THE CHILD SUPPORT RECOVERY ACT OF 1992: SQUEEZING BLOOD FROM A STONE

Amy E. Watkins

I. INTRODUCTION

Jeffrey Nichols is a 47-year-old investment adviser who earns approximately $180,000 per year[1] and lives in a home valued at $500,000.[2] Mr. Nichols also owes over $580,000 in overdue child support payments.[3] In order to avoid paying this child support, he hid his money by transferring it into separate bank accounts in two foreign countries and three different states.[4] He even denied that he fathered the three children produced from his sixteen-year marriage to his first wife.[5] In 1990, the State of New York issued a warrant for his arrest when he only owed $68,000.[6] However, Mr. Nichols avoided multiple efforts to enforce his child support obligation by

---

[1]*Justice Ready to Save 'Deadbeat Parent' Law*, CHARLESTON GAZZETTE, Aug. 29, 1995, at 6B.

[2]*Computer System Will Track Deadbeat Dads*, ROCKY MOUNTAIN NEWS, Aug. 27, 1995, at 3A.

[3]*Id.*

[4]*Justice Ready to Save 'Deadbeat Parent' Law*, *supra* note 1.

[5]*Id.*

[6]Mr. Nichols was ordered to pay more than $9,000 each month in child support in 1990. Joseph F. Fried, *Most Notorious Deadbeat Dad Cuts Pay-Up Deal for Freedom*, PATRIOT LEDGER, Dec. 8, 1995, at 27. In the mid-1980s, he made as much as $300,000 per year; however, Mr. Nichols claimed to have suffered business reversals in the late-1980s and went into a deep depression. *Id.* Interestingly, he generously continued to lavish gifts upon his second wife. *Id.* Shortly before his second wife's death in 1995, Mr. Nichols was arrested and jailed for contempt for failure to pay child support by Justice Phyllis Gangel-Jacob, who presided over his original divorce from Ms. Kane, his first wife. *Id.* During subsequent negotiations toward an agreement for repayment, Saul Edelstein, one of Mr. Nichols' attorneys, said to Ms. Kane, "Here's the fur and jewelry, you sell it." Ms. Kane replied, "I can't handle that. He bought this for his second wife while my children were starving." *Id.*

moving from state to state and, at one point, to Canada.[7] Finally, in August of 1995, Mr. Nichols was arrested by the Federal Bureau of Investigation ("FBI") under the 1992 Child Support Recovery Act.[8]

The constitutionality of the Child Support Recovery Act is presently being challenged and the Act has been invalidated in some federal courts.[9] Recently, in *United States v. Schroeder*[10] and its companion case, *United States v. Mussari*,[11] the United States District Court for Arizona found the Act to be unconstitutional under the Commerce Clause, which empowers Congress to regulate matters affecting commerce occurring among the states.[12] Pivotal to the district court's analysis was the Supreme Court's

---

[7]*Computer System Will Track Deadbeat Dads*, *supra* note 2.

[8]18 U.S.C. § 228 (Supp. IV 1992). For the text and a discussion of the Act, see *infra* note 73 and accompanying text.

After being incarcerated for four months, Mr. Nichols was freed when he and his former wife reached a court-approved agreement calling for Nichols to pay 10 percent of the first $25,000 of his gross annual income, 30 percent of the next $100,000 and 25 percent of any amount above $125,000. Fried, *supra* note 6 at 27.

[9]*See* United States v. Parker, 64 U.S.L.W. 2313 (E.D. Pa. 1995); United States v. Schroeder, 894 F. Supp. 360 (D. Ariz. 1995); United States v. Mussari, 894 F. Supp. 1360 (D. Ariz. 1995); United States v. Bailey, 902 F. Supp. 727 (W.D. Tex. 1995).

[10]894 F. Supp. 360 (D. Ariz. 1995).

[11]894 F. Supp. 1360 (D. Ariz. 1995). Both the *Mussari* and *Schroeder* decisions were based on the United States Supreme Court's recent ruling in United States v. Lopez, 115 S. Ct. 1624 (1995), limiting Congress's power under the Commerce Clause. *Mussari*, 894 F. Supp. at 1361. The court also held that the Child Support Recovery Act violated the Tenth Amendment and breached the principles of federalism and comity. *Id.* at 1367. Except for the background facts, both *Mussari* and *Schroeder* are identical. Therefore, in the interest of simplicity, they will be collectively referred to as *Mussari*.

[12]The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3. The United States Supreme Court's interpretation of Congress's authority under the Commerce Clause has changed dramatically over the past two centuries and has proven to be cyclical in nature. Initially, the Court ruled that Congress possessed the power to regulate all activity that had any interstate impact, regardless of how indirect it may have been. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824) (holding that Congress may legislate with respect to "commerce which concerns more [s]tates than one"). However, between 1887 and 1937, the Court repeatedly invalidated congressional action under the Commerce Clause. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 11-12 (1895) (distinguishing between state police power and congressional authority to regulate interstate commerce in holding that Congress could not regulate the manufacture of goods because "commerce succeeds

recent decision in *United States v. Lopez*,[13] limiting Congress's authority to regulate under the Commerce Clause and holding that an "explicit connection with or effect on interstate commerce" is necessary to uphold legislation.[14]

It is debatable whether the Child Support Recovery Act should be interpreted under Congress's Commerce Clause power. A second analysis, however, interpreting the Act under the Spending Clause, which allows Congress to tax and spend for the general welfare,[15] might prove more favorable to the Act's future. If the Supreme Court declares the Act unconstitutional, Mr. Nichols and other parents like him will consistently be able to avoid paying child support by moving across state lines.

This Comment will explore the constitutional issues stemming from the Child Support Recovery Act, particularly the Commerce Clause and Congress's spending power. Part II of this Comment will review the history of state and federal child support laws; it will also examine the statistics of those who need and those who receive child support. As the federal courts

---

to manufacture, and is not a part of it"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating provisions of the National Industrial Recovery Act of 1933 because the regulated activities occurred after the flow in interstate commerce had ceased and their effect on interstate commerce was merely indirect).

After the depression and in the face of New Deal expansion in the late 1920s and early 1930s, the Court returned to recognizing Congress's power as plenary under the Commerce Clause. *See, e.g.*, NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 41 (1937) (upholding a labor relations regulation with respect to interstate sales because work stoppage "would have a most serious effect upon interstate commerce"); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) ("The only questions are: (1) whether Congress had a rational basis for finding . . . [the activity] affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.").

The Supreme Court's deference toward Congress's regulations under the Commerce Clause continued until United States v. Lopez, 115 S. Ct. 1624 (1995), which invalidated the Gun Free School Zones Act because the legislation regulated purely intrastate activities.

[13]115 S. Ct. 1624 (1995).

[14]*Id.* at 1631.

[15]U.S. CONST. art. I, § 8, cl. 1. The Spending Clause provides that "Congress shall have the Power . . . to pay the debts and provide for the common Defense and general Welfare of the United States." *Id.* Congress may condition the federal appropriation of money upon a state's action or inaction, and thereby indirectly regulate the state's activity. *See* Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (allowing credit against federal taxes for employers who contributed to a state-enacted unemployment plan); South Dakota v. Dole, 483 U.S. 203, 206 (1987) (holding that Congress may regulate "indirectly under its spending power to encourage uniformity in the [s]tates' drinking ages").

have undertaken to determine the Act's constitutionality under the Commerce Clause, Part III will review the history of Congress's commerce power. Part IV will examine the decisions of different courts which have interpreted the Act as both constitutional and unconstitutional. Finally, Part V will demonstrate that the Child Support Recovery Act is not only a legitimate exercise of Congress's power under the Commerce Clause, but also under the Spending Clause, and therefore, the Child Support Recovery Act is constitutional.

II. THE HISTORY OF STATE AND FEDERAL CHILD SUPPORT REGULATION

A. THE EARLY INVOLVEMENT OF FEDERAL AND STATE GOVERNMENTS IN CHILD SUPPORT ENFORCEMENT

Child support enforcement traditionally has been a state responsibility and, accordingly, has been regulated by the states.[16] Recently, however, the federal government has become involved in this area, partially due to the increased mobility of American citizens and conflicting state regulations regarding child support enforcement.[17]

One common approach to enforcing child support orders in sister states is to register the judgment in a court having jurisdiction over the absent parent.[18] This enforcement mechanism does not always work, particularly for those who are at or near the poverty level and cannot afford the

---

[16]Natural law directs that parents owe a responsibility to support their offspring. Janelle T. Calhoun, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 MERCER L. REV. 921, 924 (1995). In the United States, the legal obligation to support children arose primarily from agency principles. *Id.* at 924-25. State regulations of child support obligations resulted in fifty-four different plans implemented by the fifty states, the territories of the United States, and the District of Columbia. *Id.* Each of these are judicially-based systems, which makes enforcement of child support obligations practically impossible for those unable to hire a lawyer and pay associated court fees. *See* Paula Roberts, *Nationalization and Federalization of Child Support*, 13 No. 7 Fair$hare 8 (1993).

[17]*See* Calhoun, *supra* note 16, at 924.

[18]U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause provides that each state must recognize "public Acts, Records and judicial Proceedings of every other state." *Id.*; *see also* Christmas v. Russell, 72 U.S. (5 Wall.) 290, 302 (1866) ("If a judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere in the courts of the United States.").

attorneys' fees and filing costs associated in registering the judgment. When a non-paying parent moves from state to state, registering each judgment becomes costly.

Another means of compelling a parent to pay a child support obligation is to provide for personal jurisdiction over the parent who, although not a resident of the state, voluntarily enters the state or communicates with persons in the state for limited purposes.[19] While every state now utilizes some form of "long arm" jurisdiction to exercise control over a non-custodial parent who fails to pay child support obligations, application of these statutes to child support cases is difficult because of their ambiguity and vague wording.[20]

Congress has attempted to assist the states in enforcing child support orders through legislation such as Aid to Families with Dependent Children.[21] Although non-payment of child support has become a national problem,[22] it is still largely governed by state law.[23] Despite federal efforts, difficulty arises when parents live in different states which usually have different enforcement mechanisms, thereby thwarting collection.

---

[19]BLACK'S LAW DICTIONARY 942 (6th ed. 1990) (defining "long arm statutes"). *See* International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945) (allowing a state to obtain personal jurisdiction if there is sufficient contact between the state and the non-resident if the non-resident receives adequate notice of the proceeding and traditional notions of justice and fair play are not offended).

[20]Calhoun, *supra* note 16, at 926-27. Often, the constitutionality of the long-arm statute is challenged. *See, e.g.*, Georgia Dep't of Human Resources v. Estes, 432 S.E.2d 613 (Ga. 1993) (reversing trial court's denial of motion to serve defendant in another state for action regarding recovery of child support).

[21]*See infra* notes 24-33 and accompanying text (discussing Aid to Families with Dependent Children).

[22]Calhoun, *supra* note 16, at 924.

[23]*See supra* note 16 and accompanying text. Most states have agencies which administer and enforce child support payments. Calhoun, *supra* note 16, at 940. While the amount of non-paying parent cases is increasing, the funding and staffing of these agencies are decreasing. *Id.* at 940-41.

Many states allow for criminal prosecution of non-paying parents. *See, e.g.*, CAL. PENAL CODE § 270 (West 1988); ALASKA STAT. § 11.51.120 (1978). The cost of extradition or hiring an attorney in another state once a non-supporting parent crosses state lines often prevents the custodial parent from obtaining any relief. *See supra* note 16 and accompanying text.

1. AID TO FAMILIES WITH DEPENDENT CHILDREN

In 1935, Congress attempted to provide for the needs of children when it created Aid to Families with Dependent Children ("AFDC")[24] under Title IV-A of the Social Security Act. AFDC, administered by the Administration for Children and Families, United States Department of Health and Human Services, provides cash grants as income support for the basic maintenance of needy families.[25] Originally, the AFDC program (also known as "welfare") was designed to give each state federal money to support only those children with disabled or deceased fathers and children whose fathers had abandoned the family.[26] By 1985, however, almost 90 percent of

---

[24]Act of Aug. 14, 1935, ch. 531, title IV, § 1, 49 Stat. 627 (codified as amended 42 U.S.C. § 601 (1976 & Supp. III 1979)).

[25]MADELYN DEWOODY, MAKING SENSE OF FEDERAL DOLLARS: A FUNDING GUIDE FOR SOCIAL SERVICE PROVIDERS 77 (1994). The Secretary of Treasury reimburses those states which have approved plans providing services and aid to needy families with dependent children. 42 U.S.C. § 603 (1976 & Supp. III 1979). The term "dependent child" is defined in the statute as:

> [A] needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with the standards prescribed by the Secretary) a student regularly attending school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

Id. at § 606(a).

[26]Calhoun, *supra* note 16, at 925. Today, it is a welfare program which, critics feel, fails to accurately provide for lone-parent families or establish independence by improving educational and technical skills. *See* DUNCAN LINDSEY, THE WELFARE OF CHILDREN 230 (1994).

AFDC recipients had a parent, typically the father,[27] who was alive and lived outside of the home but was not supporting his children.[28]

The purpose of AFDC funding is to "encourag[e] the care of dependent children in their own homes or in the homes of relatives by enabling each state to furnish financial assistance and rehabilitation . . . to needy dependent children."[29] This goal reflects the overwhelming sentiment of the federal government to ensure financial income to children from broken homes.[30] States which choose to participate in the program typically assist the AFDC recipient with state funds which are then recouped, up to seventy-five percent, from the federal government.[31] While AFDC was originally a small program intended to help a narrow class of families, it has greatly expanded into a highly controversial welfare effort providing income to over three million poverty-stricken American families.[32] AFDC funding to these families could be minimalized, if not completely eradicated, by better enforcement of child support obligations.[33]

---

[27]Fathers are not, by any means, the only parents failing to pay a child support obligation; approximately eight percent of obligors are mothers. Francine Griggs, *Deadbeat Mother Goes to Jail*, THE CINCINNATI POST, Aug. 29, 1995, at 1A.

[28]Calhoun, *supra* note 16, at 925.

[29]42 U.S.C. § 601 (1976).

[30]*Compare* Roger J.R. Levesque, *Looking to Unwed Dads to Fill the Public Purse: A Disturbing Wave in Welfare Reform*, 32 U. LOUISVILLE J. FAM. L. 1, 7 (1994) ("The program was intended to replenish state funds for widows with young children relying on state pension programs.") *with* James I. O'Hern, *Aid to Families with Dependent Children and Emergency Assistance: New Jersey's Aid to Homeless Families*, 13 SETON HALL LEGIS. J. 181 (1990) (discussing how AFDC grants are used to meet the needs of homeless families) *and* James C. Fontana, *State Regulations Implementing Federal AFDC Provisions Are Constitutional Despite Conclusive Presumption Concerning an Applicant's Income Availability*, 56 TEMP. L.Q. 773, 778 (1983) ("[C]ongress intended to limit the amount of AFDC funding by making the absence of parental support a prerequisite to AFDC eligibility . . . .").

[31]42 U.S.C. § 603; *see also* O'Hern, *supra* note 30. Each state establishes its own standard of need, the amount necessary "to maintain a hypothetical family at subsistence level." Shea v. Vialpando, 416 U.S. 251, 253 (1974).

[32]THE READER'S COMPANION TO AMERICAN HISTORY 1007 (Eric Foner & John A. Garraty eds., 1991). Currently, the largest single allocation of direct public assistance funds is to AFDC. *Id.* at 1142.

[33]*See infra* notes 81-91 and accompanying text (discussing statistics on child support).

B. THE ROLE OF FEDERAL GOVERNMENT REGULATIONS

Before 1950, custodial parents found it practically impossible to enforce a child support order against a noncustodial parent residing in another state. Generally, parents with custody could not afford the attorney's fees incurred by procedural burdens and difficulties in obtaining personal jurisdiction.[34]

1. UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

In 1950, the National Conference of Commissioners on Uniform State Laws responded to the plight of custodial parents and adopted the Uniform Reciprocal Enforcement of Support Act ("URESA").[35] By 1955, each state had adopted URESA and, throughout the past forty years, it has become the primary means of interstate enforcement of child support orders.[36] Until URESA, custodial parents could either: (1) hire an attorney licensed in the absent parent's state of residence (which could be across the country); or (2) extradite the absent parent for criminal prosecution for non-support.[37] For parents who were at or near the poverty level, however, the increased cost of attorney's fees prevented any action. URESA allowed the custodial

---

[34]Calhoun, *supra* note 16, at 925-26. Critics today still feel that the Child Support Recovery Act, a federal statute, should not be used to regulate areas which are traditionally regulated by state law because it depletes scarce resources. Jamie S. Gorelick and Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 974 (1995). However, the Department of Justice has proposed that Congress create concurrent jurisdiction to "address aspects of crime problems that the states cannot adequately address and that the federal government's unique attributes put it in a qualitatively better position to handle." *Id.* at 971. Particularly applicable to the Child Support Recovery Act, the Department gave the example of criminal activity that spreads across states, making it difficult for any one state to investigate and prosecute the activity or its participants. *Id.* at 971-72. In these cases, the Department concluded, "Even if the area is appropriate for state regulation, the particular case calls out for federal prosecution, which cannot be achieved without a grant of federal criminal jurisdiction." *Id.* at 972.

[35]Uniform Reciprocal Enforcement of Support Act of 1950, 9B U.L.A. 553 (1958 & Supp. 1993). URESA, also known as "The Runaway Pappy Act," was designed to enable custodial parents to enforce child support orders across state lines. Calhoun, *supra* note 16, at 927.

[36]CAROLYN K. ROYCE, A LEGISLATOR'S GUIDE TO CHILD SUPPORT ENFORCEMENT 48 (Carolyn K. Royce, *et al.* eds., 1980).

[37]*Id.*

parent to file in his or her own home state court,[38] which would forward the petition to the absent parent's state court[39] where the petition was placed on the docket for enforcement.[40] Each parent would then appear in his or her respective court for arguments. This procedure resulted in only one judgment, in the absent-parent's state, which did not need to be registered in sister states as long as the absent parent did not move. The responding state would then proceed against the absent parent under its own enforcement laws, avoiding any possible conflict of laws issue.[41]

Despite amendments to URESA in 1958 and 1968,[42] states have not acted uniformly and have either adopted the amendments or dropped entire sections of URESA from their code, significantly reducing the impact of URESA.[43] The result is that, in many cases, the difference in each state's laws prevents prosecution at all, as the order by the responding state is not always entitled to full faith and credit in the initiating jurisdiction.[44]

Further difficulties arise under URESA when the responding state requires the original support order to be registered according to its laws before its courts will even consider enforcement.[45] Responding courts currently do not place high priority on URESA cases because the responding

---

[38]The custodial parent's state is referred to as the "initiating state." *Id.*

[39]The absent parent's state is referred to as the "responding state." *Id.*

[40]The prosecutor in the responding state is responsible for enforcement of the child support order. This presents problems as state funds are used to collect child support in another state, and each state is more loyal to its own state orders. *Id.* at 49.

[41]Calhoun, *supra* note 16, at 927.

[42]Uniform Reciprocal Enforcement of Support Act of 1950, 9B U.L.A. 553 (1958 & Supp. V 1993).

[43]ROYCE, *supra* note 36, at 49.

[44]*See, e.g.*, Poirrier v. Jones, 781 P.2d 531 (Wyo. 1989) (stating that the responding court's order compelling payment of child support arrearage was not entitled to full faith and credit and cannot modify or supersede prior decree).

[45]*See, e.g.*, Commonwealth of Ky. ex rel. Ball v. Musiak, 775 S.W.2d 524 (Ky. Ct. App. 1989) (requiring registration of the foreign support order with the responding court before order may be modified).

state is not spending AFDC funds for the custodial parent; thus making enforcement of child support orders by sister states practically nonexistent.[46]

Finally, URESA has not been effective due to an overall lack of standardization.[47] While current regulations require the initiating state to provide the responding state with sufficient information upon which to act, each state requires different information.[48] Furthermore, each state's computer programs may not be compatible, making electronic linkup of state agencies impossible.[49]

URESA, intended to be the government's answer to child support enforcement problems, has become almost impotent, as the states have undertaken to modify or ignore its provisions. As federal spending continued to increase to families who were owed unpaid child support, Congress was forced to act again.

2. TITLE IV-D OF THE SOCIAL SECURITY ACT

In response to URESA's shortcomings and the states' failure to effectively use URESA, Congress added Title IV-D to the Social Security Act in 1975.[50] Under Title IV-D, states which participate in AFDC must maintain a program that enforces child support payments by locating absent parents, establishing paternity, and obtaining, modifying and enforcing support orders.[51] To this end, the federal government will match up to

---

[46]Calhoun, *supra* note 16, at 943. The responding state does not recoup expenditures to pursue the non-paying parent, as only the custodial parent receives AFDC payments which are refunded by the federal government. *Id.* Therefore, the state is more likely to use its resources to assist those custodial parents within its boundaries. *Id.*

[47]*Id.*

[48]*Id.*

[49]*Id.*

[50]Pub. L. No. 93-647 (codified at 42 U.S.C. §§ 651-87 (1990)).

[51]DEWOODY, *supra* note 25, at 85. Individuals eligible for AFDC payments are also automatically eligible for Title IV-D services without charge. *Id.* Families receiving Medicaid are eligible for only free child support enforcement services, while non-AFDC, non-Medicaid families may receive some services for free, while having to pay for others. *Id.*

Every state must provide these enforcement services free of charge to AFDC recipients and at a nominal charge to non-welfare families.[53] If a state does not provide these services as mandated by the statute, it risks forfeiting federal funding.[54]

AFDC expenditures are recouped when AFDC recipients assign their right to child support to the state.[55] As long as the custodial parent continues to receive AFDC payments, child support payments may be collected by the state, which then distributes the payments.[56] Title IV-D created the Office of Child Support Enforcement ("OCSE"), which established administrative regulations that govern state plans.[57] Each state program is administered individually by Child Support Recovery Units ("CSRUs").[58]

Once again, the state plans clashed and failed as they did under URESA. State child support agencies did not have adequate funding or staffing to handle all of the Title IV-D cases.[59] Title IV-D was modified in 1977, 1980, 1981 and 1982; but, the only significant innovation was a program in 1981 that intercepted federal tax refunds for overdue child

---

[53]Calhoun, *supra* note 16, at 929.

[54]*Id.* The legislative history of Title IV-D shows that Congress recognized that welfare payments result considerably from the failure of absent parents to pay child support. *Id.* Congress concluded that not only would Title IV-D lower taxpayers' costs for welfare, but once an effective support system was established, it would deter fathers from deserting their families and causing them to rely on welfare. *Id.*

[55]*See* 45 C.F.R. § 232.11 (1993); 42 U.S.C. § 602(a)(26)(A) (1988).

[56]45 C.F.R. § 302.32 (1993). The state agency gives the first $50 of the child support collection to the custodial parent. 45 C.F.R. § 302.51(b)(1). Then, the agency reimburses the state and federal governments for that month's AFDC payments. 45 C.F.R. § 302.51(b)(2). With any leftover money, the custodial parent receives the collection up to the court-ordered monthly support payments. 45 C.F.R. § 302.51(b)(3)-(4). Finally, if there is any money left, arrears are paid to the state first for prior AFDC payments and then to the custodial parent for past due child support. 45 C.F.R. § 302.51(b)(5).

[57]45 C.F.R. §§ 301-07.

[58]*See* Keasling v. Keasling, 442 N.W.2d 118 (Iowa 1989) (acknowledging that CSRUs may issue wage withholding orders); Whitebreast v. Whitebreast, 409 N.W.2d 460 (Iowa 1987) (noting that CSRUs act on behalf of state to enforce child support orders); Owens v. Griggs, 246 S.E.2d 480 (Ga. 1978) (stating that CSRUs may collect child support payments directly).

[59]Calhoun, *supra* note 16, at 931.

support.[60] Thereafter, a study by the OCSE showed that state agencies were virtually ignoring interstate cases because of the ineffective procedures and burdensome requirements.[61] Subsequently, the program was modified in 1984, 1986 and 1988, again with little success.[62] Neither the Act nor the amendments provided comprehensive direction for enforcement of the interstate cases, nor did they remedy the states' inadequate handling of Title IV-D cases.[63]

3. UNIFORM INTERSTATE FAMILY SUPPORT ACT

Congress established the United States Commission on Interstate Child Support in 1988 through the Family Support Act.[64] The Commission assisted the National Conference of Commissioners on Uniform State Laws[65] in enacting the Uniform Interstate Family Support Act ("UIFSA"),[66] which was intended to replace URESA.[67]

---

[60]*Id.*

[61]*Id.*; OCSE NATIONAL REFERENCE CENTER, CHILD SUPPORT ENFORCEMENT PROGRAMS; PROVISION OF SERVICES IN INTERSTATE IV-D CASES 72-73 (1985).

[62]Calhoun, *supra* note 16, at 931; *see also* 42 U.S.C. § 666 (1990). Major changes included a requirement that the states enact laws regarding income assignments, withholding of income, liens and child support guidelines. *Id.*

[63]Calhoun, *supra* note 16, at 931.

[64]Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified at 42 U.S.C. § 666(a)(10)(B) (1988)). The Family Support Act requires each state to enact laws for wage withholding, to establish child support guidelines which impose a rebuttable presumption regarding the obligation amount, and to improve the methods for establishing paternity. *Id.* Most importantly, the Act's goal was "to improve interstate enforcement of child support obligations." Calhoun, *supra* note 16, at 932.

[65]The National Conference of Commissioners on Uniform State Laws ("NCCUL") originally drafted URESA. *See supra* note 35 and accompanying text.

[66]UNIFORM INTERSTATE FAMILY SUPPORT ACT, 9 Part I U.L.A. Art. 2 (Supp. 1993).

[67]The Commission's purpose was to recommend ways of "improving the interstate establishment and enforcement of child support awards . . . and revising the Uniform Reciprocal Enforcement of Support Act." 102 Stat. § 126(d)(2) at 2355.

After four years of intensive studies, public hearings and in-depth examinations, the Commission recommended 120 changes to current state law through the federal government. *See* UNITED STATES COMMISSION ON INTERSTATE CHILD SUPPORT,

Unlike URESA, UIFSA requires that the state which first issues a support order retain jurisdiction until the support obligation is terminated.[68] This long arm jurisdiction ensures that only one state controls the order's terms at any one time.[69] The interstate commission recommended that Congress require each state to adopt UIFSA as a prerequisite to AFDC funding.[70] Indeed, UIFSA will only work if all states adopt it without major modification; to date, only twelve state have done so.[71]

C. CHILD SUPPORT RECOVERY ACT OF 1992

In 1992, almost concurrent with Congress's enactment of UIFSA, Congress enacted the Child Support Recovery Act.[72] Under the Child Support Recovery Act, it is a federal offense to willfully miss more than $5,000 in payments in one year for the support of a child residing in another state.[73] Offenders are subject to imprisonment and fines.[74] Thus, the

---

SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM (U.S. Gov't. Printing Office 1992). The Commission's recommendations regarding interstate reform concentrated on establishing a single support order enforceable in all states. *Id.*

[68]102 Stat. § 126(d)(2) at 2355.

[69]Calhoun, *supra* note 16, at 958-59.

[70]*Id.*

[71]States which have adopted UIFSA are: Arizona, Arkansas, Colorado, Montana, Nebraska, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Virginia, and Washington. *See* Margaret Campbell Haynes, *Child Support and the Courts in the Year 2000*, 17 AM. J. TRIAL ADVOC. 693, 717 (1994).

[72]Pub. L. No. 102-521, 106 Stat. 3403 (codified at 18 U.S.C. § 228 (Supp. IV 1992)).

[73]The Child Support Recovery Act states as follows:

> (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:
> (1) in the case of a first offense under this section, a fine under this title, imprisonment for not more than six months, or both; and
> (2) in any other cases, a fine under this title, imprisonment for not more than two years, or both.
> (c) Restitution. Upon a conviction under this section, the court shall order restitution under section 3663 of this title in an amount equal to the past due

Child Support Recovery Act criminalizes the failure to pay child support, not the obligor's flight from the child's state of residence.[75]

Congress adopted the Child Support Recovery Act to enforce support obligations across state lines, finding that the non-collection of these obligations has significantly contributed to child poverty.[76] The failure to collect child support, Congress reasoned, has resulted in an increase in the federal government's expenditures to single parents with dependent children.[77]

While the non-collection of child support is a national problem which mandates federal action, critics of the Child Support Recovery Act consider

---

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

(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 in the United States.

18 U.S.C. § 228(a)-(d) (Supp. IV 1992).

[74]18 U.S.C. § 228(b)(1)-(2).

[75]Haynes, *supra* note 71, at 707. For example, if a father owes child support and he and his child both live in New Jersey, the fact that the father moves out of New Jersey is not, in itself, a crime. By the same token, if the father remains in New Jersey, but the child moves out of state, once the father incurs $5,000 of overdue child support payments, he is subject to arrest.

[76]H.R. Rep. No. 1241, 102d Cong., 2d. Sess. (1992) ("It is my belief that a leading reason, if not in fact the No. 1 reason, for the increasing number of children slipping into . . . poverty . . . are children in households with single parents not receiving child support. We all know the devastating effects of poverty on these children." (statement of Sen. Schiff)); *see also* United States v. Hampshire, 892 F. Supp. 1327, 1329-30 (D. Kan. 1995) ("The avoidance of child support obligations exacerbates the problem of child poverty, requiring the government to expend its own resources to help alleviate the problem.").

[77]H.R. Rep. No. 1241, 102d Cong., 2d Sess. (1992) ("Too many of these single parent families have incomes that do not even reach the poverty level. This means that they are very likely to be dependent on public assistance in order to make ends meet. The responsibility for these families fall on the taxpayers." (statement of Sen. Fazio)).

this statute a blatantly inappropriate enlargement of the jurisdiction of federal courts.[78] Specifically, the critics charge that domestic relations cases are normally heard in state courts, and the federal courts' resources should be conserved to deal specifically with federal matters.[79] The critics, however, do not address the fact that many offenders, like Mr. Nichols, intentionally exploit the jurisdictional limits of each state by moving to a new state each time an order compelling payment is brought against them. Ultimately the following decision must be reached: federalize non-payment across state lines, thereby reaching these offenders through a selective enforcement policy,[80] or allow them to abuse the present system further and escape their obligations.

---

[78]Calhoun, *supra* note 16, at 932 (explaining that resistance to federalization of child support collection has contributed to its inefficiency); *see also* Gorelick, *supra* note 34, at 969 (stating that many want to limit the type of crime that a federal court may be able to review).

[79]Gorelick, *supra* note 34, at 969. *Compare* Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir. 1983) (explaining that federal courts typically refuse to hear diversity suits involving domestic relations for "a number of reasons, including the strong state interest in domestic relations matters, the competence of state courts in settling family disputes . . . and the problem of congested dockets in federal courts"); *and* Brenhouse v. Bloch, 418 F. Supp. 412, 414 (S.D.N.Y. 1976) ("Domestic relations is an area in which the federal courts have traditionally declined jurisdiction though diversity and jurisdiction amount are present.") *with Ruffalo*, 702 F.2d at 718 (stating that the underlying premise behind the domestic relations exception is that "[t]here is a state forum in which the plaintiff may obtain relief"); *and* Solomon v. Solomon, 516 F.2d 1018, 1024 (3d Cir. 1975) (holding that federal courts will not exercise jurisdiction in domestic matters except where necessary to enforce prior judgments of a state court involving the same matters).

[80]The Department of Justice, believing that the Child Support Recovery Act is a constitutional exercise of Congress's power, enforces it selectively by specifically targeting the cases that are outside of a state's jurisdiction. Gorelick, *supra* note 34, at 974-75. In 1994, the Department filed 28 charges under the Act, with 200 more currently under review. *Id.* Even if each of these 200 cases were prosecuted, it would amount to less than three cases per jurisdiction. *Id.* These cases, the Department feels, are usually easily proven and typically straightforward, and will send a message to egregious offenders who exploit each state's limitations. *Id.*

Federal prosecutorial discretion is the most important way to protect the federal interest which most concerns critics of the Child Support Recovery Act. *Id.* at 976. This discretion ensures that federal resources are used effectively and that the federal courts do not become inundated with cases that the state courts are better equipped to handle. *Id.*

For a more in-depth review of the Department of Justice's prosecutorial approaches, see Gorelick, *supra* note 34, at 976.

D. STATISTICAL EVIDENCE REGARDING CHILD SUPPORT ORDERS

There are seven million "deadbeat" parents who refuse to pay their child support obligations,[81] ninety percent of whom are fathers.[82] Less than half of the parents who do not have permanent custody of their children pay anything at all towards their children's support.[83] Only sixty-seven percent of the parents who actually have obtained court orders for payment collect any money.[84] Of the $17.7 billion of child support owed in 1991, only $11.9 billion was actually paid.[85] In 1992, nearly $27 billion in child support went uncollected, an increase of over $10 billion from the previous year.[86] Further, and perhaps most importantly, about one-third of the cases in which child support is not being paid involve a parent who no longer resides in the same state as the child.[87]

The custodial parents are not the only ones paying for these deadbeat parents. Recent studies show that more than one-fifth of America's children live in poverty, and that, for the last five years, welfare in the form of AFDC[88] has increased dramatically.[89] The Department of Health and Human Services has determined that stronger child support enforcement

---

[81]Fathers are not the only ones who do not pay child support. *See* Griggs, *supra* note 27.

[82]*Stiff Laws Nab Deadbeats*, USA TODAY, Aug. 16, 1995, at 10A.

[83]*See Computer System Will Track Deadbeat Dads*, *supra* note 2.

[84]*Id.*

[85]*Id.*

[86]Calhoun, *supra* note 16, at 923.

[87]*Id.* ("Although three out of every ten child support cases are interstate, only $1 of every $10 collected nationwide comes from interstate cases.").

[88]AFDC is a federal-state cooperative program intended to ensure that needy families with children deprived of parental support due to death, disability, or desertion receive welfare benefits. *See* 42 U.S.C. §§ 601-617 (1988); *see also supra* notes 24-33 and accompanying text.

[89]Calhoun, *supra* note 16, at 923.

could reduce welfare payments by twenty-five percent.[90] This could save the taxpayers $4.2 billion over a ten-year period.[91]

III. THE COMMERCE CLAUSE

The Child Support Recovery Act has been challenged at least seven times in federal court under the pretense that Congress's authority under the Commerce Clause falls short of enacting the legislation.[92] When the Constitution was originally drafted, the framers intended the Commerce Clause to regulate interstate commerce only.[93] At the time, most states were relatively independent and the Commerce Clause was quite limited and narrow in scope.[94] In the late nineteenth and early twentieth centuries, however, the states became a larger and more integral part of the growing national economy due to improvements in transportation, communication and technology.[95] Intrastate events began to have interstate effects.[96] The Court, therefore, faced the challenge of expanding the interpretation of the Commerce Clause within the framework of its original purpose: to prevent the states from enacting discriminatory legislation which crippled trade between the states.[97]

---

[90]*Id.*

[91]*See Stiff Laws Nab Deadbeats, supra* note 82, at 10A.

[92]For cases upholding the Child Support Recovery Act, see United States v. Hampshire, 892 F. Supp. 1327 (D. Kan. 1995); United States v. Murphy, 893 F. Supp. 614 (W.D. Va. 1995); United States v. Hopper, 899 F. Supp. 389 (S.D. Ind. 1995); United States v. Sage, 64 U.S.L.W. 2295 (D. Conn. 1995). For cases invalidating the Child Support Recovery Act, see United States v. Parker, 64 U.S.L.W. 2313 (E.D. Pa. 1995); United States v. Schroeder, 894 F. Supp. 1360 (D. Ariz. 1995); United States v. Mussari, 894 F. Supp. 360 (D. Ariz. 1995); United States v. Bailey, 902 F. Supp. 727 (W.D. Tex. 1995).

[93]Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COL. L. REV. 1, 88 (1994).

[94]*See id.* at 89.

[95]*Id.* at 88.

[96]*Id.* at 89.

[97]Charles B. Schweitzer, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of* United States v. Lopez, 34 DUQ. L. REV. 71, 82 (1995) (discussing the shortcomings of the Articles of Confederation); *see also* THE FEDERALIST No. 22

In *Gibbons v. Ogden*,[98] Chief Justice Marshall initially defined the reach of the commerce power in very broad terms.[99] At issue was whether the commerce power included the regulation of navigation between two states.[100] The Chief Justice determined that commerce included trade and the traffic necessary to establish the buying and selling of goods.[101] Nevertheless, the Court held that the federal government was limited to regulating those transactions that occurred between the states, and could not regulate purely intrastate matters.[102] The Court never determined whether the federal commerce power was exclusive, thereby constraining states from acting even in the absence of federal law.[103]

(Alexander Hamilton).

[98]22 U.S. (9 Wheat.) 1 (1824).

[99]*Id.* at 196 (holding that Congress may exercise its power to regulate commerce to its utmost extent, and that this power is complete within itself).

[100]*Id.* at 189-90. The Court held, "Commerce, undoubtedly, is traffic, but is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Id.* A state law granted Ogden a monopoly to be the sole operator of steamboats between New York and New Jersey. *Id.* at 3-6. Gibbons, however, owned a federal coasting license and also wanted to operate between these states but could not because of New York's law. *Id.* The Court determined that New York's law was invalid because it impaired Gibbons' federal license and violated the Supremacy Clause. *Id.* at 210. The Court, however, hesitated to limit state action in the absence of federal action, referred to today as the "dormant commerce power." *Id.* at 209-11.

[101]*Id.* at 194. The Court held that the commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, *may be exercised to its utmost extent, and acknowledges no limitations*, other than prescribed in the [C]onstitution." *Id.* at 196 (emphasis added).

[102]*Id.* at 194-95. For example, in Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829), the Court *upheld* a state law which authorized the construction of a dam across a navigable waterway, even though the dam impaired a federal coasting license much like the license at issue in *Gibbons*. *Id.* at 246 (emphasis added). Unlike *Gibbons*, the Court found that the state law in *Willson* was completely within the state's police power to regulate health and safety; thus, the federal commerce power was not affected. *Id.* at 252.

[103]*Gibbons*, 22 U.S. at 209. Chief Justice Marshall suggested that this power was exclusive, stating, "[T]he word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the

Until recently, the Court characterized the commerce power as an exclusive federal power, preventing state interference with interstate activity.[104] Subsequent to *Gibbons*, the United States Supreme Court recharacterized the commerce power as a check against discriminatory assertions of state power.[105] For example, in *Cooley v. Board of Wardens*,[106] the Court established that some matters were so local in nature that they required different regulation from state to state.[107] Those subjects of interstate commerce which required uniform national treatment, however, could only be regulated by Congress.[108]

Between *Gibbons* and *Cooley*, the Court defined "commerce" broadly and began to draw important distinctions between purely national and local matters.[109] During the late nineteenth century, however, the Court began to change its approach to the commerce power. After the Civil War and the abolition of slavery, industrialization and technological innovation transformed the United States economy.[110] Increasingly suspicious of large trusts and monopolies, Congress enacted the Interstate Commerce Act of 1887[111] and the Sherman Antitrust Act of 1880.[112]

---

same operation on the same thing." *Id.*

[104]Schweitzer, *supra* note 97, at 85.

[105]*See* Veazie v. Moor, 55 U.S. (14 How.) 568 (1852) (upholding absolute state regulation of purely intrastate commerce); Thurlow v. Massachusetts (The License Cases), 46 U.S. (5 How.) 504 (1847) (validating state laws which required licenses to distribute liquor as within the state's police power).

[106]53 U.S. (12 How.) 299 (1851).

[107]*Id.* at 320.

[108]*Id.* at 319.

[109]*See id.* at 299-300.

[110]*See* Schweitzer, *supra* note 97, at 86.

[111]The Interstate Commerce Act, Act of Feb. 4, 1887 ch. 104, 24 Stat. 379. For a discussion of the Act's purpose, see *infra*, note 112.

[112]The Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.* The Interstate Commerce Act and the Sherman Antitrust Act attempted to address the abuses of capitalism by promoting competitive trade. *See* Schweitzer, *supra* note 97, at 87-88 n.94.

The Court first considered the Sherman Antitrust Act in *United States v. E.C. Knight Company*,[113] where a New Jersey corporation acquired four Pennsylvania corporations and effectively monopolized the manufacture of sugar in the United States.[114] The Court held that Congress could not forbid the manufacture of materials under the Commerce Clause because manufacturing was purely an intrastate activity and not interstate commerce subject to congressional regulation.[115] According to the majority, the fact that the refineries eventually sold the sugar in interstate commerce was irrelevant because the manufacturing aspect, the subject of the regulation, was incidental and indirect.[116]

Similarly, in *Hammer v. Dagenhart*,[117] the Court invalidated a federal attempt to prohibit interstate transport of goods manufactured by companies employing child labor.[118] The Court held that only the states could regulate employment matters pursuant to their police powers.[119] The Court reasoned that the goods shipped in interstate commerce were themselves

---

[113]156 U.S. 1 (1895).

[114]*Id.* at 17. After purchasing the four Pennsylvania companies, the American Sugar Refining Company refined 98 percent of the sugar in the United States. *Id.* at 18 (Harlan, J. dissenting).

[115]*Id.* at 12. The Court held "commerce succeeds to manufacture, and is not part of it." *Id.* The Court, however, never explained how the purchase of the stock of the companies owning the refineries was not commerce. *See id.*

[116]*Id.*

[117]247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

[118]*Id.* at 277. In *Hammer*, Congress prohibited interstate transportation of goods produced by factories employing children under age fourteen, or children between the ages of 14 and 16 who worked over eight hours per day and more than six days per week, after 7:00 p.m. or before 6:00 a.m. *Id.* at 268.

[119]*Id.* at 276-77. In a dissenting opinion, Justice Holmes emphatically insisted, "It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not against the product of ruined lives." *Id.* at 280 (Holmes, J., dissenting); *see also* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935 which proscribed maximum hours and minimum wages for coal mine workers); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (striking down a federal regulation fixing employee hours because of their indirect relation to interstate commerce).

harmless, but the employment of child labor was not directly related to interstate commerce and thus could not be regulated by Congress.[120]

In 1937, the Court turned completely and decided the watershed case *NLRB v. Jones & Laughlin Steel Corporation*.[121] The issue before the Court in *NLRB* was the National Labor Relations Act,[122] which attempted to prevent Jones and Laughlin, a large producer of steel, from discriminatorily firing employees because of their union activity.[123] Until *NLRB*, the Court insisted upon a direct and logical relationship between the regulated intrastate activity and interstate commerce.[124] In *NLRB*, the Court rejected the direct and logical relationship test between the intrastate activity being regulated and interstate commerce and upheld the National Labor Relations Act.[125] The Court concluded that because of Jones and Laughlin's multi-state operational network, any labor stoppage would have a substantial effect on interstate commerce.[126] This substantial effect of steel production on interstate commerce enabled Congress to regulate labor relations, a matter traditionally regulated by the states.[127]

---

[120]*Hammer*, 247 U.S. at 276-77.

[121]301 U.S. 1 (1937).

[122]29 U.S.C. § 151 (1935).

[123]*NLRB*, 301 U.S. at 22-23. In particular, the National Labor Relations Board charged Jones and Laughlin with "discriminating against members of the union with regard to hire and tenure of employment, and . . . coercing and intimidating its employees in order to interfere with their self-organization." *Id.* at 22.

[124]*See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (distinguishing between production, a purely local activity, and commerce and holding that a direct logical relation did not exist between the production and interstate commerce); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding that the manufacturing of sugar, a purely local activity, could not be regulated by Congress under the Commerce Clause because it bore no direct logical relationship to commerce).

[125]*NLRB*, 301 U.S. at 36-38.

[126]*Id.* at 37. Significantly, the Court reasoned that while "activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Id.* (citation omitted).

[127]*Id.*; *see also* United States v. Darby, 312 U.S. 100 (1941) (overruling *Hammer* and unanimously upholding the Fair Labor Standards Act using the substantial effects test).

Another major expansion of the commerce power came in 1942 in *Wickard v. Filburn*,[128] where the Court upheld a federal law requiring farmers to reduce the size of their annual harvest in order to receive federal funding.[129] Utilizing a "cumulative effects" theory,[130] the Court held that Congress could regulate local activities even though they did not directly affect interstate commerce.[131] The sole requirement imposed by the Court was that the regulation substantially affected commerce.[132] The Court emphasized that even though the farmer's own effect on the market may have been trivial, the combination of all those in similar situations would have a substantial impact on interstate commerce.[133]

As a result of these decisions, the Court's present analysis focuses upon whether a rational basis exists for Congress's determination that the regulated activity sufficiently affects interstate commerce.[134] Notably, in *Maryland v. Wirtz*,[135] the Court held that Congress could regulate the wages and hours of state institutional employees through the Fair Labor Standards Act

---

[128]317 U.S. 111 (1942).

[129]*Id.* at 127-28.

[130]Under the cumulative effects theory, not only may Congress regulate acts which by themselves have a substantial and economic effect on interstate commerce, but also those classes of acts which, when combined, have a substantial economic effect. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 434 (2d ed. 1988).

[131]*Wickard*, 317 U.S. at 124-25.

[132]*Id.*

[133]*Id.* at 127-28. In *Wickard*, the plaintiff grew wheat on his own property in excess of federal requirements for his own consumption. *Id.* at 114. The Court reasoned that if all farmers grew wheat in excess of that proscribed, even though used for home consumption, less wheat would be demanded in interstate commerce. *Id.* at 128.

[134]*See* United States v. Lopez, 115 S. Ct. 1624, 1629 (1995) (the Court should decide only "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce"); *see also* Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 276-280 (1981); Perez v. United States, 379 U.S. 294, 299-301 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-53 (1964).

[135]392 U.S. 183 (1968), *overruled in part by* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

("FLSA").[136] This broad reading of Congress's power was again applied in *United States v. Perez*,[137] where the Court upheld the Consumer Credit Protection Act[138] which made loansharking a federal crime, even in purely local activities, due to its national impact.[139] In fact, the transaction in *Perez* occurred entirely in one state, but because of its cumulative effect on interstate commerce, the Court found it could be regulated by Congress.[140]

The Supreme Court took a second look at the FLSA as it applied to state employees in *National League of Cities v. Usery*.[141] Based on the notion of state sovereignty, *National League of Cities* overruled *Wirtz* and invalidated the FLSA amendments[142] which extended the federal minimum wage and maximum hour requirements to state and municipal employees.[143] The Court concluded that this type of activity was traditionally regulated by the states and Congress's requirements violated the Tenth Amendment.[144]

---

[136]*Wirtz*, 392 U.S. at 198-99. The Court admitted that the Commerce Clause did have limits, stating that Congress may not "use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Id.* at 197 n.27; *see also* Federal Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (current version at 29 U.S.C. §§ 201-219 (1988 & Supp. V 1993)).

[137]402 U.S. 146 (1971).

[138]18 U.S.C. § 891 *et seq* (Supp. V 1964).

[139]*Id.*

[140]*Perez*, 402 U.S. at 155-57. The Court relied on Congress's judgment that organized crime depended heavily on loansharking revenues siphoned from different localities to finance a national operation. *Id.* at 154. Notably, to establish federal criminal jurisdiction, prosecutors no longer had to demonstrate that each specific criminal act affected interstate commerce. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[141]426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[142]Fair Labor Standards Act, Pub. L. 93-259, 88 Stat. 55 (1974) (current version at 29 U.S.C. §§ 201-219 (1988 & Supp. V 1993)).

[143]*National League of Cities*, 426 U.S. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 565 (1911)).

[144]*Id.* The Tenth Amendment provides, "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." U.S. CONST. amend X; *see also* Fry v. United States, 421 U.S. 542, 547 n.7 (1975) ("The [Tenth] Amendment expressly declares the constitutional

The Court noted that the statute fell within the scope of Congress's authority under the Commerce Clause as it applied to private employees.[145] As applied to state employees, however, the Court held that the statute violated the states' independence in two ways: (1) compliance with the statute would cost the states substantial sums of money; and (2) the statute stripped each state of its regulatory discretion.[146]

In 1985, *National League of Cities* was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*.[147] At issue was whether the FLSA should apply to employees of a municipally-owned and operated mass transit system.[148] The Court found that the "traditional state function"[149] test was unworkable and argued that "procedural safeguards inherent in the structure of the federal system" protected state sovereign interests.[150]

---

policy that Congress may not exercise its power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.").

The Court in *National League of Cities* invalidated the regulations based on the "traditional state function" test, stating, "These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851.

[145]*National League of Cities*, 426 U.S. at 851.

[146]*Id.* at 847.

[147]469 U.S. 528 (1985).

[148]*Id.* at 530. Significantly, this was the same statute the Court struck down in *National League of Cities* as it applied to state employees. *See supra* notes 141-146 and accompanying text.

[149]*See supra* note 144 (describing the traditional state function test).

[150]*Garcia*, 469 U.S. at 551. This argument was recently made again in United States v. Bishop, 66 F.3d 569, 577 (3d Cir. 1995). In *Bishop*, the court upheld a federal carjacking statute, stating that "the primary check upon [c]ongressional action is its direct responsibility to the will of the people." *Id.*

Garcia made clear "the manner in which the Constitution insulates States from the reach of Congress' power under the Commerce Clause." *Garcia*, 469 U.S. at 547. At the same time Congress was regulating mass-transit employees, it was spending billions of dollars in mass transit aid to the states. *Id.* at 555. The Court explicitly noted that the "regulation under the Commerce Clause must [not] be accompanied by countervailing financial benefits under the Spending Clause." *Id.* at 555 n.21. In fact, the Court stated that the Fair Labor Standards Act would be constitutional regardless of any federal spending. *Id.*

Notably, Justice Rehnquist predicted in a dissenting opinion that the Court would someday return to *National League of Cities'* holding. *Id.* at 580 (Rehnquist, J.,

In recent years, the Court has recognized that Congress has limited authority to interfere with state police powers under the Tenth Amendment to the United States Constitution.[151] In *New York v. United States*,[152] the Court found that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985[153] violated the Tenth Amendment by coercing the State of New York into enacting and enforcing a federal regulatory program.[154] However, the Court upheld the statute's "incentives"[155] as a valid conditional use of the spending power and regulation of interstate commerce.[156]

The most dramatic change in Commerce Clause jurisprudence since 1937 came in *United States v. Lopez*.[157] The *Lopez* decision involved a twelfth grade student who was arrested for violating the Gun Free School Zones Act[158] when he carried a concealed handgun into his high

---

dissenting).

[151]U.S. CONST. amend X; *see also supra* note 144 (discussing the Tenth Amendment).

[152]505 U.S. 144 (1992).

[153]The Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842, 1850 (repealed). The take title provision required that states dispose of radioactive waste in accordance with federal standards or "take title" to the waste and be liable for damages in connection with its disposal. *Id.*

[154]New York v. United States, 505 U.S. at 179-80.

[155]The Act under scrutiny provided each state with: (1) monetary incentives, by which each state which complied with the Act's waste disposal arrangements would receive federally-collected funds; and (2) access incentives, denying those states that did not comply with the Act access to certain disposal facilities. *Id.* at 152-53.

[156]*Id.* at 171-73. The Court reasoned that these incentives allow the states to choose between regulating the waste disposal industry in accordance with federal standards or denying their residents access to certain disposal sites. *Id.* Crucial to the Court's analysis was the fact that the incentives did not compel the states to regulate or spend any money. *Id.*

[157]115 S. Ct. 1624 (1995).

[158]18 U.S.C.A § 922(q) (West Supp. 1994). The Gun-Free School Zones Act prohibits "any individual [from] knowingly [possessing] a firearm at a place that . . . [he] knows . . . is a school zone." *Id.* at § 922(q)(2)(A).

school.[159] In invalidating the Act, the Court held that Congress exceeded its Commerce Clause authority, positing that, "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[160] The Supreme Court also found it important that the statute was not part of a "larger regulation of economic activity."[161] In *Lopez*, the "[r]espondent was a local student at a local school."[162] There was no indication that he recently moved between states, and more importantly no requirement that his possession of the firearm have any concrete tie to interstate commerce.[163]

Lopez placed a potentially sweeping limitation on Congress's power to regulate commerce. Unable to find any rational basis for Congress's finding of a relationship between the regulated activity and interstate commerce, the Court invalidated the Gun Free School Zones Act.[164] In *Lopez*, the Court reasserted the concepts of state sovereignty and limited federal powers, providing an excellent example of Chief Justice Rehnquist's efforts to expand the Court's conception of federalism at every opportunity.[165] Nevertheless, the assumption that states guard an individual's freedom because they are

---

[159]*Id.* at 1626.

[160]*Id.* at 1634.

[161]*Id.* at 1631. Apparently, where a federal regulatory scheme would be undermined if the intrastate activity were not regulated, an act such as the Gun Free School Zones Act would be constitutional. *Id.*

[162]*Id.* at 1625.

[163]Interestingly, it was exactly this type of regulatory scheme that was challenged in United States v. Bishop, 66 F.3d 569 (3d Cir. 1995). In *Bishop*, the defendants were convicted for carjacking, defined as "armed theft of an automobile from the presence of another by force and violence or by intimidation." *Id.* at 571. The United States Court of Appeals for the Third Circuit noted that, in response to the national problem of carjacking, Congress enacted 18 U.S.C.A § 2119 (West 1995) (the Carjacking Statute). *Id.* The circuit court declared the Act to be constitutional because it was limited to cars which traveled in interstate commerce. *Id.* at 585. This limitation is much like the limitation in the Child Support Recovery Act. *See supra* notes 72-75 and acompanying text.

[164]*Lopez*, 115 S. Ct. at 1630-31.

[165]*See* Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1360 (1982) (arguing that Chief Justice Rehnquist engaged in judicial activism to invalidate legislation that impinged on state sovereignty).

more connected with the people than the federal government is historically inaccurate, ignoring the changes which the Fourteenth Amendment brought to federal relations.[166] In addition, any redistribution of power within a federal system should occur through the legislative process, in which elected officials reflect the will of the people and are accountable to the electorate.[167] *Lopez*, however, invalidated a clearly legislative judgment, which indicates that the Court is willing to substitute its judgment for that of the legislature.[168]

Within three months of the *Lopez* decision, over three dozen opinions were issued interpreting *Lopez*.[169] Unfortunately, some courts have found no limit to *Lopez's* scope, invalidating acts which do indeed fall within Congress's power to legislate.[170] Among these regulations stands the Child Support Recovery Act, a necessary plan of enforcement against parents who refuse to pay their child support obligations while living in a state different from that of their child.[171]

IV. THE COURTS' ANALYSIS OF THE CHILD SUPPORT RECOVERY ACT OF 1992

As of the publication of this Comment, the United States Supreme Court has not yet determined the constitutionality of the Child Support Recovery Act. The district courts which have reviewed the Act, however, remain divided over whether Congress possessed the authority to enact it

---

[166]Schweitzer, *supra* note 97, at 96-97.

[167]*See Bishop*, 66 F.3d at 577.

[168]*Id.*

[169]Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 712 (1995); *see also* United States v. Garcia-Salazar, 891 F. Supp. 568 (D. Kan. 1995) (upholding the Drug Free School Zones Act because it regulates the commercial activity of trading controlled substances, and distinguishing the Act from that in *Lopez* because it regulates more than simple possession); United States v. Stillo, 57 F.3d 553 (7th Cir. 1995) (upholding the Hobbs Act, prohibiting extortion and robbery that affects commerce in any way because of its express jurisdictional element); United States v. Bishop, 66 F.3d 569 (3d Cir. 1995) (upholding the Carjacking Statute because it is limited to those cars which travel in interstate commerce).

[170]*See supra* note 9 (citing cases invalidating the Child Support Recovery Act).

[171]*See supra* notes 72-80 and accompanying text (discussing the history of the Child Support Recovery Act).

under the Commerce Clause.[172] Three of seven courts have determined that the Act is unconstitutional, holding that the federal government cannot legislate in local matters or areas of state concern.[173] On July 26, 1995, Judge Paul G. Rosenblatt, presiding in the United States District Court for Arizona, declared the Act unconstitutional in *United States v. Mussari*[174] and its companion case, *United States v. Schroeder*.[175]

In both *Mussari* and *Schroeder*, the defendant was indicted for failing to pay child support to his ex-wife for the benefit of their children.[176] Also, in both cases, the defendant lived in a state other than that of his children, owing approximately $40,385 in *Mussari* and $24,096 in *Schroeder*.[177]

Despite the Child Support Recovery Act's interstate requirements, Judge Rosenblatt ruled in *Mussari* that, under *Lopez*, the Child Support Recovery Act was unrelated to commerce or economic enterprise and, thus, exceeded Congress's power under the Constitution to regulate interstate commerce.[178] Moreover, the judge explained that "criminal law and child custody are traditionally delegated to the states for regulation."[179] Judge Rosenblatt opined that because some states criminally punish defendants for failure to pay child support and others only punish civilly, a uniform federal law would "usurp the authority of the states" to regulate as they see fit.[180] Finally, the judge concluded that the Act violated the "principles of

---

[172]*See supra* note 92 and accompanying text.

[173]*Id.*

[174]894 F. Supp. 1360, 1368 (D. Ariz. 1995).

[175]894 F. Supp. 360 (D. Ariz. 1995); *see also supra* notes 10-11 and accompanying text (briefly discussing *Mussari* and *Schroeder*).

[176]*Mussari*, 894 F. Supp. at 1361.

[177]*Id.*

[178]*Id.* at 1368. President Clinton disagreed with Judge Rosenblatt's decision, explaining that the Act "gives us the power to punish deadbeat parents who cross state lines to avoid paying child support . . . . The states cannot bring these criminals to justice, especially the 'hard core' group of parents who flagrantly move from state to state to evade their obligations." *Justice Ready to Save 'Deadbeat Parents' Law, supra* note 1, at 6B.

[179]*Mussari*, 894 F. Supp. at 1367.

[180]*Id.* at 1363.

federalism and comity" because the defendant could challenge the underlying state order, requiring the federal court to stay the criminal case or review the state order.[181] Such intervention by the federal courts, reasoned Judge Rosenblatt, would upset the balance of power between the states and the federal government.[182]

On October 25, 1995, the United States District Court for Texas also declared the Child Support Recovery Act unconstitutional in *United States v. Bailey*.[183] In *Bailey*, the father failed to pay support in accordance with the Act and was arrested.[184] Judge Biery began analyzing the Act with a restatement of the Supreme Court's holding in *Lopez* and based the remainder of the opinion on *Mussari*.[185] The court did not focus on the Commerce Clause, however; rather, the court held that "notions of federalism and comity preclude[d] the Child Support Recovery Act from passing constitutional scrutiny."[186]

Five days later the United States District Court for Pennsylvania also held that the Child Support Recovery Act was unconstitutional in *United States v. Parker*.[187] In a thorough and thoughtful opinion, Judge Bechtle held that Congress had no rational basis for determining that the interstate enforcement of unpaid child support substantially affected commerce.[188] Sympathizing with the victimized children, Judge Bechtle determined that this was a matter "carefully reserved to the states" upon which Congress could

---

[181]*Id.* at 1367.

[182]*Id.*

[183]902 F. Supp. 727 (W.D. Tex. 1995).

[184]*Id.* at 727-28.

[185]*Id.* at 728-29. It is important to note that the *Mussari* decision, decided in the District Court for Arizona, was not binding on the Texas District Court.

[186]*Id.* at 730. The district court stated that there may be other reasons to challenge the Child Support Recovery Act's constitutionality, but never explained what they may be. *Id.* Contrary to the court's opinion, these principles alone have never been used to declare an act of Congress to be unconstitutional. *See* United States v. Hopper, 899 F. Supp. 389, 393 (S.D. Ind. 1995), discussed *infra* notes 205-212 and accompanying text.

[187]64 U.S.L.W. 2313 (E.D. Pa. 1995).

[188]*Id.* at *13.

not intrude.[189] Again, the *Lopez* holding was the basis for the court's decision that the Child Support Act was unconstitutional.[190] While Arizona, Texas, and Pennsylvania are the only courts to have declared the Act unconstitutional,[191] four other courts have upheld the Act, stating that *Lopez* is not applicable.[192] In *United States v. Hampshire*,[193] the defendant, living in a different state than his child, failed to pay support of over $5,000 arising from a divorce proceeding.[194] There, the court found that the Child Support Recovery Act was constitutional, distinguishing *Lopez* on the ground that the Child Support Recovery Act, unlike the Gun-Free School Zones Act, requires an interstate relationship as an element of the actual crime.[195] Further, the court found that the failure to pay child support does indeed have an effect on interstate commerce.[196] Moreover, the court rejected the defendant's Tenth Amendment argument that the Child Support Recovery Act infringed upon the states' police power,[197] stating that the Act regulates purely private conduct with "no attempt to regulate the conduct of the states, as states."[198]

The District Court of Appeals for the Western District of Virginia applied a somewhat different reasoning than did the Kansas court, but also

---

[189]*Id.*

[190]*Id.* at *7.

[191]*See supra* note 92.

[192]*Id.*

[193]892 F. Supp. 1327 (D. Kan. 1995).

[194]*Id.* at 1329.

[195]*Id.* at 1330.

[196]*Id.* at 1329-30. The court explained that "the avoidance of child support obligations exacerbates the problem of child poverty, requiring the government to expend its own resources to help alleviate the problem." *Id.* at 1330.

[197]U.S. CONST. amend. X; *see also supra* note 144 (discussing the Tenth Amendment).

[198]*Hampshire*, 892 F. Supp. 1327, 1330 (D. Kan. 1995); *see also* New York v. United States, 505 U.S. 144 (1992); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

upheld the Child Support Recovery Act in *United States v. Murphy*.[199] The court determined that the interstate travel involved with violation of the Act was sufficient to establish Congress's authority under the Commerce Clause.[200] In *Murphy*, the defendant, charged with violating the Child Support Recovery Act, argued that Congress did not possess the authority under the Commerce Clause to enact the legislation.[201] The district court held that the *Lopez* decision was inapposite because "[t]he Court in *Lopez* was clearly concerned only with Congress' intrusion into the arena of *intrastate* activity."[202] The court noted that while the states have traditionally enforced family law matters, Congress could nevertheless enact laws aimed at the regulation of interstate travel, the means used to avoid child support obligations.[203] Judge Conrad found it important that federal courts have consistently upheld as constitutional statutes analogous to the Child Support Recovery Act, and noted that *Lopez* itself "affirmed that Congress has the authority 'to keep the channels of interstate commerce free from immoral or injurious uses.'"[204]

---

[199]893 F. Supp. 614 (W.D. Va. 1995).

[200]*Id.* at 617.

[201]*Id.* at 615. Not relevant to this Comment, the defendant also argued that his conviction under the CSRA violated the *ex post facto* clause in Article I of the Constitution. *Id.* at 618. The court found that while he allowed over $5,000 to become outstanding before the passage of the Act, he was charged with the failure to pay that amount after the Act was made a law, when he had notice that he would be criminally liable if he failed to pay. *Id.*

[202]*Id.* at 617 (emphasis in original).

[203]*Id.* *See supra* notes 16-23 and accompanying text (discussing the primary regulation of domestic matters by the states).

[204]*Murphy*, 893 F. Supp. at 616 (quoting *Lopez*, 115 S. Ct. at 1629); *see, e.g.*, Simmons v. Zerbst, 18 F. Supp. 929 (N.D. Ga. 1937) (upholding the Fugitive Felony Act which made it a federal offense to pass from one state to another to escape prosecution because only federal officers can be given the authority to act over the country as a whole, and Congress's withdrawal of facilities of interstate commerce from escaping criminals was an appropriate means to a proper end); United States v. Miller, 17 F. Supp. 65 (W.D. Ky. 1936) (holding that federal prosecution for fleeing a state to avoid prosecution or compulsion to testify is a proper exercise of Congress's power to regulate interstate commerce); United States v. Toledo, 985 F.2d 1462 (10th Cir. 1993) (holding that, while kidnapping is a matter traditionally regulated by the states, transportation of an unwilling abductee across state lines confers federal jurisdiction under the Commerce Clause).

In *United States v. Hopper*,[205] the United States District Court for the Southern District of Indiana also upheld the Child Support Recovery Act, systematically refuting each point asserted in *Mussari*.[206] The *Hopper* court also distinguished the Child Support Recovery Act from the Gun Free School Zones Act in *Lopez* because of its interstate requirement.[207] In fact, the court affirmed that the Child Support Recovery Act allowed the states to maintain their sovereignty in purely intrastate domestic matters while solving the problems caused by each state's jurisdictional limitations.[208] Relying on *United States v. Shubert*,[209] Judge Hussman expressly found that the collection of a debt amounts to commerce because: (1) significant amounts of money are lost across state lines; and (2) attempts to collect past due support are made through the mail, telephone and telegraph.[210] Addressing the domestic relations exception discussed in *Murphy*,[211] the court analogized the failure to pay child support to a personal injury by a father upon his children, for which the exemption does not apply.[212]

The most recent decision upholding the constitutionality of the Child Support Recovery Act came in *United States v. Sage*.[213] In *Sage*, the

---

[205]899 F. Supp. 389 (S.D. Ind. 1995).

[206]*Id.* at 391-95. In *Hopper*, the defendant only made sporadic child support payments. *Id.* at 391. He owed approximately $5,335, accruing over a seven-month period, and resided in a state separate from his child. *Id.*

[207]*Id.* at 392.

[208]*Id.*

[209]348 U.S. 222 (1955). In *Shubert*, the Court found that commerce exists where there is a "'continuous and indivisible stream of intercourse among the states' involving the *transmission of large sums of money and communications by mail, telephone and telegraph.*" *Id.* at 226 (quoting United States v. South-Eastern Underwriter's Ass'n, 322 U.S. 533, 541 (1944) (emphasis added)).

Significantly, this definition includes the regulation of fire insurance contracts. In *South-Eastern Underwriter's*, the Court held that Congress could regulate interstate traffic, even though it consisted of intangibles, and the *entire transaction* determined whether the contract became a part of interstate contracts. *Id.* at 549-50 (emphasis added).

[210]*Hopper*, 899 F. Supp. at 393.

[211]*See supra* notes 199-204 and accompanying text (discussing *Murphy*).

[212]*Hopper*, 899 F. Supp. at 394.

[213]64 U.S.L.W. 2295 (D. Conn. 1995).

district court judge first advised that Congress is entitled to extreme deference and the court must presume a statute's constitutionality.[214] Turning to an analysis of the Act under the Commerce Clause, the court found that the failure to pay child support reduced each child's consumption of goods traveling in interstate commerce, and therefore a rational basis existed for Congress's enactment of the legislation.[215] Judge Squatitro focused on the legislative history of the statute which demonstrated the inadequacy of URESA and each state's own enforcement laws.[216] Moreover, the court rejected the defendant's Tenth Amendment challenge, finding that it does not matter whether an activity is traditionally regulated by the states.[217]

How broadly did the Supreme Court intend to apply *Lopez*?[218] Does it reach an area such as child support which, although traditionally regulated by the states, is not solely a state matter? In fact, the states are unable to adequately enforce child support obligations because of jurisdictional limitations.[219] Clearly, the avoidance of child support obligations is a problem which is national in its scope and demanding of federal intervention.

V. THE SPENDING POWER

The federal district courts which have upheld the Child Support Recovery Act have all distinguished *Lopez*, thereby resolving any Commerce Clause outcome mandated by *Lopez*.[220] Notwithstanding the Commerce Clause, perhaps another way of avoiding *Lopez* is to focus upon whether the

---

[214]*Id.* at *1; *see also* Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323 (1984); United States v. National Dairy Products Corp., 372 U.S. 29 (1963).

[215]*Sage*, 64 U.S.L.W. at *4; *see also* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) (holding that courts need only find Congress had a rational basis for their action).

[216]*Sage*, 64 U.S.L.W. at *4; *see also supra* notes 35-49 and accompanying text discussing the Uniform Reciprocal Enforcement of Support Act.

[217]*Sage*, 64 U.S.L.W. at *6 (citing *Lopez*, 115 S. Ct. at 1631-34).

[218]*See supra* note 169 (discussing the after-effects of *Lopez*).

[219]*See supra* note 34 and accompanying text.

[220]*See supra* notes 192-219 and accompanying text (summarizing the decisions by those courts upholding the Child Support Recovery Act).

Act falls within Congress's power under the Spending Clause.[221] The federal government provides welfare benefits to impoverished families who are owed, but are not collecting, child support.[222] One-parent families, particularly where the mother is the lone-parent, are the fastest growing group of people stricken with poverty.[223] When child support obligations are not enforced and these families fall below the poverty level, it is the taxpayers who become responsible for the support of American children.[224]

The United States Constitution gives Congress the power to "Lay and collect Taxes . . . [and] to pay the Debts and provide for the common Defense and general Welfare of the United States."[225] Before 1937, it was never determined whether Congress could spend for any purpose which served the general welfare, or spend only to carry out one of its other powers enumerated in Section Eight of Article I.[226] In *United States v. Butler*,[227] however, the Court held that Congress's spending power was not necessarily linked to the exercise of any other Article I power.[228]

Under scrutiny in *Butler* was the Agricultural Adjustment Act of 1933, which authorized the Secretary of Agriculture to enter into contracts with farmers who agreed to reduce their cultivated acreage in exchange for payments generated by a tax on the processing of the commodity.[229] In determining that Congress has the power to tax and spend for the general

---

[221]U.S. CONST. art. I, § 8, cl. 1; *see also infra* note 225 and accompanying text (discussing the Spending Clause).

[222]*See supra* notes 24-33 and accompanying text; *see also supra* note 54 and accompanying text.

[223]Royce, *supra* note 36, at ii. If child support is not paid, the poverty level for families eligible for child support increases from twelve to nineteen percent. *Id.*

[224]*Id.*

[225]U.S. CONST. art. I, § 8, cl. 1.

[226]Other powers enumerated in Article One, Section Eight include: the power to borrow (cl. 2); regulate Commerce between foreign nations and among the States (cl. 3); establish naturalization and bankruptcy rules (cl. 4); coin money (cl. 5); establish post offices (cl. 7); establish tribunals under the Supreme Court (cl. 9); declare war (cl. 11); and support the military (cl. 12). U.S. CONST. art. I, § 8, cls. 2-5, 7, 9, 11-12.

[227]297 U.S. 1 (1936).

[228]*Id.* at 66.

[229]*Id.* at 53-54.

welfare separate and distinct from its other powers, the Court in *Butler* limited the scope of this power.[230] Congress may not utilize spending as a means of regulating simply because the regulation is for the general welfare of the United States, otherwise, the Court aptly noted, the federal government would be one of "general and unlimited powers."[231] Thus, the Act in *Butler* was unconstitutional because the farmers were contractually bound to obey the regulations.[232] The Court stated, however, that a conditional appropriation of federal money would be valid.[233] Accordingly, this holding demonstrates the Court's unwillingness to allow Congress to regulate essentially local matters, in this case agriculture.

In fact, it was a conditional appropriation which was upheld in *Steward Machine Company v. Davis*,[234] challenging a Social Security Act provision granting employers a credit against federal taxes for contributions toward a state-enacted unemployment plan.[235] Of crucial note, the credit was only given where the state passed an unemployment fund plan,[236] which is not much different than if the state had entered into an agreement with the federal government, as in *Butler*. The plan, however, was upheld because it did not coerce the states or impair their autonomy.[237]

Similarly, in *South Dakota v. Dole*,[238] Congress withheld federal highway funds from states which allowed individuals under age twenty-one

---

[230]*Id.* at 66. The Court stated that the Agricultural Adjustment Act was a "statutory plan [intended] to regulate and control agricultural production," and invalidated the Act because it involved a "matter beyond the powers delegated to the federal government." *Id.* at 68.

[231]*Id.* at 66 (quotation omitted).

[232]*Id.* at 78.

[233]*Id.* at 73.

[234]301 U.S. 548 (1937).

[235]*Id.* at 574-75.

[236]*Id.* at 575-76.

[237]*Id.* at 585. Also, the Court was responding to the need to combat unemployment, a decidedly national problem. *Id.* at 586. In particular, the Court stated, "The problem [of unemployment] had become national in area and dimensions. There was need of help from the nation if the people were not to starve." *Id.*

[238]483 U.S. 203 (1987).

to purchase alcohol or possess it in public.[239] Of course, Congress's main intent was to regulate and prevent drivers under the age of twenty-one from drinking at all. According to *Butler*, however, Congress did not possess the authority to regulate for the general welfare, the precise reason that South Dakota attacked the statute as violative of the Tenth Amendment.[240] The Court found the statute to be valid because of Congress's indirect use of its conditional spending power, even though the result was the same as if Congress had regulated the conduct itself.[241]

The Child Support Recovery Act uses federal funds to enforce child support obligations which cross state lines. In return, AFDC expenses are reduced as need and the number of poverty-stricken families decrease. Congress can effectively pressure each state into adopting legislation if that state is participating in a federal program.[242] Here, the federal government could give those states which participate in AFDC and receive federal funds a choice: either participate in the federal child support enforcement programs or forego AFDC funding altogether.

VI. CONCLUSION

The Department of Justice insists that Congress should provide federal involvement in criminal areas where: "(1) there is a pressing problem of national concern; (2) state criminal jurisdiction is inadequate to solve significant aspects of the problem; and (3) the federal government [will] make a qualitative difference to the solution of the problem . . . that could not be produced by the state[s]."[243]

---

[239]*Id.* at 205.

[240]*Id.* South Dakota argued that the statute prevented the state from using its own powers under the Tenth and Twenty-first Amendments. *Id.* The Court admitted that the "Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* (quotation omitted); *see also* U.S. CONST. amend XXI, § 2. However, the Court utilized a Spending Clause analysis, explaining, "[W]e need not decide in this case whether [the Twenty-first] Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age. Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages." *Dole*, 483 U.S. at 206.

[241]*Dole*, 483 U.S. at 209-12.

[242]*Id.* at 206-09 (allowing Congress to attach condition on receipt of federal funds).

[243]Gorelick, *supra* note 34, at 972.

The courts have only to look at whether a rational basis existed for congressional action.[244] As the Court in *Lopez* pointed out, the Gun-Free School Zones Act clearly had only a tenable nexus to interstate commerce.[245] The Child Support Recovery Act, on the other hand, was enacted specifically because of the problem of interstate enforcement of child support laws.[246] Further, legislative history indicates Congress was trying to reduce taxpayer expenditures which served as a supplement to parents who were not receiving the child support they deserved.[247] This legislative history compels a finding that the Child Support Recovery Act is constitutional, both under the Commerce Clause and the Spending Clause.

---

[244]*See supra* note 134 and accompanying text.

[245]United States v. Lopez, 115 S. Ct. 1624, 1631 (1995).

[246]*See* United States v. Sage, 64 U.S.L.W. 2295 (D. Conn. 1995); *see also supra* note 213 and accompanying text (discussing *Sage*).

[247]For senators' statements regarding the Child Support Recovery Act, see *supra* note 76.