregate" in order to determine whether they substantially affect interstate commerce.[16]

In *Perez v. United States*,[17] the Court upheld a federal criminal loan sharking law on the grounds that extortion affected interstate commerce.[18] The Court held that the law could be used to prosecute loan sharks who were not involved in a larger interstate economic enterprise or organized crime.[19] The Court reasoned that, in the aggregate, loan sharking had a substantial adverse effect on interstate commerce, reaching $350 million a year.[20] Additionally, it noted that an activity may be regulated under the commerce power "'[e]ven if [it] be local and though it may not be regarded as commerce, . . . if it exerts a substantial economic effect on interstate commerce.'"[21]

The CSRA would be an easy case under these precedents. The legislative history shows that in 1989, $5.1 billion in child support went unpaid, that interstate support cases account for one-third of the cases for nonpayment, and that nonpayment of support has led to an increase in child poverty and federal support for children through welfare programs.[22] Thus, this impact would constitute a "substantial economic effect on interstate commerce" under *Wickard* and *Perez*, as the aggregate impact of child support nonpayment on interstate commerce is greater than the activities regulated in those cases.[23] The fact that nonpayment of child support may arguably not be considered "commerce" itself would not be fatal under these cases.[24] Moreover, the CSRA requires that every case involve an interstate debt,[25] while the statutes in *Wickard* and

15. *Id.* at 125.

16. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 189 (2d ed. 1991).

17. 402 U.S. 146 (1971).

18. *Id.* at 154.

19. *Id.*

20. *Id.* at 155.

21. *Id.* at 151-52 (quoting *Wickard*, 317 U.S. at 125).

22. H.R. REP. NO. 771, 102d Cong., 2d Sess., at 5 (1992).

23. Although one court invalidating the CSRA distinguished it from *Wickard* and *Perez*, *see* United States v. Parker, 911 F. Supp. 830, 839-40 (E.D. Pa. 1995), this distinction was made on the basis of an application of those cases under the framework articulated by the Court in *Lopez*, not the actual language of the decisions. *See infra* notes 55-56 and accompanying text (discussing the *Parker* court's rationale).

24. *See supra* note 21 and accompanying text.

25. *See* 18 U.S.C. § 228(a) (1995) ("Whoever willfully fails to pay a past due support

Perez regulated purely local activities.

As with every other statute considered by the Supreme Court between 1936 and 1995, the CSRA would likely be held constitutional as a valid exercise of the commerce power before *Lopez*. The constitutionality of the CSRA therefore depends in large part on interpretation of the Court's decision in *Lopez*.

A. *The* Lopez *Framework*

In *Lopez*, the Court identified "three broad categories of activity that Congress may regulate under its commerce power."[26] The Court held that Congress may (1) "regulate the use of the channels of interstate commerce";[27] (2) "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities";[28] and (3) "regulate those activities having a substantial relation to interstate commerce."[29] To rectify inconsistencies in the language of prior case law, the Court confirmed that the proper test for the third category is "whether the regulated activity 'substantially affects' interstate commerce."[30]

The Gun-Free School Zones Act prohibited the possession of a gun within 1000 feet of a school.[31] The Court briefly concluded that the Act could not fall in either of the first two categories, because it did not regulate the channels of interstate commerce or attempt to regulate things in commerce.[32] The government presented three arguments for upholding the Act under the third category. Two examined the effects of the "costs of crime," and a third focused on "national productivity."[33] First, it argued that posses-

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obligation *with respect to a child who resides in another State* shall be punished as provided in subsection (b)." (emphasis added)).

26. *Lopez*, 115 S. Ct. at 1629.

27. *Id.* As an example of this type of regulation, the Court cited *United States v. Darby*, 312 U.S. 100, 114 (1941). *Lopez*, 115 S. Ct. at 1629. The *Darby* Court upheld the Fair Labor Standards Act of 1938, which prohibited the shipment of certain goods in interstate commerce when the wages and hours of the employees did not meet the requirements of the Act. 312 U.S. at 115.

28. *Lopez*, 115 S. Ct. at 1629. For an example of this type of regulation, see 18 U.S.C. § 659 (1994), which prohibits thefts from interstate shipments.

29. *Lopez*, 115 S. Ct. at 1629-30; *see also* Perez v. United States, 402 U.S. 146 (1971) (upholding the federal loan sharking provision on the ground that loan sharking, in the aggregate, substantially affects interstate commerce).

30. 115 S. Ct. at 1630.

31. 18 U.S.C. § 922(q)(2)(A).

32. 115 S. Ct. at 1630.

33. *Id.* at 1632.

sion of a gun near a school may increase violent crime, and that violent crime affects the national economy by increasing insurance costs.[34] Second, the government argued that an increase in violent crime would decrease the amount of travel to the unsafe area, again affecting the national economy.[35] Finally, it argued that possessing guns in schools would inhibit the learning process, resulting in a "less productive citizenry."[36]

The Court held that these purported links with interstate commerce were not sufficient because recognition of the government's arguments would essentially allow Congress to regulate anything under the Commerce Clause.[37] The Court also held that the statute had "nothing to do with 'commerce' or any sort of economic enterprise."[38] Additionally, the Court invalidated the statute because it did not contain a jurisdictional element limiting its application to possession of firearms that effect interstate commerce.[39] Although the Court noted that it does not necessarily require legislative findings demonstrating the activity's effect on interstate commerce, it stated that they would help in this case, where the connection was not "visible to the naked eye."[40] The *Lopez* opinion did not explicitly overrule any previous Commerce Clause cases, although it did call *Wickard* "the most far reaching example of Commerce Clause authority over intrastate activity."[41]

The problem in applying the *Lopez* decision to other cases is that there actually is a connection between the Gun-Free School Zones Act and commerce, albeit a tenuous one.[42] Subsequent cases will have difficulty determining whether there is a sufficient connection between the regulated act and interstate commerce. The difficulty is determining where *Lopez* drew the line between sufficient and insufficient connections. Possibilities of where this line might be drawn include (1) when the activity is not "economic" or

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.* ("[I]f 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.").

38. *Id.* at 1630-31.

39. *Id.* at 1631.

40. *Id.* at 1632. Although Congress had amended the Act in 1994 to include legislative findings, the Government did not rely on these post-hoc findings in its argument, and the Court did not examine them. *Id.* at 1632 n.4.

41. *Id.* at 1630.

42. *See* Nagel, *supra* note 11, at 651-52.

"commercial";[43] (2) when the statute lacks a jurisdictional requirement;[44] (3) when Congress does not provide legislative findings;[45] or, (4) when recognition of an interstate connection would effectively eliminate any limits on congressional commerce power.[46]

B. The Constitutionality of the CSRA Under Lopez

Since the *Lopez* decision, several district courts have considered the constitutionality of the CSRA.[47] Before exploring the application of the possible factors the Court found fatal to the Gun-Free School Zones Act, however, it is necessary to determine under which basic Commerce Clause "category" the CSRA should be examined.[48]

Most courts addressing the constitutionality of the CSRA determined that the statute must be upheld, if at all, under *Lopez's* "category three," as regulation of an activity that substantially affects interstate commerce.[49] One court upholding the statute, however, likened the CSRA to a statute prohibiting fleeing across state lines to avoid prosecution.[50] Under this argument, the CSRA may be upheld under *Lopez's* "category two," as a regulation of the channels of interstate commerce.[51] However, as other courts have noted, the CSRA can apply to defendants whose children

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43. *See* Brickey, *Crime Control*, *supra* note 13, at 806-11 (examining the semantics and ramifications of this distinction).

44. *See id.* at 812-17 (exploring the ways in which Congress could potentially cure the jurisdictional flaw in the Gun-Free School Zones Act).

45. *See generally* Frickey, *supra* note 11.

46. Professor Philip Frickey notes that this "slippery slope" reasoning concerned the Court because it would "destroy any meaningful distinction between the local police power and the enumerated authority of Congress." Frickey, *supra* note 11, at 706.

47. *See supra* notes 9-10 and accompanying text.

48. *See supra* notes 26-30 and accompanying text (setting forth the basic categories for permissible regulation under the Commerce Clause).

49. *See, e.g.*, *Sage*, 906 F. Supp. at 92 (upholding the CSRA under category three); *Hopper*, 899 F. Supp. at 393 ("This Court must therefore conclude that the CSRA is a proper congressional regulation of an activity that substantially relates to interstate commerce."); *Mussari*, 894 F. Supp. at 1363 (observing that "if the CSRA is to be upheld, it would have to be as a regulation of activities having a 'substantial relation to interstate commerce'").

50. *Murphy*, 893 F. Supp. at 616 (The CSRA, along with other similar statutes, "seem to be aimed at preventing an individual from escaping either law enforcement officers or his own legal obligations by taking advantage of our federal system of government through flight to another state.").

51. *See id.* at 617 (stating that *Lopez* does not bar regulation of the use of interstate travel to avoid child support); *see also Kegel*, 916 F. Supp. at 1237 (upholding the CSRA as a valid regulation of the channels of interstate commerce).

move to another state, not merely those who purposely use interstate travel to avoid paying child support.[52] Thus, the argument for including the CSRA in "category two" is fairly weak. This Comment will focus on the constitutionality of the CSRA as a regulation of an activity that "substantially affects" commerce.

1. Economic or Commercial Activity

One court that determined the CSRA to be unconstitutional asserted that the *Lopez* decision changed the "substantial effects" test so that Congress may no longer aggregate activities quantitatively (in dollar figures) to show a substantial effect on commerce, but instead must look at the qualitative aspects of the activity to determine whether it is "economic" or "commercial."[53] In *Parker*, the court held that congressional findings of annual aggregate deficit of $5.1 billion in unpaid child support was not enough to show a substantial effect on commerce.[54] The court explained that while previous Commerce Clause cases have held that less significant monetary effects on the national economy were sufficient, "in *Lopez*, the Court demonstrated that the focus must be on the activity, not the dollar figure."[55] Applying this test, the *Parker* court asserted that the activity regulated by the CSRA was in no way qualitatively related to commerce: "The failure to make these [child support] payments affects primarily the parents and the children born of or dependent upon the marriage. Arm's-length commercial actors are not involved in any way. The marketplace for goods and services and prices of commodities are not affected at all."[56]

Even if the *Lopez* Court did negate the use of quantitative data, the CSRA would still pass constitutional muster qualitatively.

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52. *See Mussari*, 894 F. Supp. at 1364 (noting that there is no "intent to flee requirement" in the CSRA).

53. United States v. Parker, 911 F. Supp. 830, 837 (E.D. Pa. 1995).

54. *Id.*

55. *Id.*

56. *Id.* at 835. The court also qualitatively distinguished the failure to pay child support from the activities regulated in *Wickard* and *Perez*, arguing that the regulation of wheat affects the price of goods, and that loan sharking involves organized crime, a national enterprise. *Id.* at 839-40.

In *Mussari*, the court reasoned that the CSRA was not related to commerce primarily because states have traditionally been responsible for enforcing child support payments. *Mussari*, 894 F. Supp. at 1363. However, this reasoning is inappropriate, as the states' traditional responsibility for enforcing child support payments indicates only that child support obligations are traditionally local, intrastate concerns, not that they are not "commercial" or "economic."

The *Parker* court characterized the activity regulated by the CSRA inaccurately. Essentially, the CSRA is criminally enforcing an interstate debt. The *Hopper* court observed that "the act of collecting an obligation, though dealing with an intangible, does amount to commerce," as it involves the exchange of money and communications.[57] Similarly, in *Sage*, the court reasoned that while child support payments may not be characterized as "commerce," they are "economic" in the sense that "[t]he non-custodial parent reaps an economic gain each time a support payment is withheld, while the offspring suffers an economic loss."[58] Clearly, then, child support payments are "economic," and are certainly distinguishable from possession of a firearm.

At this point, however, the *Lopez* Court's distinction between commercial, economic, and non-commercial activities merits further scrutiny. While it is clear the CSRA addresses an activity that is "economic," it is arguable this debt would not be a "commercial transaction" in the traditional sense. However, the *Lopez* Court was not clear in defining precisely what it meant, as it treated "commercial" and "economic" as interchangeable words.[59] At one point, the Court stated that the Gun-Free School Zones Act does not deal with "commerce," "economic enterprise," and "is not an essential part of a larger regulation of economic activity."[60] Then, it referred to the Commerce Clause cases upholding regulations of "activities that arise out of or are connected with a *commercial transaction.*"[61] At the same time, the Court also distinguished the *Wickard* holding on the grounds that the activity there "involved *economic activity* in a way that the possession of a gun in a school zone does not."[62] Justice Kennedy's concurrence asserted that Congress may regulate "*transactions* of a *commercial nature.*"[63]

The problem is that all these words used interchangeably by

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57. *Hopper*, 899 F. Supp. at 392.

58. *Sage*, 906 F. Supp. at 89-90. The court also cited *United States v. Bishop*, 66 F.3d 569, 577 (3d Cir.); *cert. denied*, 116 S. Ct. 681 (1995), for support in distinguishing the crime prohibited in *Lopez* (possession of a firearm near a school) from other crimes. *Id.* In *Bishop*, the court upheld the constitutionality of the federal carjacking statute, reasoning that such activity is economic, involving gains and losses. *Bishop*, 66 F.3d at 580.

59. Brickey, *Crime Control, supra* note 13, at 806-07.

60. *Lopez*, 115 S. Ct. at 1631.

61. *Id.* (emphasis added).

62. *Id.* at 1630 (emphasis added).

63. *Id.* at 1637 (Kennedy, J., concurring) (emphasis added). Kennedy's opinion also concluded that "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Id.*

the Court have different meanings.[64] Professor Brickey argues that, based on other Supreme Court precedent, the *Lopez* Court did not intend to limit these terms to include only activities with a profit seeking motive.[65] Instead, she argues, a rational reading of *Lopez* allows congressional regulation when the regulated activity is "economic," "commercial," or "noncommercial" with a substantial effect on an economic enterprise.[66]

This argument is supported by the fact that other laws upheld by the Court in previous Commerce Clause cases were not limited to regulations of profit seeking activities. For example, if the Court's definition of "commercial" or "economic" is so narrow that it does not encompass an interstate debt, it would probably also dictate invalidation of the Civil Rights Act of 1964 and overruling *Katzenbach v. McClung*.[67] Certainly, the *Lopez* Court did not intend to invalidate volumes of federal civil rights and criminal law on the grounds that the activities were not "commercial"; the Court in *Lopez* did not explicitly overrule any prior cases, and the ruling seems to indicate it is merely setting an outer limit on the commerce power.[68]

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64. Black's Law Dictionary defines "commerce" as follows:

> The exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of articles. The transportation of persons and property by land, water and air.
>
> Intercourse by way of trade or traffic between different peoples or states and the citizens or inhabitants thereof, including not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on, and transportation of persons as well as of goods, both by land and sea.

BLACK'S LAW DICTIONARY 269 (6th ed. 1991) (citations omitted). "Economic" has been defined as "pertaining to the production, distribution, and use of income, wealth, and commodities" or "involving or pertaining to one's personal resources of money." THE RANDOM HOUSE DICTIONARY 618 (2d ed. 1987).

65. Brickey, *Crime Control, supra* note 13, at 808-11 (comparing Justice Rehnquist's *Lopez* opinion with his opinion in National Organization for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994)).

66. *Id.*

67. 379 U.S. 294 (1964). There, the Court upheld the Civil Rights Act as applied to a local restaurant, because the restaurant received food that had traveled in interstate commerce. *Id.* at 300-01; *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964) (upholding the Civil Rights Act as applied to a motel operator). The primary activity regulated by the Civil Rights Act is discrimination. *See Heart of Atlanta Motel*, 379 U.S. at 245-46, 250 (describing the purposes of the executive and legislative branches in enacting the Civil Rights Act). Discrimination is qualitatively much more social than "economic," but quantitatively does have a substantial impact on interstate commerce. Nagel, *supra* note 11, at 647.

68. Justice Kennedy's concurring opinion, joined by Justice O'Connor, stated that the

Courts upholding the CSRA have recognized this distinction, and have narrowly read the limits on Congress's Commerce Clause power set forth in *Lopez*. For example, in *Sage*, the court recognized that "[a] regulated activity . . . need not be commercial in order to be economic."[69] In *Hopper*, the court reasoned that "commerce" does not have to involve a commodity or be a commercial transaction in the traditional sense.[70] Regulation of the failure to pay child support is clearly an "economic" regulation that merely happens to involve members of the same family instead of arm's length business actors. Under a careful interpretation of *Lopez*, this activity should qualitatively fall under the commerce power.

2. Jurisdictional Element and Legislative Findings

The CSRA contains both a jurisdictional element and congressional findings. The absence of these elements proved fatal to the Gun-Free School Zones Act in *Lopez*.[71] The CSRA explicitly requires that each case involve a child support obligation where the parent and child reside in different states.[72] Additionally, Congress made specific legislative findings that failure to pay child support affects interstate commerce, and that state enforcement of interstate cases was not effective.[73] While the courts holding the CSRA unconstitutional asserted that these factors were not dispositive,[74] and that the *Lopez* decision is unclear on the issue of whether an explicit jurisdictional element and contemporary legislative findings could have saved the Gun-Free School Zones Act,[75] it is clear that

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statutes upheld in *Perez*, *Katzenbach*, and *Heart of Atlanta Motel* "are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today." 115 S. Ct. at 1637 (Kennedy, J., concurring); *see also* Brickey, *Crime Control*, *supra* note 13, at 811 ("[T]he [*Lopez*] Court succeeded in invalidating the Act as an unconstitutional exercise of the commerce power without overruling a single case.").

69. *Sage*, 906 F. Supp. at 89.

70. 899 F. Supp. at 392-93.

71. See *supra* notes 39-40 and accompanying text (summarizing the *Lopez* Court's statements that had the Gun-Free School Zones Act contained these two elements, it would more likely have been found constitutional).

72. 18 U.S.C. § 228(a) (1993); *see also Sage*, 906 F. Supp. at 91; *Murphy*, 893 F. Supp. at 616 ("Unlike § 922(q), § 228 does have a jurisdictional element that ensures it will not intrude upon matters with no relation to interstate commerce."); *Hampshire*, 892 F. Supp. at 1330.

73. H.R. REP. NO. 771, 102d Cong., 2d Sess., at 4-6 (1992); *see also Sage*, 906 F. Supp. at 90-91.

74. *See Mussari*, 894 F. Supp. at 1363-64; *United States v. Parker*, 911 F. Supp. 830, 836 (E.D. Pa. 1995). The *Bailey* court did not even address these issues.

75. *See* Frickey, *supra* note 11, at 707 ("*Lopez* provides no authoritative answer to the

legislative findings can significantly aid in showing the link to interstate commerce.[76] Here, therefore, they help to tip the scale in favor of the CSRA's constitutionality.

3. "Slippery Slope" Arguments

While the government's arguments in the *Lopez* case proposed a limitless commerce power over local activities, there are arguments that can be used to uphold the CSRA while still keeping a limit on the Commerce Clause power. In *Parker*, the government argued that the failure to pay child support makes children and custodial parents unable to buy many commodities, goods, and services, thereby affecting interstate commerce.[77] Similarly, it argued that nonpayment of support results in poverty, which in turn requires federal funds to support the children through welfare programs.[78] The *Parker* court analogized these arguments to the government's "cost of crime"[79] and "national productivity"[80] arguments in *Lopez*, which were rejected as limitless by the Supreme Court.[81]

While these arguments may sound overreaching, when one superimposes the actual statute on them, they still allow for limits on the commerce power. Under the arguments supporting the CSRA, it is probable that the federal government could regulate all interstate debt.[82] However, by its terms, the CSRA is not attempting to regulate any intrastate debt, or non-economic activities in the area of domestic relations. Certainly, the *Lopez* Court's rejection of the government's arguments does not mean that every argument that involves implications on the national economy will be rejected; however, it does mean that the Court will not accept limitless arguments when the regulated activity "tenuously . . . relate[s] to interstate commerce."[83] Unlike the Gun-Free School Zones Act, the

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future utility of congressional findings . . . .").

76. *See id.* (arguing that "the Supreme Court considered the lack of findings [in *Lopez*] simply to negate one source of potential support for the proposition that the statute had a rational connection to interstate commerce").

77. *Parker*, 911 F. Supp. at 837.

78. *Id.*

79. *See supra* notes 33-35 and accompanying text.

80. *See supra* notes 33, 36 and accompanying text.

81. 911 F. Supp. at 837-39.

82. *See supra* note 57 and accompanying text (asserting that the collection of debts is "commerce"). This is not problematic, as the commerce power extends to all "interstate commerce."

83. *Lopez*, 115 S. Ct. at 1632; *see also* Brickey, *Crime Control*, *supra* note 13, at

CSRA does not involve a tenuous link to the national economy; the activity itself is economic, and linking a lack of financial support to commerce does not involve the same mental gymnastics as the government's *Lopez* arguments. Thus, the government can argue to uphold the CSRA without asserting a limitless commerce power.

As this analysis has shown, the various factors that were fatal to the Gun-Free School Zones Act in *Lopez* are not discrete, dispositive requirements, but are interrelated.[84] In the case of the CSRA, all factors point to its constitutionality, as it regulates an economic activity, explicitly requires a link to interstate commerce, demonstrates a substantial effect on interstate commerce through legislative findings, and does not require the prospect of limitless commerce power to justify its constitutionality.

II. PROVINCE OF THE STATES

Courts invalidating the CSRA also have done so on the grounds that the entire subject matter of domestic relations is the province of the states, and may not be regulated by the federal government. These holdings contain three major lines of reasoning: (1) the domestic relations exception to federal diversity jurisdiction supports invalidation of the CSRA; (2) *Lopez* specifically stated that domestic relations is an area left to the states; and (3) principles found in other cases, such as *Younger's* "federalism" and "comity" concerns, could be used to invalidate the CSRA. However, courts that have invalidated the CSRA on these grounds have misapplied the *Lopez* holding, the domestic relations exception, and abstention doctrines to come to these conclusions. There is nothing that prevents Congress from regulating traditional subject matter of the states through the commerce power.

A. The Domestic Relations Exception

Federal courts have a long-standing domestic relations exception to diversity jurisdiction. The exception stems from dicta in *Barber v. Barber*,[85] and has been recognized in its progeny.[86]

827.

84. *See* Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685 (1996).

85. 62 U.S. (21 How.) 582, 584 (1858) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony.").

86. *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 693-701 (1992); De La Rama v.

This exception does not allow district courts to refuse jurisdiction over all diversity cases that touch on domestic relations, only those that involve a divorce, alimony, or child custody decree.[87] The court in *Bailey* invoked this exception in support of its determination that the CSRA is unconstitutional.[88] However, this reliance is misplaced. The domestic relations exception is an exception to diversity jurisdiction under 28 U.S.C. § 1332, not federal question jurisdiction.[89] Thus, where Congress regulates a matter of domestic relations through the Commerce Clause, the exception does not apply.[90]

B. The Lopez *Dicta on Domestic Relations*

The *Bailey* court also relied on dicta in the *Lopez* case indicating that the subject matter of domestic relations is reserved for the states, so Congress may not regulate it under the commerce power.[91] The *Lopez* majority was concerned that "under the Government's 'national productivity' reasoning, 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."[92] As the *Bailey* court noted, even Justice Breyer's dissent observed that family law would serve as a limit on the commerce power.[93] Specifically, Justice Breyer stated that to uphold the statute in *Lopez* would not be "to hold that the Commerce Clause permits the Federal Government to . . . regulate 'marriage, divorce, and child custody.'"[94] Based

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De La Rama, 201 U.S. 303, 307 (1906).

87. *See Ankenbrandt*, 504 U.S. at 703-04 (affirming the domestic relations exception with regard to divorce and alimony decrees and child custody orders, but holding that it does not apply to a tort action between child and parent for abuse).

88. *Bailey*, 902 F. Supp. at 729.

89. *See Ankenbrandt*, 504 U.S. at 695-97 (stating that the domestic relations exception is based on an interpretation of 28 U.S.C. § 1332, the federal diversity jurisdiction statute, not the Constitution); *see also Hampshire*, 892 F. Supp. at 1330 (noting that the exception is a rule "in which the Court has adopted a narrow interpretation of the federal courts' civil diversity jurisdiction to exclude domestic relations cases").

90. *See Ankenbrandt*, 504 U.S. at 695-97; *Sage*, 906 F. Supp. at 92; *Hampshire*, 892 F. Supp. at 1330-31 ("[B]ecause the domestic relations exception is rooted in a narrow construction of the diversity jurisdiction statute, . . . the rule has no application where there exists an independent basis for federal jurisdiction beyond diversity of citizenship. . . . Accordingly, the domestic relations exception has no application.").

91. *Bailey*, 902 F. Supp. at 727.

92. *Lopez*, 115 S. Ct. at 1632.

93. *Bailey*, 902 F. Supp. at 727.

94. *Lopez*, 115 S. Ct. at 1661 (Breyer, J., dissenting) (citation omitted).

on this dicta, the *Bailey* court held that the CSRA "sounds, walks, and looks like a domestic relations statute and aims the central government down a slippery slope where it should not be."[95]

While reliance on the *Lopez* dicta may be warranted if Congress were to assert federal jurisdiction over marriage, divorce, or child custody, the CSRA does not go this far. Instead, it merely enforces a past due state order to pay child custody through criminal sanctions.[96] Thus, the CSRA does not permit federal courts to make child custody decrees or determine a fair amount of child support; it allows them to punish nonpayers. As such, it does not invade any "core" family law prerogative of the state because it does not allow federal courts to create or modify orders. Many courts have distinguished between "'core' cases, such as a petition for divorce or a request for child custody," and "'peripheral' domestic relations cases, such as an interspousal tort suit for interference with custody rights."[97] In fact, many other federal laws touch on domestic relations law without regulating marriage, divorce, and child custody orders.[98] Thus, as the *Hampshire* court noted, "The

95. *Bailey*, 902 F. Supp. at 730.

96. 18 U.S.C. § 228(c) (1993 & Supp. 1995); *see also Hampshire*, 892 F. Supp. at 1330-31 ("The present case does not involve a diversity action directed at obtaining a divorce or child custody decree or for an award of alimony. It is a criminal action undertaken pursuant to an express grant of jurisdictional authority.").

97. Barbara A. Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571, 603 & n.206 (1984) (exploring judicial distinctions between "core" family law cases, involving matters such as a "request for child custody" and "peripheral" cases, which do not require inquiry into the parties' relationships, in the context of diversity jurisdiction); *see also Ankenbrandt*, 504 U.S. at 703-04 (1992) (distinguishing divorce, alimony, and child custody orders from other suits, such as a tort claim for abuse).

Apart from the *Lopez* dicta, it is actually questionable under Supreme Court precedent whether Congress could regulate all family law, as well as other traditional subject matters of the state, as long as it could show the requisite "substantial effects" on interstate commerce. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) (holding that a congressional act pursuant to the Commerce Clause is valid even though it intrudes on a traditional state function); *see also* Frickey, supra note 11, at 720. Dean Jesse Choper argues that the division of power between the states and the federal government should be kept within the political process. Jesse Choper, *Did Last Term Reveal "A Revolutionary States' Rights Movement within the Supreme Court"?*, 46 CASE W. RES. L. REV. 663, 670 (1996).

98. *See* Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1721-29 (1991) (discussing how federal laws on welfare programs, taxation, bankruptcy, constitutional law, and pensions regulate family relationships).

[*Lopez*] Court's opinion cannot be read to suggest that *all* federal legislation touching upon domestic relations is necessarily invalid."[99]

C. *Federalism and Comity*

The *Mussari* court held that "[p]rinciples of federalism and comity also support this court's finding that the CSRA is unconstitutional."[100] The court was concerned that application of the statute may require federal courts to review state court orders, in violation of federalism and comity "principles" if a defendant challenged the validity of an underlying state court order.[101] Similarly, the *Bailey* court cited *Younger v. Harris*[102] for the proposition that "comity" requires federal courts to respect state court judgments.[103] Thus, it concluded that the CSRA may require federal courts to review state court orders, in violation of the Constitution.[104]

Reliance on the *Younger* doctrine in this situation is misplaced. This doctrine requires federal court abstention when allowing jurisdiction would interfere with an ongoing state criminal proceeding.[105] *Younger* has been extended to include ongoing state civil proceedings,[106] and some exceptional state civil proceedings that are not ongoing.[107] In fact, a prosecution brought in federal court under the CSRA may call for *Younger* abstention if there is a concurrent state proceeding concerning the defendant's child support payments. However, the *Younger* doctrine has not been used to find statutes unconstitutional; to do so would require an unprecedented extension of the doctrine.[108] Thus, while the

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99. *Hampshire*, 892 F. Supp. at 1330 (emphasis in original).

100. 894 F. Supp. at 1367.

101. *Id.*

102. 401 U.S. 37 (1971).

103. *Bailey*, 902 F. Supp. at 728.

104. *Id.* at 728-29.

105. *Younger*, 401 U.S. at 54.

106. *See, e.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) (extending the *Younger* doctrine to an ongoing "noncriminal judicial proceeding").

107. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 17 (1987) (holding that because Texaco did not give Texas courts an opportunity to hear the case, there is no basis for concluding Texas law and procedures are so deficient that the *Younger* abstention is inappropriate).

108. *See Hopper*, 899 F. Supp. at 393 ("[T]his Court can find no case where those 'principles' were held to be grounds to declare an act of Congress unconstitutional. . . . The abstention doctrine is designed to promote federal-state comity, under which the court

doctrine may apply to certain individual cases under the CSRA,[109] it cannot be used to find the CSRA unconstitutional.

III. APPLICATION OF THE CSRA

The arguments made by courts invalidating the CSRA did not come out of thin air; although they are not sufficient to invalidate the actual law, concerns about the federalization of criminal and family law are serious and will manifest themselves in application of the CSRA. The problem with the CSRA is not its constitutionality, or the lack of a national problem. Instead, the problem is that the statute is a naked enforcement scheme, designed not as a substantive provision, but as a jurisdictional hook to bring "deadbeat dads" into federal court.

There are some serious hurdles to effective application of the CSRA that bring its value into question. In applying the CSRA, a federal judge need only determine whether there is a state order that has been unpaid for over a year or that is over $5,000, whether the child lives in a different state than the defendant, and whether the defendant "willfully" failed to pay support (i.e., had sufficient income to pay but did not).[110] As the *Mussari* and *Bailey* courts noted, there are many other issues that a defendant could potentially raise, including a challenge to the validity of the state court order, or present ability to find employment.[111] Although these concerns are not sufficient to invalidate the CSRA, they may lead to application of the abstention doctrines in many cases. In fact, at least one of the defendants challenging the CSRA argued for abstention as an alternative ground for dismissing his case.[112]

The abstention doctrines are used by federal courts to abstain from exercising jurisdiction over a certain case or claim due to federalism and comity concerns, when such jurisdiction would interfere with a particular state function or interest.[113] Procedural-

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may refuse to exercise jurisdiction in a matter which would disrupt the establishment of a coherent state policy.").

109. *Cf. Hopper*, 899 F. Supp. at 393 ("In the present case, the *Younger* abstention is inapplicable because there are no pending state criminal proceedings which this Court may defer to."); *Hampshire*, 892 F. Supp. at 1331 ("In the present case, the *Younger* abstention is inapplicable because there are no pending state proceedings.").

110. 18 U.S.C. § 228 (1994).

111. *Bailey*, 902 F. Supp. at 729; *Mussari*, 894 F. Supp. at 1367.

112. *See Hampshire*, 892 F. Supp. at 1331 (asserting *Younger* and *Burford* abstention).

113. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 12.1 (2d ed. 1994).

ly, when a federal court abstains, it may retain jurisdiction over the federal issue and stay the proceedings pending resolution of the state issue in state court; or, depending on the type of abstention, it may dismiss the case altogether.[114] Understandably, abstention can lead to lengthy and inefficient litigation, as the parties must go back and forth between state and federal court in order to have all their claims heard.

Two abstention doctrines, *Burford* and *Younger* abstention, may be particularly relevant in cases under the CSRA. In *Ankenbrandt*, the Supreme Court observed that *Burford* abstention "might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody."[115] *Burford* abstention is proper when a case presents an issue of unique importance to a state, and jurisdiction would disrupt state policymaking or a state administrative process on the issue.[116] For example, in *Burford v. Sun Oil Co.*,[117] the Supreme Court held that a federal court should refuse jurisdiction over a suit for an injunction concerning the grant of an oil drilling permit by a Texas commission despite the fact that the claim posed a colorable federal question, because Texas had unique concerns for consistency and expertise in administrating the grant of drilling permits.[118] Likewise, *Burford* abstention could apply in the domestic relations context because many states have developed judicial expertise in "core" family law cases, which in most states may only be heard in certain specialized courts.[119] Thus, if a defendant prosecuted in federal court under the CSRA legitimately challenged the underlying state custody or support orders, the federal court could simply dismiss the case.[120]

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114. *Id.* § 12.3.

115. 504 U.S. 689, 705 (1992).

116. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-15 (1976); *see also* Atwood, *supra* note 97, at 605-06 (explaining *Burford* abstention).

117. 319 U.S. 315 (1943).

118. *Id.* at 332-34.

119. Atwood, *supra* note 97, at 606-07 & n.229. Professor Atwood poses an argument that *Burford* abstention may not apply to core domestic relations cases because, arguably, "[s]tate laws governing divorce and child custody, while comprehensive, ordinarily will not amount to a complex regulatory scheme of the type that triggered abstention in Burford itself." *Id.* at 607. Still, Professor Atwood acknowledges that the Court would most likely approve of *Burford* abstention in the domestic relations context, as "[a] complex regulatory scheme . . . is not an essential element of *Burford* abstention." *Id.* at 608-09.

120. *See* CHEMERINSKY, *supra* note 113, § 12.3 ("The effect of *Burford* abstention is thus not to postpone federal court review but to prevent it entirely.").

Apart from *Burford* abstention, there could be abstention in cases brought under the CSRA under *Younger v. Harris.*[121] As noted earlier, *Younger* abstention could apply to a CSRA prosecution if there is an ongoing state proceeding regarding the status of the support order.[122]

Arguably, there is no reason to believe that abstention will be applied under the CSRA any more or less than in any other area of federal jurisdiction. It will not apply to cases where the status of the parties is settled as a matter of state law.[123] However, given the federal courts' animosity toward domestic relations issues[124] and concerns about the federalization of criminal law,[125] it is foreseeable that judges will use these abstention doctrines liberally in applying the CSRA.

The fact that many cases under the CSRA may never reach the merits because of underlying state claims expose the statute for what it really is: a naked enforcement provision for an interstate debt, devoid of any substance. Ironically, it is just this lack of substance that keeps the CSRA from being an invalid exercise of the commerce power. As noted earlier, if the statute did give federal courts the substantive power to grant and modify child support orders, it may be unconstitutional under *Lopez.*[126] The question

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121. 401 U.S. 37 (1971).

122. *See supra* notes 105-09 and accompanying text (asserting that while *Younger's* abstention doctrine may not be used to entirely invalidate the CSRA, such abstention may be called for in individual cases).

123. *See Ankenbrandt*, 504 U.S. at 706 ("Where, as here, the status of the domestic relationship has been determined as a matter of state law, and in any event has no bearing on the underlying torts alleged, we have no difficulty concluding that *Burford* abstention is inappropriate in this case."); *Hopper*, 899 F. Supp. at 394 ("There are no issues of Indiana law which are of great importance from a public policy perspective immediately apparent in this case. Therefore, this Court concludes that it need not abstain from deciding the case at bar.").

124. *See infra* notes 132-33 and accompanying text (summarizing Professor Judith Resnik's view that domestic relations is an example of the exclusion of women from federal courts).

125. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1168 (1995) [hereinafter Brickey, *Criminal Mischief*] (highlighting Justice Rehnquist's warning about the duplication of state criminal law in federal courts); Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 968 (1995) (describing the plan of the Committee on Long Range Planning of the Judicial Conference of the United States, which recommends decreasing federal criminal jurisdiction).

126. *See supra* notes 91-99 and accompanying text.

remains, then, why Congress would want to federalize this offense, and whether it makes sense to federalize the nonpayment of child support.

IV. SOCIETAL MOBILITY AND THE FEDERALIZATION OF CRIMINAL LAW

An increase in geographic mobility has led to extensions of the commerce power by Congress and the courts.[127] As society has increasingly become more mobile, state borders tend to disappear, and more and more activities become linked economically.[128] As a result, many problems that were once local have now become national.[129] Thus, it is not surprising that Congress has responded by federalizing traditionally "local" crimes, such as the failure to pay child support.[130] Many crimes, by their unique interstate or international nature, demand federal responses.[131] The CSRA does address a national problem, arguably a wise reason for Congress to assert its commerce power and regulate.

Additionally, the CSRA marks a turning point in federal jurisdiction by providing greater access to federal courts for women. In 1991, Professor Judith Resnik documented how women have been perpetually excluded from the federal courts, both in terms of participation as judges and staff, as well as in the subject matter of federal jurisdiction.[132] Specifically, Professor Resnik argued that domestic relations law, an area traditionally associated with women,

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127. *See* Brickey, *Criminal Mischief, supra* note 125, at 1141-45 (tracing the increase in cultural mobility and the corresponding rise in the federalization of crime).

128. *See Lopez*, 115 S. Ct. at 1628 (stating that the modern expansion of Congress's Commerce Clause authority "was a recognition of the great changes that had occurred in the way business was carried on in this country"); *see also* Brickey, *Crime Control, supra* note 13 ("[A]s commerce inexorably forged a national economy, the line began to blur. . . . [P]roblems that had formerly been localized in one state could quickly migrate to others.").

129. *See* Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1293 (1995) ("[T]he public has come to rely increasingly on the federal government to provide solutions to any important national problem, including crime.").

130. Currently, there are over 3,000 federal crimes on the books. Beale, *supra* note 129, at 1282; Brickey, *Criminal Mischief, supra* note 125, at 1135 n.1.

131. *See, e.g.*, John C. Jeffries, Jr. & Honorable John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1098 (1995) (arguing that investigating and prosecuting organized crime particularly needs federalization); *see also* Beale, *supra* note 129, at 1296 (suggesting criteria for federal criminal jurisdiction).

132. *See generally* Resnik, *supra* note 98.

has been repeatedly disdained and marginalized by the federal courts.[133] Although it may not have been Congress's explicit intent, enactment of the CSRA acknowledges what is primarily a women's problem,[134] bringing it to national attention and into the federal system.[135] However, it is questionable whether this is a convincing justification for federalization.

Federalization also occurs "in order to emphasize the importance of the issue involved."[136] Thus, the current political culture dictates that if Congress does not address an important problem through legislation, the public perceives that it does not care about the problem.[137] As a result, traditionally local issues are often federalized purely for political gain.[138] Most recently, politicians have sought political capital by being "tough on crime";[139] likewise, the CSRA's attack on "deadbeat dads" certainly achieves this goal.

Additionally, federal criminal law is often desirable because the federal system has more resources at its disposal, and generally imposes greater sentences than state law. Many state justice systems are strapped for resources and overwhelmed by caseloads, whereas federal resources for investigators and prosecutors are more plentiful.[140] Thus, "the federalization of crimes traditionally

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133. *Id.* at 1756-57.

134. The House Report on the CSRA notes that "ten million women head households with children whose father is absent from the home," and that "[t]he poverty rate of families with children from an absent father has risen steadily throughout the 1980s." H.R. REP. No. 771, 102d Cong., 2d Sess., at 4-5 (1992).

135. The Violence Against Women Act also federalizes and highlights a women's issue, making it a federal crime to cross a state line with the intent to harm a spouse or domestic partner. *See* 18 U.S.C. § 2261 (1995).

136. William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 723 (1995)

137. *See id.* at 724; Beale, *supra* note 129, at 1293.

138. Marshall, *supra* note 136, at 724.

139. Professor Sanford Kadish traces the typical federalization of a state criminal law as follows:

> Some dramatic crimes or series of crimes are given conspicuous media coverage, producing what is perceived, and often is, widespread public anxiety. Seeking to make political hay, some legislator proposes a new law to make this or that a major felony or to raise the penalty or otherwise tighten the screws. Since other legislators know well that no one can lose voter popularity for seeming to be tough on crime, the legislation sails through in a breeze.

Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1248 (1995).

140. *See* Beale, *supra* note 129, at 1293; *see also* Honorable J. Anthony Kline, *Comment: The Politicalization of Crime*, 46 HASTINGS L.J. 1087, 1088 (1995) (noting that

prosecuted by the states and resulting [federal law enforcement] budget increases could be seen as a form of in-kind fiscal relief for state and local government."[141] In the case of the CSRA, it is evident that one of the underlying reasons Congress decided to federalize the crime of failure to pay child support was to enable the use of federal resources in child support nonpayment cases. As the legislative history shows, the CSRA is a duplication of existing state law,[142] so its only substantive effect is to transfer cases to federal court, thereby transferring resources.

V. TOWARD A REASONABLE USE OF FEDERAL POWER

Do we really need federal resources here? We do not need them in the same way that we need federal money and sophistication for investigating and prosecuting organized crime, or interstate and international drug gangs.[143] One can hardly imagine an interstate "gang" of "deadbeat dads" conspiring to deprive their children of support payments; cases falling under the CSRA are individual, discrete matters. While resources are obviously necessary for investigation and prosecution of these cases, there is no convincing reason why they have to come from a jurisdictional hook that arbitrarily transfers cases to federal court,[144] or that they have to come from the federal government at all.[145]

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while the federal judicial budget averages out to about $4 million per federal judge, the California budget is less than $1 million per judge).

141. Beale, *supra* note 129, at 1291 (explaining the opinion of one participant in a roundtable on federal jurisdiction).

142. The House Report on the CSRA acknowledges that states have provisions for enforcing child support orders among the states; however, the Report concludes that these provisions are not working. H.R. REP. NO. 771, 102d Cong., 2d Sess., at 5-6 (1992).

143. *See generally* Jeffries & Gleeson, *supra* note 131 (discussing the need for federal resources to attack organized crime).

144. Apart from the CSRA, Congress has made federal resources available to states for collection and prosecution of child support nonpayment cases through many other channels. H.R. REP. NO. 771, 102d Cong., 2d Sess., at 12-15 (1992).

145. The participants in a roundtable on the federalization of criminal law observed, "[T]he large federal tax burden places practical limitations on the resources that can be raised by the states. If federal taxes were reduced, states could increase their own taxes and correspondingly increase their expenditures for law enforcement." Beale, *supra* note 129, at 1291. Similarly, Professor Marshall asserts, "Logically, it would seem that the protection of the resources and the abilities of the state courts to effectively function should be the top judicial priority. . . . A political culture that treats the federal courts as the premiere guardians of important rights and thereby relegates the state courts to essentially secondary status, can only exacerbate the state courts' resource concerns." Marshall, *supra* note 136, at 735-36.

One may argue that federal resources are necessary to attack the difficult interstate cases.[146] Still, states already have the legal means to handle these cases. The Uniform Reciprocal Enforcement of Support Act, adopted by most states, provides for reciprocal enforcement of child support orders obtained in another state.[147] Thus, "the fact that deplorable conduct is widespread in the United States, and in that sense constitutes a national problem, hardly warrants making that conduct a federal crime when it is already adequately covered by state law."[148] Practically speaking, the states should be able to handle interstate cases, as they are distinct, individual cases, not organized crime syndicates.

Professor Jonathan Macey observed that federal regulators will rationally choose not to regulate in an area where it will be more efficient to stay out if, over time, local regulators have developed expertise and essentially built up a capital asset in a particular area.[149] As an example, he cites Delaware's corporate law, which dominates the subject area despite the fact that Congress could federalize it under the commerce power.[150] Similarly, states have built up expertise in the area of domestic relations, and many have specialized courts to handle domestic relations cases.[151] Congress should recognize that family law, like Delaware's corporate law, is an area where states have built up significant expertise and efficiency over time, accumulating value as a "capital asset."[152]

This assertion is certainly not meant to insinuate that domestic relations law is "below" the federal courts, as the judiciary has sometimes suggested;[153] it is merely a recognition that states have developed expertise in this area, which cannot be disregarded. This contention is also not meant to forewarn that Congress is leading

146. *See* Gorelick & Litman, *supra* note 125, at 974-75 (arguing that the federal government is "uniquely positioned" to prosecute certain interstate cases that will otherwise never be reached by the states).

147. *See, e.g.*, OHIO REV. CODE ANN. §§ 3115.01-.34 (Anderson 1994). Most states have also criminalized the failure to pay child support. H.R. REP. NO. 771, at 5-6.

148. Kadish, *supra* note 139, at 1249.

149. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 268 (1990).

150. *Id.* at 277-78.

151. *See supra* note 119 and accompanying text.

152. *See* Macey, *supra* note 149, at 279-80.

153. *See supra* notes 132-33 and accompanying text (summarizing Professor Judith Resnik's assertion that domestic relations law has been treated with disdain and marginalized by federal courts).

down a "slippery slope"[154] that will eventually federalize all family law. In fact, the Department of Justice has emphasized that it will only prosecute the most serious offenders under the CSRA who have previously outsmarted state enforcement agencies.[155]

This assertion does mean, however, that enactment of the CSRA is not the most efficient or effective way to deal with the problem of "deadbeat dads." Like most of the recent federal criminal statutes, it is another example of federalization run rampant.[156] Moreover, it is a wasteful duplication of state law, enacted to emphasize and address a particular politically "hot" issue with federal resources. As such, it is not a wise or principled use of federal commerce power.

VI. CONCLUSION

The CSRA is one of many recent examples of federal criminal law running out of control. It may be constitutional, but it is not a wise use of federal resources or commerce power. With increased societal mobility, state courts must be able to deal with a variety of issues which involve crossing borders. The answer to this is not to federalize everything that walks across a state line. While some problems are essentially national and call for the use of the federal government, child support recovery is not one of them. Federal government is not uniquely able to solve the problem of "deadbeat

154. *See Bailey*, 902 F. Supp. at 730 (warning that Congress is heading down a "slippery slope" by encroaching on family law).

155. Jamie Gorelick and Harry Litman assert that the prosecutorial criteria are aimed selectively at the few offenders who have been successful in abusing state jurisdictional boundaries, the precise offenders who justify federal presence. Gorelick & Litman, *supra* note 125, at 974-75. Even with this limit, however, there is increasing pressure to prosecute all cases falling under the CSRA. *Deadbeat Dad Enforcement: DOJ on Tightrope*, DOJ Alert, January 2-16, 1995, found in Westlaw, JLR.

History has shown, however, that prosecutorial discretion is not always the best mechanism for limiting federal enforcement merely to cases that states cannot handle. Federal courts currently handle numerous drug cases that involve small-time, local violators. Brickey, *Criminal Mischief, supra* note 125, at 1159-61. In fact, Alfonzo Lopez was a student whose case had no particular facts that set it apart from other state gun possession violators. Brickey, *Crime Control, supra* note 13, at 804-05.

156. Scholars have repeatedly characterized the federalization of criminal drug law as the best example of overfederalization and waste of resources. *See, e.g.*, Kadish, *supra* note 139, at 1251; Brickey, *Criminal Mischief, supra* note 125, at 1150-65.

dads." Given the proper legal and financial means, states can and should be able to address this problem just as effectively as the federal government.

REBECCA A. WISTNER