

**UNITED STATES v. LOPEZ AND THE CHILD SUPPORT
RECOVERY ACT OF 1992:
WHY A NICE IDEA MUST BE DECLARED
A CASUALTY OF THE STRUGGLE TO
SAVE FEDERALISM**

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I.e INTRODUCTION

The statement that history repeats itself may be a cliché, but like many clichés, it contains some truth. Students of military and political history quickly discern certain issues pertaining to their subjects which recur cyclically. Students of constitutional law do so as well. One of the recurring issues in American constitutional law concerns the allocation of governmental authority between the federal government and the fifty states. As Woodrow Wilson once explained, the debate over federalism continually arises because “it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, and makes it a new question.”¹

Today, many Americans are seriously questioning the New Deal philosophy which produced an activist federal government with broad regulatory powers and the bureaucracy that accompanies it. As the consensus supporting an activist national government has eroded, a vigorous political debate has ensued regarding the proper allocation of authority between the states and the federal government. While the political aspects of this debate will be settled at the polls in future congressional and presidential elections, its constitutional aspects are currently being thrashed out in the opinions of a deeply divided Supreme Court.²

Throughout the history of American constitutional law, challenges to the authority of Congress to legislate under the Commerce Clause have provided the real battleground for disputes over the balance of power between the federal government and the states.³ During the 1995 Supreme Court term, it became clear that a majority of the Justices felt that the federal balance had tilted too far in favor of Capitol Hill. Conse-

¹ Marcia Coyle, *Washington Gets Amendment Fever*, NAT’L L.J., June 5, 1995, at A1.

² Joan Biskupic, *Tests of Federal Power Are Prominent on Supreme Court’s Docket*, WASH. POST, Oct. 2, 1995, at A6.

³ GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 151-52 (1991).

quently, for the first time in sixty years, the Court invalidated a Congressional attempt to legislate under the Commerce Clause in *United States v. Lopez*.⁴ This landmark decision created considerable confusion in the lower federal courts regarding the breadth of Congress's authority to legislate pursuant to the Commerce Clause. Some federal judges interpreted *Lopez* as the beginning of an offensive aimed at rolling back the vast regulatory authority the government had accumulated since the Court redefined the federal balance during the New Deal.⁵ Other federal judges interpreted the opinion as establishing a clear limit on the previously unlimited commerce power, which would prevent Congress from further regulating areas of traditional state concern (e.g., education, family law, and criminal law) via the Commerce Clause.⁶ Still other members of the federal bench felt that *Lopez* was limited to its facts and posed no obstacle to the expansion of Congress's authority to regulate private conduct pursuant to the Commerce Clause.⁷ The larger debate over the scope of the commerce power after *Lopez* spawned several smaller debates over whether particular pieces of legislation premised upon the commerce power were still constitutional.

The purpose of this Note is to illuminate one of these smaller debates centering around the Federal Child Support Recovery Act of 1992 (CSRA) by analyzing the arguments for and against the validity of the CSRA. Part II of the Note explains the CSRA and shows how the *Lopez* decision encouraged constitutional attacks on the Act. Part III of the Note traces the development of the debate over the CSRA by describing the earliest challenges to the CSRA and the arguments offered in those cases which, notably, have been repeated in all subsequent challenges to the CSRA. Part IV analyzes the rationales used by courts during this debate to hold the CSRA unconstitutional and finds that most of these rationales possess little merit. To assess the one formidable argument in favor of invalidating the CSRA, the Note devotes the majority of its analysis to discussing the larger debate concerning the scope of Congress's commerce power after *Lopez*. The analysis attempts to explain where the current boundary of the commerce power lies by placing *Lopez* in its historical context. Ultimately, the Note concludes that federal courts hearing CSRA challenges have misconstrued *Lopez*, causing most of

⁴ 514 U.S. 549 (1995) (declaring the Gun Free School Zones Act unconstitutional as exceeding congressional authority to regulate interstate commerce). The last time the Court invalidated congressional legislation premised upon the Commerce Clause was in 1936. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (declaring the Bituminous Coal Conservation Act of 1935 unconstitutional).

⁵ See *infra* Part IV.C.2.b.

⁶ See, e.g., *United States v. Parker*, 911 F. Supp. 830, 837-38 (E.D. Pa. 1995) (declaring the CSRA unconstitutional).

⁷ See, e.g., *United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995) (upholding the federal car-jacking statute against *Lopez* challenge).

them to erroneously conclude that the CSRA is a constitutional assertion of the commerce power. The Note's analysis also suggests that courts reaching the correct result may be doing so for the wrong reason due to errors in translating the subtle but important message of *Lopez*.

II.e BACKGROUND^e

A.e THE CSRA: WHAT IT DOES AND WHY IT WAS ENACTED^e

In 1992, George Bush signed the Child Support Recovery Act into law.⁸ The Act addresses the growing problem of collecting child support payments across state lines by imposing federal criminal sanctions for intentional failure to pay past due support obligations for a child residing in another state.⁹ The CSRA permits a maximum fine¹⁰ of \$5,000¹¹ and a jail term of six months for first-time offenders.¹² Repeat offenders may be imprisoned for two years¹³ and fined¹⁴ \$250,000.¹⁵ All offenders convicted under the CSRA must make restitution "in an amount equal to the past due support obligation as it exists at the time of sentencing."¹⁶

The CSRA does not, however, re-institute some form of debtor's prison. The willfulness requirement in the statute¹⁷ forces the government to:

[E]stablish, beyond a reasonable doubt, that at the time payment was due the [defendant] possessed sufficient funds to enable him to meet his obligation or that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all of the financial circumstances.¹⁸

Thus, Congress deemed the CSRA an appropriate response to two related problems—the rising cost of federal welfare programs¹⁹ and the increas-

⁸ 18 U.S.C. § 228 (1994).

⁹ *Id.*

¹⁰ *Id.* at § 228(b)(1).

¹¹ H.R. REP. NO. 102-771, at 4 (1992).

¹² *Id.*

¹³ 18 U.S.C. § 228(b)(2) (1994).

¹⁴ *Id.*

¹⁵ H.R. REP. NO. 102-771, *supra* note 11, at 1.

¹⁶ 18 U.S.C. § 228(c) (1994).

¹⁷ *Id.* at § 228(a).

¹⁸ H.R. REP. NO. 102-771, *supra* note 11, at 7 (quoting *United States v. Poll*, 521 F.2d 329, 333 (9th Cir. 1975)). Courts have interpreted the willfulness requirement of the CSRA in accordance with this congressional guidance. Therefore, inability to pay and lack of notice of legal duty constitute defenses to a CSRA prosecution. *See, e.g., United States v. Lewis*, 936 F. Supp. 1093, 1102-03 (D.R.I. 1996).

¹⁹ *See generally*, U.S. GENERAL ACCOUNTING OFFICE, *Child Support Enforcement: Timely Action Needed To Correct System Development Problems*, GAO/IMEC-92-46 (1992)

ing gap between the amount of child support owed and the amount actually paid.²⁰

In 1992, this gap was estimated to be \$27 billion,²¹ up from an estimated \$5 billion in 1989.²² When supporting parents fail to pay their child support obligations, custodial parents are more likely to seek assistance from federal welfare programs, the AFDC²³ program in particular.²⁴ Therefore, increases in the amount of unpaid child support cause corresponding increases in federal payments to custodial parents.²⁵

As a policy matter, and notwithstanding federalism concerns, the challenge of collecting child support across state lines to ensure that the burden of supporting children falls "where it belongs"²⁶ seems an appropriate topic for federal criminal legislation, even by the standards of commentators critical of the "federalization" of criminal law.²⁷ Accord-

(connecting unpaid child support obligations to the increasing costs of certain federal welfare programs).

²⁰ H.R. REP. NO. 102-771, *supra* note 11, at 5-7.

²¹ Janelle T. Calhoun, Note, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 MERCER L. REV. 921, 922 (1995).

²² H.R. REP. NO. 102-771, *supra* note 11, at 6.

²³ Aid to Families with Dependent Children (AFDC) was established by the Federal Government in 1935 "for the purpose of encouraging the care of dependent children . . . by enabling each state to furnish financial assistance . . . to needy children." 42 U.S.C. § 601 (1994). Since 1975, federal expenditures to support needy children have increased from \$5 billion to \$12.7 billion. During the same period, state expenditures have risen from \$4 billion to \$10.5 billion. See Calhoun, *supra* note 21, at 922 (this Note is an invaluable source for anyone trying to understand the history and scope of America's child support crisis; it also discusses several proposed solutions).

²⁴ H.R. REP. NO. 102-771, *supra* note 11, at 6.

²⁵ *Id.* See also Editorial, *Parents Who Don't Pay*, ST. LOUIS DISPATCH, July 23, 1994, at 14B.

²⁶ Speaking in support of Congress's first attempt to solve the problems associated with collecting interstate child support, Senator Long of Louisiana summarized the problem:

Should our welfare system be made to support the children whose father cavalierly abandons them or chooses not to marry the mother in the first place? Is it fair to ask the American taxpayer who works hard to support his own family and to carry his burden to carry the burden of the deserting father as well? Perhaps we cannot stop the father from abandoning his children, but we can certainly improve the system by obtaining child support from him and thereby place the burden of caring for his children on his own shoulders where it belongs. We can, and we must, take the financial reward out of desertion.

118 CONG. REC. 8291 (1975).

²⁷ See Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 KAN. L. REV. 503 (1995). Mengler describes four circumstances which militate in favor of federal criminal jurisdiction. One circumstance favoring "federalization" of a crime arises when "[t]he conduct is serious (identified perhaps by some monetary minimum, if, for example, the injury can easily be measured in those terms) and state enforcement is impeded by the multi-state or international aspects of the crime." *Id.* at 526. See also Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Jurisdiction*, 46 HASTINGS L.J. 979, 986 (1995).

ing to a 1992 General Accounting Office (GAO) report,²⁸ roughly one-third of child support cases involve supporting and custodial parents living in different states.²⁹ Although every state “has some form of ‘long arm statute’ designed to reach out and exercise jurisdiction over an absent noncustodial parent who fails to make court ordered child support payments,”³⁰ efforts to establish personal jurisdiction over out-of-state “deadbeat” parents under these statutes sometimes violate due process.

The case of *Kulko v. Superior Court*³¹ illustrates this problem. In *Kulko*, a custodial parent living in California attempted to sue her former husband, then residing in New York, for child support.³² The United States Supreme Court reversed the California Supreme Court’s decision granting a California trial court personal jurisdiction over Mr. Kulko.³³ Justice Marshall, speaking for the Court, held that although the defendant’s former wife and the children he was obligated to support lived in California, there was not “a sufficient connection between the defendant and the forum State as to make it fair to require defense of the action in the forum [state].”³⁴

Of course, it may appear that custodial parents in Ms. Kulko’s position could avoid the difficulties of obtaining personal jurisdiction in another state by filing an action in the state where the supporting parent resides. This solution, however, ignores what Congress explicitly noted during its deliberations on the CSRA—many single, female custodial parents are rather impecunious.³⁵ Thus, the costs of filing and maintaining an in-state action can be prohibitive to single parents.³⁶ The additional costs associated with maintaining an out-of-state suit are even

²⁸ U.S. GENERAL ACCOUNTING OFFICE, *Interstate Child Support: Mothers Report Receiving Less Support From Out-of-State Fathers*, GAO/HRD-92-39FS (1992) (cited by H.R. REP. NO. 102-771, *supra* note 11, at 5).

²⁹ *Id.*

³⁰ Calhoun, *supra* note 21, at 924.

³¹ 436 U.S. 84 (1978).

³² *Id.* at 86-88.

³³ *Id.* at 90.

³⁴ *Id.* at 91 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463-64 (1940)).

³⁵ In 1989, 3.2 million families with children from an absent father lived below the government’s official poverty line. H.R. REP. NO. 102-771, *supra* note 11, at 5. “In a majority of divorces, custodial mothers face a serious financial crisis while the noncustodial father’s lifestyle improves markedly.” Calhoun, *supra* note 21, at 1. See generally Lenore J. Weitzman, *The Economic Consequences of Divorce: An Empirical Study of Property, Alimony, and Child Support Awards*, 8 FAM. L. REP. 4037 (1982) (providing a detailed analysis of the sharp decline in the standard of living that custodial mothers and their children often experience after a divorce).

³⁶ For a good discussion of the financial burden lawyers, court costs, and fees impose on these parents, see Paula Roberts, *The Case for Fundamental Child Support Reform*, 13 FAIR\$HARE 8 (1993).

more daunting.³⁷ Furthermore, efforts to encourage states to pursue "deadbeats" owing support to residents of another state have failed.³⁸ After hearing extensive testimony to this effect, Congress took action to alleviate the problems associated with collecting child support payments across state lines.³⁹

When Congress moved to enact the CSRA, it heard many policy-oriented objections to the proposed legislation. Some critics viewed the CSRA as redundant criminal legislation⁴⁰ because it addressed a matter already covered by almost every state.⁴¹ Others branded the CSRA a coercive measure to perpetuate a child support system that includes a hidden margin of spousal maintenance as high as 50 percent.⁴² But in 1992, no one discussed whether or not Congress had the authority to enact the CSRA. Nevertheless, in the summer of 1995, United States District Judge Rosenblatt of the District of Arizona held⁴³ that the CSRA was "an unconstitutional exercise of Congressional power."⁴⁴ Congress's failure to consider constitutional challenges to the CSRA in 1992 is, nevertheless, understandable since attacks on Congress's authority to regulate private behavior under the Commerce Clause were futile until a landmark decision in the spring of 1995.⁴⁵

³⁷ These additional expenses include hiring local counsel and the increased transaction costs of communicating with and monitoring out-of-state counsel. Anyone with knowledge of law firm billing knows who pays for a New York attorney's long distance calls to update his California client. Such costs do not come out of the pockets of attorneys attempting to pay off their student loans.

³⁸ Harry B. O'Donnell, *The Quest for Effective National Child Support Enforcement Continues*, 29 J. FAM. L. 149, 164-66 (1990).

³⁹ H.R. REP. NO. 102-771, *supra* note 11, at 5-6.

⁴⁰ Mengler, *supra* note 27, at 504 (arguing that increased political interest in crime prevention and punishment has led to improper redundancy between federal and state criminal justice systems).

⁴¹ Forty-two states have made willful failure to pay child support a crime, and many impose stiffer sentences than the CSRA. *See, e.g.*, ALASKA STAT. § 11.51.120 (Michie 1996); ARIZ. REV. STAT. ANN. § 12-2458 (West 1994 & Supp. 1996); CAL. PENAL CODE § 270 (West 1995); CONN. GEN. STAT. ANN. § 53-304 (West 1994 & Supp. 1996); FLA. STAT. ANN. § 856.04 (West 1994); IDAHO CODE § 18-401 (1995); KAN. STAT. ANN. § 21-3605 (1993 & Supp. 1996); LA. REV. STAT. ANN. § 14:74 (West 1986 & Supp. 1997); MONT. CODE ANN. § 45-5-621 (1995); OHIO REV. CODE ANN. § 2919.21 (Anderson 1996); OR. REV. STAT. § 163.555 (1993); TEX. PENAL CODE ANN. § 25.05 (West 1993); WIS. STAT. ANN. § 948.22a (West 1996).a

Furthermore, all fifty states have adopted some form of the Uniform Reciprocal Enforcement of Support Act (URESA). URESA was promulgated by the National Conference of Commissioners on Uniform States Laws to facilitate extradition of custodial parents in arrears on support payments. *See* Calhoun, *supra* note 21, at 926-28. For an analysis of why URESA never solved the problem, see O'Donnell, *supra* note 38, at 166.

⁴² Calhoun, *supra* note 21, at 952-54.

⁴³ The case was *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996).a

⁴⁴ *Id.* at 1362.a

⁴⁵ *See infra* Part IV.C.2.c.a

B.e A LANDMARK DECISION PROVIDES A BASIS FOR CHALLENGING^a
 LEGISLATION PREMISED UPON THE COMMERCE POWER^a

The landmark⁴⁶ decision was *United States v. Lopez*.⁴⁷ *Lopez* involved a challenge to the constitutionality of the Gun-Free School Zones Act (GFSZA).⁴⁸ The GFSZA “made it a federal offense ‘for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.’”⁴⁹ The challenge was brought on behalf of a twelfth grade high school student from San Antonio, Texas charged with carrying a concealed handgun and ammunition on a school campus.⁵⁰ *Lopez* appeared⁵¹ to identify “three broad categories of activity that Congress may regulate under its commerce power.”⁵²

First, Congress may regulate the use of the channels of interstate commerce Second, Congress is empowered to 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 Finally, Congress’s commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.⁵³

⁴⁶ Some scholars and judges have tried to downplay the significance of *Lopez*. One court remarked that “the winds have not shifted that much.” *United States v. Bishop*, 66 F.3d 569, 590 (3rd Cir. 1995) (2-1 decision) (rejecting a *Lopez* challenge and upholding the constitutionality of the federal car-jacking statute).a “There is just much less here than meets the eye.” Harvey Berkman, *Second Commerce Clause Ruling Calms Waters*, NAT’L L. J. May 15, 1995, at A7 (quoting Professor Laurence Tribe on the significance of *Lopez*).

These characterizations of *Lopez* are questionable. *Lopez* certainly is a “watershed” *Bishop*, 66 F.3d at 603 (Becker, J., dissenting). This is true simply because *Lopez* “found some limitation on Congress’s virtually unbounded power to legislate under the Commerce Clause” for the first time in sixty years. Mengler, *supra* note 27, at 504. It is no longer the “Hey, you-can-do-whatever-you-feel-like Clause” Judge Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. PUB. POL’Y 1, 5 (1995). Furthermore, since it came down, *Lopez* has served as the basis for constitutional challenges to other exercises of federal power under the Commerce Clause. See *infra* notes 58-67 and accompanying text.

⁴⁷ 115 S. Ct. 1624 (1995) (declaring the Federal Gun Free School Zone Act unconstitutional on the grounds that it was beyond Congress’s power to enact pursuant to the Commerce Clause).

⁴⁸ 18 U.S.C. § 922(q)(1)(A) (1988 ed. Supp. V).a

⁴⁹ *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995) (quoting 18 U.S.C. § 922(q)(1)(A) (1988)).a The statute at issue defined “school zone” as “in, or on the grounds of a public, parochial or private school” or “within a distance of 1,000 feet from the grounds of a public, parochial or private school.” 18 U.S.C. § 921(a)(25) (1988).aa

⁵⁰ *Lopez*, 115 S. Ct. at 1626a.

⁵¹ I use the word “appeared” because, as will be explained later, the *Lopez* majority’s holding, and the test it articulated, is more complex than this discussion of *Lopez* may indicate at first blush. See *infra* Part IVaC.3-4.

⁵² *Lopez*, 115 S. Ct. at 1629 (citing *Perez v. United States*, 402 U.S. 146, 150 (1971)).

⁵³ *Id.* at 1629-30a.

Applying this three-pronged test, the Court quickly concluded that the GFSZA could not be upheld as a regulation of either the channels or instrumentalities of interstate commerce and could only be sustained if it regulated "an activit[y] that substantially affect[s] interstate commerce."⁵⁴ After a lengthy analysis,⁵⁵ the Court concluded that the GFSZA could not be upheld on this ground and affirmed the Fifth Circuit's decision⁵⁶ holding the statute "invalid as beyond the power of Congress under the Commerce Clause."⁵⁷

After *Lopez*, attorneys defending federal criminal prosecutions attempted to defend their clients by using *Lopez* to attack the constitutionality of various federal criminal statutes enacted pursuant to the Commerce Clause. This resulted in *Lopez*-based challenges to federal statutes criminalizing car-jacking,⁵⁸ possession of firearms and ammunition by convicted felons,⁵⁹ illegal sale and transportation of machine guns,⁶⁰ arson,⁶¹ blocking abortion clinic access,⁶² dealing in firearms without a license,⁶³ distribution of methamphetamines,⁶⁴ the Drug Free School Zones Act,⁶⁵ the Federal Child Support Recovery Act,⁶⁶ and an

⁵⁴ *Id.* at 1630 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)).

⁵⁵ The Court's analysis is discussed in detail *infra* Part IV.C.3-4.

⁵⁶ *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993).

⁵⁷ *Lopez*, 115 S. Ct. at 1634. a

⁵⁸ *See, e.g.* *United States v. Bishop*, 66 F.3d 569 (3rd Cir. 1995); *United States v. Robinson*, 62 F.3d 234 (8th Cir. 1995); *United States v. Carolina*, 61 F.3d 917 (10th Cir. 1995); *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995); *United States v. Johnson*, 56 F.3d 947 (8th Cir. 1995). All of these courts rejected *Lopez*-type challenges.

⁵⁹ *See, e.g.* *United States v. Rankin*, 14 F.3d 338 (8th Cir. 1995); *United States v. Shelton*, 66 F.3d 991 (8th Cir. 1995); *United States v. Collins*, 61 F.3d 1379 (9th Cir. 1995). All of these courts rejected *Lopez* challenges.

⁶⁰ *See, e.g.* *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995) (rejecting *Lopez* challenge).

⁶¹ *See, e.g.*, *United States v. DiSanto*, 86 F.3d 1238 (1st Cir. 1996); *United States v. a Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) (holding, in light of *Lopez*, that convicting the defendant on the facts of this particular case would be unconstitutional).

⁶² *See, e.g.* *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (rejecting *Lopez* challenge); *United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis. 1995) (following the Fifth Circuit's reasoning in *Lopez*, which the Supreme Court later affirmed, the Freedom of Access to Clinic Entrances Act was declared unconstitutional).

⁶³ *See, e.g.*, *United States v. Taylor*, 897 F. Supp. 1500 (D. Conn. 1995). a

⁶⁴ *See, e.g.*, *United States v. Gonzalez*, 893 F. Supp. 935 (S.D. Cal. 1995).

⁶⁵ *See, e.g.* *United States v. Salmiento*, 898 F. Supp. 45 (D.P.R. 1995); *United States v. Garcia-Salazar*, 891 F. Supp. 568 (D. Kan. 1995).

⁶⁶ *United States v. Bongiorno*, No. 96-1052, 1997 U.S. App. LEXIS 2170 (1st Cir. Feb. 7, 1997) (upholding CSRA); *United States v. Johnson*, 940 F. Supp. 911 (E.D. Va. 1996) (upholding CSRA); *United States v. Lewis*, 936 F. Supp. 1093 (D.R.I. 1996) (upholding CSRA); *United States v. Sims*, 936 F. Supp. 817 (N.D. Okla. 1996) (upholding CSRA); *United States v. Ganapolski*, 930 F. Supp. 1076 (M.D. Pa. 1996) (upholding CSRA); *United States v. Nichols*, 928 F. Supp. 302 (S.D.N.Y. 1996) (upholding CSRA); *United States v. Collins*, 921 F. Supp. 1028 (W.D.N.Y. 1996) (upholding CSRA); *United States v. Kegel*, 916 F. Supp. 1233a (M.D. Fla. 1996) (upholding CSRA); *United States v. Parker*, 911 F. Supp. 830 (E.D. Pa. a 1995) (declaring CSRA unconstitutional); *United States v. Sage*, 906 F. Supp. 84 (D. Conn. a

assortment of other federal laws.⁶⁷ The CSRA is one of a small number of statutes that more than one federal district court has held to be an unconstitutional exercise of Congress's commerce power in the wake of *Lopez*.⁶⁸

III.e CHALLENGES TO THE CONSTITUTIONALITY OF THEe CSRA: THE DISTRICT COURTS SPLIT

A.e AN INITIAL CONSENSUS UPHOLDS THE CSRAe

The first five court challenges to the CSRA set out the general arguments that defendants in all subsequent cases would use to challenge the Act's constitutionality. These cases are worth reviewing because they place the arguments against the CSRA in context and illustrate the debate in the lower federal courts which is percolating up to the Appellate Courts.

In *United States v. Hampshire*,⁶⁹ the United States District Court of Kansas rejected the first constitutional challenge to the CSRA. The defense made several arguments. First, Hampshire's counsel contended that, after *Lopez*, the CSRA was invalid because Congress did not have authority under the Commerce Clause to enact the statute in the first place.⁷⁰ In rejecting this argument, the court analyzed the CSRA in light of *Lopez*. It concluded that the CSRA was a constitutional exercise of Congress's commerce power "because the requirement of an interstate relationship is one of the explicit elements of the crime,"⁷¹ and it satisfies the "substantially affecting commerce" requirement because, according

1995) (upholding CSRA), *aff'd*, 92 F.3d 101 (1996); *United States v. Bailey*, 902 F. Supp. 727 (W.D. Tex. 1995) (declaring CSRA unconstitutional); *United States v. Hopper*, 899 F. Supp. 389 (S.D. Ind. 1995) (upholding CSRA); *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995) (declaring CSRA unconstitutional), *rev'd*, 95 F.3d 787 (1996); *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995) (declaring CSRA unconstitutional), *rev'd*, 95 F.3d 787 (1996); *United States v. Murphy*, 893 F. Supp. 614 (W.D. Va. 1995) (upholding CSRA), *vacated for improper venue*, 934 F. Supp. 736 (1996); *United States v. Hampshire*, 892 F. Supp. 1327 (D. Kan. 1995) (upholding CSRA), *aff'd*, 95 F.3d 999 (1996).

⁶⁷ For a thoroughly exhaustive account of the range of federal statutes subjected to *Lopez* challenges see *United States v. Walls*, 92 F.3d 1444, 1480-85 nn.53-63 (6th Cir. 1996) (Boggs, J. concurring in part and dissenting in part) (listing cases).a

⁶⁸ *United States v. Parker*, 911 F. Supp. 830 (E.D. Pa. 1995); *United States v. Bailey*,a 902 F. Supp. 727 (W.D. Tex. 1995).

⁶⁹ *United States v. Hampshire*, 892 F. Supp. 1327, 1329 (D. Kan. 1995), *aff'd*, 95 F.3d 999 (1996). Mr. Hampshire's wife commenced divorce proceedings on October 4, 1986 while he was in prison for being absent without leave (AWOL) from the U.S. Army. Mr. Hampshire was served process for the divorce in prison and subsequently held in default. At the divorce proceeding, the former Mrs. Hampshire was awarded custody of their child, and Mr. Hampshire was ordered to pay \$350.00 a month in child support. Mr. Hampshire subsequently fell in arrears with his support obligation and, in December 1994, was prosecuted under the Child Support Recovery Act.

⁷⁰ *Id.*

⁷¹ *Id.* at 1332.

to Congressional findings in the CSRA, “failure to pay child support has an effect on interstate commerce sufficient to comply with constitutional requirements.”⁷²

The defense then argued that the CSRA violated the Tenth Amendment and the “domestic relations exception” to federal court jurisdiction.⁷³ Citing *New York v. United States*⁷⁴ and *Hodel v. Virginia Surface Mining & Reclamation Ass’n*,⁷⁵ the court rejected the Tenth Amendment argument because “[t]he CSRA creates criminal sanctions for individuals who fail to comply with child support obligations; it makes no attempt to regulate the conduct of the states as states.”⁷⁶ The court also found the domestic relations exception argument meritless “because 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.”⁷⁷

Mr. Hampshire also tried to avoid prosecution under the CSRA through the doctrine of abstention and the principle of federal-state comity.⁷⁸ These arguments did not impress the court. The judge failed to see how prosecuting Hampshire “interferes with any state proceeding” and noted that “there are no pending state proceedings” that would be disrupted.⁷⁹ With these words, it was clear that the first attack on the CSRA had failed.

One month after *Hampshire* was decided, *United States v. Murphy*⁸⁰ presented the second constitutional challenge to the CSRA. James Murphy asserted that the CSRA, as it applied to him, violated the *Ex Post Facto* Clause⁸¹ and generally exceeded Congress’s authority under the

⁷² *Id.* at 1329.

⁷³ *Id.* at 1330.

⁷⁴ 505 U.S. 144, 161 (1992) (holding that “Congress may not simply commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program”) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981)).

⁷⁵ 452 U.S. 264 (1981).

⁷⁶ *United States v. Hampshire*, 892 F. Supp. 1327, 1330 (D. Kana 1995)a

⁷⁷ *Id.*

⁷⁸ Citing to *Younger v. Harris*, 401 U.S. 37 (1971) and *Burfod v. Sun Oil*, 319 U.S. 315 (1943), the *Hampshire* Court aptly summarized abstention as a federal court’s discretionary authority to “refuse to exercise jurisdiction in a matter which would disrupt the establishment of coherent state policy . . . over matters traditionally reserved to states” and to prevent “interfere[nce] with a pending state criminal prosecution.” *Hampshire*, 892 F. Supp. at 1331.

⁷⁹ *Hampshire*, 892 F. Supp. at 1331. a

⁸⁰ *United States v. Murphy*, 893 F. Supp. 614 (W.D. Va. 1995), *vacated for improper venue*, 934 F. Supp. 736 (W.D. Va. 1996).

⁸¹ U.S. CONST. art. I, § 9, cl. 3. Mr. Murphy had neglected to pay child support for his daughter in Virginia since 1991. When the CSRA was passed on October 26, 1992, Murphy already owed \$5,099.49 in child support. He was subsequently notified that continued failure to pay this past due support would result in federal criminal prosecution. After he continued to

Commerce Clause.⁸² In a brief paragraph, the court dismissed Murphy's *ex post facto* claim⁸³ and used the majority of its opinion to dispose of Murphy's Commerce Clause argument. The court quickly distinguished the CSRA from the statute held to be constitutionally infirm in *Lopez* on the grounds that the CSRA, unlike the Gun Free School Zones Act, possesses a "jurisdictional element that ensures it will not intrude upon matters with no relation to interstate commerce."⁸⁴ The court explained that the CSRA accomplishes this end by requiring the defendant to "be under an obligation to transfer funds from one state to another" to support a "child who resides in another state."⁸⁵ Under the court's analysis, the CSRA satisfied *Lopez's* "substantial relation to interstate commerce"⁸⁶ requirement because:

[I]n order to come under the purview of § 228, the accused will often have taken advantage of employment opportunities in the state in which he lives, there can be little argument that a requirement that he provide money to a child in another state has a substantial effect on interstate commerce.^{87a}

The *Murphy* Court reasoned that, like 18 U.S.C. § 1073,⁸⁸ and 18 U.S.C. § 1201,⁸⁹ the CSRA (18 U.S.C. § 228) was a justified exercise of the commerce power "to criminalize activity involving interstate travel . . . [in order to prevent] 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."⁹⁰ The court's Commerce Clause analysis ended with a citation to *United States*

neglect paying support, he was indicted under the CSRA. Murphy contended that the indictment violated the *Ex Post Facto* Clause because "although he owed \$5,099.49 on October 26, 1992 when the [the CSRA] was passed, he did not accumulate an arrearage sufficient to meet the jurisdictional pre-requisite of \$5,000 from the date of the act's passage until the termination date of the information . . . June 30, 1993." *Murphy*, 893 F. Supp. at 615.

⁸² *Murphy*, 893 F. Supp. at 615.

⁸³ The court found no violation of the *Ex Post Facto* Clause because Murphy "was put on notice that he would be held criminally liable if he did not make the child support payments then owing . . . [and] persisted in completely ignoring his obligation to pay child support." *Id.* at 617. The court concluded that Murphy was "being punished solely for conduct which occurred once he was on notice that such conduct exposed him to criminal liability under a federal statute . . . [so the] *ex post facto* clause does not prohibit punishment." *Id.*

⁸⁴ *Id.* at 616.

⁸⁵ *Id.*

⁸⁶ *United States v. Lopez*, 115 S. Ct. 1624, 1629-30 (1995).

⁸⁷ *Murphy*, 893 F. Supp. at 616.

⁸⁸ 18 U.S.C. § 1073 permits federal prosecution for fleeing a state to avoid prosecution or a legal compulsion to testify.

⁸⁹ 18 U.S.C. § 1201 creates federal criminal liability for anyone who "willfully" transports an abductee across state lines.

⁹⁰ *Murphy*, 893 F. Supp. at 616.

*v. Hampshire*⁹¹ and the conclusion that *Lopez* did not prevent Congress from enacting legislation affecting the obligations that arise from family relationships.⁹² The opinions in *Hampshire* and *Murphy*, however, were not cogent and forceful enough to convince all federal judges that the CSRA was constitutional.

B. O THIRD TIME'S THE CHARM: THE CSRA IS HELD TO BE UNCONSTITUTIONAL

Eight days after *United States v. Murphy* was decided, United States District Judge Rosenblatt in Arizona released his opinions⁹³ in *United States v. Mussari*⁹⁴ and *United States v. Schroeder*.⁹⁵ The decisions held that the CSRA was "an unconstitutional exercise of Congress's power."⁹⁶ Specifically, the *Mussari* Court found that, under *Lopez*, the CSRA exceeded Congress's authority to legislate pursuant to the Commerce Clause and therefore violated the limitations the Tenth Amendment placed on this power.⁹⁷ After summarizing *Lopez* and its three-part test, the *Mussari* Court quickly concluded that the CSRA could only be justified under the third prong of *Lopez*—" [A]ctivities having a substantial relation to interstate commerce."⁹⁸ The court, however, could not "find that the CSRA bears a substantial relation to interstate commerce"⁹⁹ and proceeded with a litany of additional reasons for the conclusion that the CSRA was unconstitutional.

⁹¹ 892 F. Supp. 1327 (D. Kan. 1995).

⁹² The *Murphy* Court stated:

While it may be true that "family law has long been considered as coming under the purview of state law," *Lopez* does not prohibit Congress from enacting laws aimed at regulating the use of interstate travel as a means by which to avoid the legal obligations arising from family responsibilities.

Murphy, 893 F. Supp. at 617.

⁹³ The opinions are literally identical except for the facts of each defendant's case on the first page. An Arizona state court held Mr. Mussari, who lived in Illinois, to be \$40,385.00 in arrears on support payments to his wife and daughter in Arizona. The same court which held Mr. Mussari to be in arrears found Mr. Schroeder, who also resided in Illinois, to be \$24,296.11 behind on payments to his wife for his child who also resided in Arizona.

By its docket number, *Mussari* was technically decided first. Because the opinions are the same, except for the facts, this Note refers only to *Mussari* when discussing Judge Rosenblatt's rationale for striking down the CSRA. It is also interesting to note that both *Mussari* and *Schroeder* were challenging the CSRA's constitutionality before *Lopez* came down and were "given additional time in which to supplement their arguments in order to discuss the *Lopez* decision." *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995). See also *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995).

⁹⁴ 894 F. Supp. 1360 (D. Ariz. 1995).

⁹⁵ 894 F. Supp. 360 (D. Ariz. 1995).

⁹⁶ *Mussari*, 894 F. Supp. at 1361.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1363 (quoting *United States v. Lopez*, 115 S. Ct. 1624, 1629-30 (1995)).

⁹⁹ *Id.*

The court rejected the government's contentions that the statute was a permissible exercise of congressional power "because the non-payment of child support substantially affects federal monies"¹⁰⁰ and that the Act was necessary to solve the "difficulties associated with extradition."¹⁰¹ The *Mussari* Court believed that accepting the government's arguments would give Congress "carte blanche to criminalize any and all activities in order to ensure that one state's laws were enforced . . . [and] a finding of such unlimited authority [was] rejected by the Supreme Court [in *Lopez*]."¹⁰²

The opinion raised additional objections to the CSRA as it continued its comparison of the CSRA to the statute in *Lopez*:

Just as there was no evidence in the *Lopez* decision that the proscribed activity, i.e. possession of a firearm within a school zone, involved interstate commerce, neither is there evidence that the CSRA involves interstate commerce. There is no commercial intercourse involved in the collection of delinquent child support payments.¹⁰³

After drawing a commercial/noncommercial distinction, the court proceeded to describe the parade of horrors¹⁰⁴ it envisioned in the aftermath of courts accepting the premise that "the collection of debt [was] sufficient to warrant federal criminal intervention."¹⁰⁵

The opinion went on to declare that "[p]rinciples of federalism and comity also support th[e] court's finding that the CSRA is unconstitutional."¹⁰⁶ The court found no "clear statement"¹⁰⁷ of Congress's intent to make the significant alteration in "the sensitive relation between federal and state criminal jurisdiction"¹⁰⁸ that would result from upholding the CSRA.¹⁰⁹ Furthermore, the CSRA violated comity because it "would force federal courts to review and apply state court orders"¹¹⁰ when de-

¹⁰⁰ *Id.* at 1364.

¹⁰¹ *Id.* at 1365.

¹⁰² *Id.*

¹⁰³ *Id.* at 1367.

¹⁰⁴ The court feared that accepting the "debt collecting" rationale "would allow Congress . . . to legislate in virtually any area. Even the collection of alimony payments could be subject to Congressional scrutiny, despite the States' traditional role as overseeing matters related to divorce and marriage." *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1368.

¹⁰⁸ *Id.*

¹⁰⁹ Whether or not the CSRA would actually affect a significant change in the federal-state balance is open to question. See *infra* Part IV.C.

¹¹⁰ *United States v. Mussari*, 894 F. Supp. 1360, 1368 (D. Ariz. 1995). This very problem has led some advocates of child support collection reform to propose having the federal gov-

defendants challenged "the validity of the underlying state court support order."¹¹¹ Moreover, the Speedy Trial Act¹¹² would make it difficult for federal courts to "stay the pending federal criminal case while the support order is collaterally attacked in state court."¹¹³

Because the court had already decided that Congress exceeded its authority under the Constitution by enacting the statute, it followed that the statute was "infringing upon those powers specifically reserved for the States under the Tenth Amendment."¹¹⁴ Under the *Mussari* Court's view of the Constitution,¹¹⁵ the CSRA also violated the Tenth Amendment because it was "an attempt to affect 'the lives liberties and properties of the people, and the internal order, improvement, and prosperity of the State'¹¹⁶ and . . . such regulation [was] within the purview of the States."¹¹⁷ In the entire opinion, the court never once mentioned either of the decisions upholding the CSRA.

On September 7, 1995, it became clear that *Mussari* was not an anomaly isolated to the District of Arizona. In *United States v. Bailey*,¹¹⁸ Judge Biery of the San Antonio Division of the United States District Court for the Western District of Texas, where *United States v. Lopez* originated,¹¹⁹ adopted the *Mussari* Court's position on the CSRA. In a

ernment take over the states' role in child support law, which would include the issuance of federally mandated support decreesa See generally Roberts, *supra* note 36.

For a critique of the "federalization" of child support law, see Maurice A. Hartnett, III, *The Uniform Interstate Family Support Act*, 11 DEL. L. REV. 51 (1993)a

¹¹¹ *Mussari*, 894 F. Supp at 1368.

¹¹² 18 U.S.C. §§ 3161-74 (1994) (providing specific time periods in which defendants must be arraigned and brought to trial)a

¹¹³ *Mussari*, 894 F. Supp. at 1368.

¹¹⁴ *Id.* at 1369.

¹¹⁵ Judge Rosenblatt's position that the Tenth Amendment reserves to the states primary authority to pass measures affecting "the lives liberties and properties of the people and the internal order, improvement and prosperity of the States," is consistent with the Framers' understanding of the federal balance. THE FEDERALIST No. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961).

Although Judge Rosenblatt's view of the Tenth Amendment comports with the Framers' intent and does not make "much if not all of Article I, Section 8 [of the Constitution] . . . surplusage," United States v. Lopez, 115 S. Ct. 1624, 1644 (1995) (Thomas, J., concurring), it is not a view of the Tenth Amendment shared by a majority of the Supreme Courta See *infra* Part IV.C.1.

¹¹⁶ The powers delegated to the federal government are few and defined. Those which remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, such as war, peace, negotiation, and foreign commerce; which, with the last power taxation will, for the most part, be connected. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and property of the people, and the internal order, improvement, and prosperity of the Statea THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

¹¹⁷ *Mussari*, 894 F. Supp. at 1369.

¹¹⁸ No. SA-95-CR-138, 1995 U.S. Dist. LEXIS 13922 (W.D. Tex. Sept. 7, 1995).

¹¹⁹ Judge Garcia of the San Antonio Division of the U.S. District Court for the Western District of Texas *upheld* the Gun Free School Zones Act. The Fifth Circuit reversed this

remarkably concise opinion¹²⁰ that was later amended,¹²¹ the government's information against Keith Douglas Bailey for violating the CSRA was dismissed on the grounds that the CSRA was unconstitutional. In his amended opinion, Judge Biery grounded his conclusion that the CSRA was unconstitutional in two arguments. First, "[a]ctual application of the CSRA would force federal courts to review and apply orders of state courts in violation of the principles of federalism and comity."¹²² Second, the CSRA embroiled the federal courts in domestic relations matters that the domestic relations exception forbid them from entertaining.¹²³

Three weeks after *Bailey*,¹²⁴ the United States District Court for the Southern District of Indiana, Evansville Division, rendered its opinion on the constitutionality of the CSRA in *United States v. Hopper*.¹²⁵ *Hopper* is an interesting¹²⁶ and disturbing¹²⁷ opinion. The Hopper Court dis-

decision. *United States v. Lopez*, 2 F.3d 1342 (1993). This reversal of the District Court was affirmed by the Supreme Court in *United States v. Lopez*, 115 S. Ct. 1624 (1995).

¹²⁰ The full opinion was:

The Court has considered the defendant's Motion to Dismiss. The Court finds 18 U.S.C. § 228 is unconstitutional. See *United States v. Lopez*, 131 L. Ed. 2d 626, 115 S.Ct. 1624, 1632 (1995); *United States v. Mussari*, 1995 U.S. Dist. LEXIS 10806, No. CR95-009 PHX-PGR, 1995 WL 447266 at*7 (D. Ariz. July 26, 1995) (Rosenblatt, J.) (18 U.S.C. § 228 declared unconstitutional). Defendant's motion is GRANTED.

It is ORDERED that the information herein is DISMISSED.

United States v. Bailey, No. SA-95-CR-138, 1995 U.S. Dist. LEXIS 13922 (W.D. Tex. Sept. 7, 1995).

¹²¹ *United States v. Bailey*, 902 F. Supp. 727 (W.D. Tex. 1995).

¹²² *Id.* at 729.

¹²³ *Id.*

¹²⁴ September 28, 1995, to be exact.

¹²⁵ *United States v. Hopper*, 899 F. Supp. 389 (S.D. Ind. 1995).

¹²⁶ The facts of *Hopper* are interesting because they demonstrate how the struggle of custodial parents to collect child support is an ongoing, frustrating process. Mr. Hopper and his wife were divorced in Indiana in 1978. The former Mrs. Hopper received custody of the couple's son and was awarded \$30 a week in child support at the time of the divorce. On June 3, 1993, the Vandenberg, Indiana Superior Court found Mr. Hopper \$18,670 in arrears on his support payments, increased his support obligation to \$75 a week, issued an Income Withheld Order, and sentenced Hopper to one year in jail for contempt. A seemingly unrepentant Mr. Hopper now faced prosecution under the CSRA for accruing \$5,335 in arrearages on his support obligation, despite the fact that he reported an income of \$24,750 during 1992. *Id.* at 390-91.

¹²⁷ *Hopper* is a disturbing opinion because Magistrate Judge Hussman displayed an extremely poor understanding of the facts and reasoning of *Lopez*. In summarizing *Lopez*, Judge Hussman stated that:

Although the GFA [Gun Free School Zones Act] specifically included congressional findings and declarations concerning how the activity of gun possession in a school zone substantially affected interstate commerce (see 18 U.S.C. § 922(q)(1)), the language in the statute which proscribed conduct did not explicitly require as an element of the crime any nexus with interstate commerce and the possession of a firearm within a school zone was too tenuous to justify Congress's intrusion into a matter of criminal law primarily of local concern.

cussed the *Mussari* Court's rationales for striking down the CSRA¹²⁸ and the reasoning which the *Hampshire* and *Murphy*¹²⁹ Courts relied upon in upholding the statute. The *Hopper* Court "conclud[ed] that *Murphy* and *Hampshire* [were] properly decided."¹³⁰ The *Hopper* opinion echoed the *Murphy* and *Hampshire* opinions by distinguishing the CSRA from the GFSZA on the grounds that it limited the federal government's interest to interstate cases in which there is failure to make support payments to "a child who resides in another state."¹³¹ The court also rejected arguments based on abstention and comity: "While principles of federalism and comity do suggest that federal courts should generally not interfere with state criminal prosecutions, and other state law functions, this court can find no case where those 'principles' were held to be grounds to declare an act of Congress unconstitutional."¹³² Furthermore, because Mr. Hopper's obligation was "already reduced to judgement . . . [t]here [we]re no issues of Indiana law . . . of great importance from a public policy perspective immediately apparent in th[e] case. Therefore, th[e] court. . . need not abstain."¹³³

The *Hopper* opinion also responded to the *Mussari* Court's argument that the collection of child support payments did not constitute commerce and was therefore beyond the reach of the commerce power.¹³⁴ The *Hopper* Court reframed the issue as whether "the act of collecting an obligation, though dealing with an intangible," amounts to commerce.¹³⁵ Avoiding the definition of commerce used by the *Lopez* Court,¹³⁶ the *Hopper* Court stated that commerce exists wherever there is a "continuous and indivisible stream of intercourse among the states involving the transmission of large sums of money and communication by

Id. at 392 (emphasis added).

This statement is incredible given the plain language of the *Lopez* decision that "the government concedes that '[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'" *United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995) (quoting Reply Brief for the United States at 5-6, *United States v. Lopez*, 115 S. Ct. 1624 (1995) (No. 93-1260)).

¹²⁸ See *supra* Part III.A.

¹²⁹ See *supra* Part III.B.

¹³⁰ *Hopper*, 899 F. Supp. at 391.

¹³¹ *Id.* at 392.

¹³² *Id.* at 393.

¹³³ *Id.* at 394.

¹³⁴ See *supra* note 103 and accompanying text.

¹³⁵ *Hopper*, 899 F. Supp. at 392.

¹³⁶ "Commerce, undoubtedly, is traffic, but it 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." *United States v. Lopez*, 115 S. Ct. 1624, 1627 (1995) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824)).

mail, telephone and telegraph.”¹³⁷ Using this definition, the court concluded that collecting child support was commerce.¹³⁸ The opinion then proceeded to argue that the CSRA satisfied the “substantial relation to interstate commerce”¹³⁹ prong of *Lopez*¹⁴⁰ by citing *Wickard v. Filburn*¹⁴¹ and arguing that failure to pay support for a child residing in another state, viewed in the aggregate, substantially affects interstate commerce.¹⁴²

After *Hopper*, the lines were drawn in the debate over the CSRA. Several other federal courts responding to challenges to the CSRA have weighed in on the issues raised in these first five cases.¹⁴³ To date, only four of the fifteen cases entertaining such challenges to the CSRA have resulted in a ruling that the CSRA is unconstitutional.¹⁴⁴ Two of these four decisions were reversed on appeal.¹⁴⁵

C.e THE CSRA IN THE APPELLATE COURTS

So far, four United States Circuit Courts have reviewed cases dealing with challenges to the constitutionality of the CSRA.¹⁴⁶ Each one of these courts has upheld the CSRA. Each appellate court decision has had to resolve the same issues raised in the first five challenges to the CSRA discussed above. The Third and Fifth Circuits have yet to hear appeals

¹³⁷ *Hopper*, 899 F. Supp. at 392 (quoting *United States v. Shubert*, 348 U.S. 222, 226 (1955)).

¹³⁸ *Id.* at 392-93 (“[T]he collection of child support orders across state lines does involve a continuous and indivisible stream of intercourse among the states involving the transmission of large sums of money and communication by mail, telephone and telegraph.”).

¹³⁹ *Lopez*, 115 S. Ct. at 1629-30.

¹⁴⁰ *Id.* at 1630-31.

¹⁴¹ 317 U.S. 111 (1942). This famous (or to many, infamous) decision upheld a challenge to the Agricultural Adjustment Act of 1938, which allowed the Secretary of Agriculture to set quotas for the raising of wheat on each farm in the country. A small farmer in Ohio challenged the Act, claiming that his growing and consuming wheat was a purely local activity and thus beyond Congress’s authority to regulate under the Commerce Clause. The Court reasoned that while farmer Filburn’s actions in isolation may be trivial, the cumulative effect of several individuals following his example would undercut Congress’s nationwide regulatory scheme for agricultural products. Therefore, Congress could regulate Filburn’s production of wheat for home consumption.

¹⁴² *Hopper*, 899 F. Supp. at 393.

¹⁴³ *See supra* note 66 (listing cases).

See supra note 66.

¹⁴⁴ *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995), *rev’d*, 95 F.3d 787a (1996); *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995), *rev’d*, 95 F.3d 787 (1996).

¹⁴⁶ *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997) (affirming district court decision upholding the CSRA); *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996) (affirming district court decision upholding the CSRA); *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996) (reversing two district court decisions declaring the CSRA unconstitutional); *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996) (affirming district court decision declaring the CSRA unconstitutional).

on the two remaining decisions holding the CSRA unconstitutional. Should these circuits follow their sister circuits and reverse judgments declaring the CSRA invalid? Or is there some infirmity in the reasoning of the appellate and district courts that have upheld the CSRA that would justify the Third and Fifth Circuits parting company with their sister circuits? The following analysis reveals there is such an infirmity in the reasoning of opinions upholding the CSRA.

IV. ANALYSIS

The first five cases to consider general constitutional objections¹⁴⁷ to the CSRA addressed four distinct arguments that have surfaced in all subsequent challenges to the Act: (1) the CSRA violates the domestic relations exception to federal court jurisdiction; (2) the CSRA violates the federalism-based principle of federal-state comity; (3) the CSRA violates the Tenth Amendment; and (4) the CSRA is invalid because, after *Lopez*, it is “beyond the power of Congress under the Commerce Clause.”¹⁴⁸ This Part of the Note analyzes these arguments in turn in an effort to determine the proper resolution of the issues they raise and which ones, if any, may justify invalidating the CSRA.

A. 0 THE DOMESTIC RELATIONS EXCEPTION TO FEDERAL JURISDICTION ARGUMENT

Arguments that the CSRA violates the domestic relations exception to the jurisdiction of federal courts cannot withstand substantive analysis. Given the lack of merit this argument possesses, it is surprising to see the amount of ink federal courts have wasted discussing it.¹⁴⁹ The domestic

¹⁴⁷ Case specific objections to the CSRA have also been made, but most are beyond the scope of this Note.

Some defendants have attempted to avoid prosecution under the CSRA by arguing that federal courts should invoke the doctrine of abstention. *See supra* Part III.A and *infra* Part IV.B. (discussing *United States v. Hampshire* and finding the abstention doctrine “inapplicable because there [were] no pending state proceedings”). It is unlikely that abstention claims against CSRA prosecutions will succeed because the statute itself does not allow a party to be prosecuted until there is “a court order or an order of an administrative process *pursuant to the law of a State*” which holds that the defendant owes a “past due support obligation” of at least \$5,000. 18 U.S.C. § 228 (d)(1) (1994) (emphasis added).

Defendants have also attempted to invoke the *Ex Post Facto* Clause of the United States Constitution to avoid prosecution under the CSRA. *See supra* Part III.A (discussing *United States v. Murphy* in which an *ex post facto* defense was found to be without merit).

¹⁴⁸ *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993).

¹⁴⁹ For discussion of this issue in CSRA cases see, e.g., *United States v. Reyes*, No. 96-235, 1996 U.S. Dist. LEXIS 20241 (D.P.R. Dec. 2, 1996) (rejecting the argument); *United States v. Lewis*, 936 F. Supp. 1093, 1106-07 (D.R.I. 1996) (rejecting the argument); *United States v. Collins*, 921 F. Supp. 1028, 1033 (W.D.N.Y. 1996) (rejecting the argument); *United States v. Nichols*, 928 F. Supp. 302, 316-17 (S.D.N.Y. 1996) (rejecting the argument); *United States v. Kegel*, 916 F. Supp. 1233, 1235 (M.D. Fla. 1996) (rejecting the argument).

relations exception does not “exist by any constitutional requirement; rather, it is a rule of statutory construction, in which the [Supreme] Court has adopted a narrow interpretation of the federal courts’ civil diversity jurisdiction to exclude domestic relations cases.”¹⁵⁰ As the *Hampshire* Court noted,¹⁵¹ the doctrine is inapplicable in cases involving the CSRA because the jurisdiction of federal courts in CSRA cases is not premised upon diversity jurisdiction.¹⁵² Rather, it is based upon federal question jurisdiction,¹⁵³ which is valid so long as Congress has the power to legislate upon the matter over which jurisdiction is conferred.¹⁵⁴

Although courts may wish that they could avoid hearing CSRA prosecutions¹⁵⁵ by extending the domestic relations exception to cases premised upon federal question jurisdiction, courts cannot unilaterally make such a significant amendment to their federal question jurisdiction.¹⁵⁶ Furthermore, even if the domestic relations exception could dis-

¹⁵⁰ *United States v. Hampshire*, 892 F. Supp. 1327 (D. Kan. 1995) (citing *Ankenbrant v. Richards*, 504 U.S. 689, 699-700 (1992)).

¹⁵¹ See *supra* note 77 and accompanying text.

¹⁵² 28 U.S.C. § 1332 (1994).a

¹⁵³ *Id.* at § 1331.

¹⁵⁴ See generally Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53a COLUM. L. REV. 157, 168 (1953) (discussing the development of and limitations on Congress’s ability to confer original jurisdiction over matters to federal courts).

¹⁵⁵ As a matter of policy it is easy to understand why federal courts might wish they could make the CSRA go away along with the “heavy burden that the federalization of interstate child support obligations may place upon the [federal] courts.” *United States v. Hampshire*, 892 F. Supp. 1327, 1331 (D. Kan. 1995). The existing criminal docket in federal courts is already overwhelming. See generally Mengler, *supra* note 27 (arguing that Congress enacted too many federal criminal statutes, and in doing so placed an overwhelming burden on federal courts). Over the last two decades the federal criminal docket has expanded from 27,968 cases in 1980, to 44,919 in 1994a PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS, COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES 14 (Mara 1995). The problem has been aptly summarized as:

A Congress determined to fight the war on crime by enacting reams of criminal legislation [under the Commerce Clause] that is frequently duplicative of state penal codes; an Executive Branch too frequently willing to authorize federal prosecut[ions] . . . as well as to take on a more dominant role in criminal prosecution that previously had resided in the states; and a federal judiciary increasingly incapable of managing its caseload because of the nature and size of its criminal docket.

Mengler, *supra* note 27, at 505 (1995). “Indeed in some districts the civil trial is a chimera, because the percentage of the docket devoted to criminal trials is so high; S.D. Cal. 86%, S.D. Fla. 66%, M.D.N.C. 84.8%, W.D. Tenn. 68%, N.D. Iowa 63.5%, D.N.M. 76.4%, D.N.D. 62.3%, D. Idaho 62.3%, D. Oreg. 64.9%, E.D. Wash. 63.5%. *Id.* at n.23.

Serious enforcement of the CSRA would significantly increase this already overcrowded criminal docket. Congressional findings report that there are approximately ten million households in the United States in which fathers are absent and single mothers are trying to raise children. H.R. REP. NO. 102-771, *supra* note 11, at 4-5. Furthermore, one-third of child support cases concern children whose fathers reside in different states, and in fifty-seven percent of these cases the custodial parent “seldom or never” receives support payments. *Id.* at 5. Attempts to prosecute even a fraction of these “deadbeat dads” under the CSRA would significantly increase the criminal dockets of federal courts.

¹⁵⁶ See generally Mishkin, *supra* note 154.

place matters Congress designated as federal questions, the CSRA would not fall within the scope of the exception as articulated by the Supreme Court in *Ankenbrandt v. Richards*.¹⁵⁷

According to the Court, the exception applies to three types of cases. First, it applies to actions seeking issuance or alteration of a divorce decree. Second, it applies to cases involving the issuance or alteration of child custody decrees. Third, it applies to actions pertaining to issuance or alteration of awards for alimony.¹⁵⁸ The CSRA has nothing to do with divorce or custody decrees.¹⁵⁹ Without disregarding long accepted legal definitions, it would require more than creativity to equate child support¹⁶⁰ with alimony.¹⁶¹ Thus, given the narrow scope of the domestic relations exception, coupled with the fact that it applies only to diversity cases, critics of the CSRA cannot rely on the exception to invalidate the statute.

B. FEDERAL-STATE JUDICIAL COMITY ARGUMENT

Judicial comity is “[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, *not as a matter of obligation, but out of deference and respect*.”¹⁶² There are two types of comity—interstate comity¹⁶³ and federal-state comity: The comity argument made against the CSRA deals with federal-state comity. The Supreme Court defined this type of comity as:

[A]pproper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the

¹⁵⁷ 504 U.S. 689, 703 n.6, 704 (1992).

¹⁵⁸ *Id.*

¹⁵⁹ See *supra* Part II.A. This is made clear by the plain language of the statute itself and is explicitly stated in the “Summary and Purpose” Section of the CSRA’s legislative history. H.R. REP. NO. 102-771, *supra* note 11, at 4.

¹⁶⁰ Child support is “[t]he legal obligation of parents to contribute to the economic maintenance, including education, of their children; enforceable in both civil and criminal context.” BLACK’S LAW DICTIONARY 239 (6th ed. 1990).

¹⁶¹ Alimony is “[a]llowances by which husband or wife by court order pays other spouse for maintenance while they are separated, or after they are divorced, or temporarily, pending a suit for divorce.” *Id.* at 73.

¹⁶² *Id.* at 267 (emphasis added).

¹⁶³ The most famous and contentious cases involving comity among states occurred during the antebellum period. They centered on whether or not slave states were obligated to respect the laws of free states which emancipated slaves travelling through or temporarily residing on free soil. See, e.g., *Strader v. Graham*, 51 U.S. 82 (1851) (holding that slave states were under no obligation to recognize either the laws or court orders of free states because comity was voluntary rather than mandatory).

States and their institutions are left free to perform their separate functions in their separate ways.¹⁶⁴

Manifestations of the judicial concern for the principle of federal-state comity take two forms.¹⁶⁵ First, federal courts may, under certain limited circumstances,¹⁶⁶ abstain from deciding a particular case.¹⁶⁷ Second, the Supreme Court has adopted a rule of construction for federal legislation¹⁶⁸ “affecting the sensitive relation between state and federal criminal jurisdiction”¹⁶⁹ which assumes that, “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”¹⁷⁰

This clear statement rule obliges federal courts to construe a statute narrowly to minimize the law’s impact on the federal-state balance when the statutory materials relating to the statute are inconclusive¹⁷¹ as to the extent to which Congress intended the measure to alter the federal-state balance. This ensures that “Congress faced the[*d*] serious questions [concerning the effect a measure will have on the division of authority between the federal government and the States], and meant to affect the federal-state balance in the way . . . claimed by the Government at some later time.”¹⁷²

In both *United States v. Bailey* and *United States v. Mussari*, the district court asserted that principles of “comity also support . . . finding that the CSRA is unconstitutional.”¹⁷³ The *Mussari* Court supported this conclusion with two observations. First, quoting *United States v. Bass*,¹⁷⁴ the court asserted that “[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. This assertion is particularly relevant here since Congress

¹⁶⁴ *Younger v. Harris*, 401 U.S. 37, 44 (1971) (holding that federal courts must refrain from hearing injunctive proceedings based upon alleged constitutional violations when such proceedings seek to enjoin an already pending state criminal proceeding)a

¹⁶⁵ Justice Sandra Day O’Connor, *Our Judicial Federalism*, 35 CASE W. L. REV. 1 (1984) (asserting that to protect the role the Constitution and its structure create for states and their judicial systems, federal courts must imply limitations upon their power).

¹⁶⁶ See *infra* notes 181-88 and accompanying text.

¹⁶⁷ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-28 at 195-208 (2d ed. 1988)a

¹⁶⁸ *United States v. Bass*, 404 U.S. 336, 349 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Five Gambling Devices*, 346 U.S. 441, 449-50 (1953).

¹⁶⁹ *Bass*, 404 U.S. at 349.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 350.

¹⁷² *Id.*

¹⁷³ *United States v. Mussari*, 894 F. Supp.1360, 1368 (Da.Ariz. 1995), *rev’d*, 95 F.3d 787 (1996). See also *United States v. Bailey*, 902 F. Supp. 727, 728-29 (1995) (discussing comity).

¹⁷⁴ *Bass*, 404 U.S. at 349.

has traditionally been reluctant to define, as a federal crime, conduct already denounced as criminal by the states.”¹⁷⁵

Second, the *Mussari* court noted that:

[A] defendant being prosecuted under the CSRA could arguably defend the action by challenging the validity of the underlying state court support order. Either the federal court would be forced to review the support order, or stay the pending federal criminal case while the support order is collaterally attacked in state court. Neither of these scenarios is desirable in light of the principles of comity and the Speedy Trial provisions federal courts are bound by in criminal matters.¹⁷⁶

The first observation, concerning the absence of a clear statement of congressional intent (certainly of questionable accuracy),¹⁷⁷ was an effort to invoke the comity-based clear statement rule of narrow statutory interpretation. The latter observation, regarding the possibility of CSRA prosecutions resulting in federal courts second-guessing state court determinations of state law to avoid delays, was an appeal to the comity-based doctrine of abstention.¹⁷⁸ Neither concept, however, provides a basis for a court concluding that the CSRA is unconstitutional. As the court in *United States v. Hopper* noted, there are “no cases” where the principle of comity is cited as grounds for declaring “an act of Congress unconstitutional.”¹⁷⁹ This is because both the doctrines, federal courts use¹⁸⁰ to defend the principles of comity, narrow construction and abstention, apply only to the specific facts of a particular case.

The comity-based doctrine of abstention is exercised when one of three situations arise.¹⁸¹ One situation is when difficult and unsettled questions of state law must be resolved before a substantial federal question can be decided.¹⁸² This is done out of respect for the function of state courts as “the principal expositors of state law.”¹⁸³ The second situation involves cases where federal courts refrain from granting declaratory or injunctive relief from a pending state law proceeding on constitutional grounds when the state action provides an adequate forum

¹⁷⁵ *Mussari*, 894 F. Supp. at 1367. Wilful failure to pay child support is a crime in at least 42 states. H.R. REP. NO. 102-771, *supra* note 11, at 6.

¹⁷⁶ *Mussari*, 894 F. Supp. at 1367. a

¹⁷⁷ See *infra* notes 197-98 and accompanying text.

¹⁷⁸ Such concerns are not discussed anywhere in the legislative history of the CSRA.

¹⁷⁹ See *supra* note 132 and accompanying text.

¹⁸⁰ TRIBE, *supra* note 167, § 3-28, at 196.

¹⁸¹ GERALD GUNTHER, CONSTITUTIONAL LAW 1643-51 (12th ed. 1991).

¹⁸² *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). a

¹⁸³ *Moore v. Sims*, 442 U.S. 415, 429 (1979).

to address the constitutional issues.¹⁸⁴ This facet of abstention is justified by the importance of maintaining efficient federal and state court systems by respecting the concurrent jurisdiction state courts possess over most federal claims.¹⁸⁵ Federal courts will also abstain from deciding cases involving issues of state law that would significantly affect state "policy problems of substantial public import whose importance transcends the result in the case then at bar."¹⁸⁶ Regardless of the concern actuating a federal court to defend the principle of comity by invoking abstention, abstention simply permits a federal court to "postpone"¹⁸⁷ hearing a particular case. And, as both the First and Ninth Circuits noted, abstention has never been used to invalidate the statute creating the underlying cause of action.¹⁸⁸

The *Mussari* Court's hypothetical regarding a federal court having to delay or stay a pending federal prosecution under the CSRA while a state court hears challenges to the underlying support decree¹⁸⁹ is a perfect example of a situation in which a federal court may abstain from hearing a case until the questions of state law are resolved. The relevant issues of state law, however, will normally be decided before a federal prosecution under the CSRA is commenced. Although it is possible for the situation envisioned by the *Mussari* Court to arise, as it did in *United States v. Lewis*,¹⁹⁰ there is little risk that a federal court will usurp the function of state courts as "the principle expositors of state [domestic] law." Admittedly, it may "not be desirable" to have a federal court delay hearing a claim until the underlying issues of state law are resolved, and doing so may pose a great inconvenience to federal courts hearing CSRA prosecutions.¹⁹¹

¹⁸⁴ *Younger v. Harris*, 401 U.S. 37, 49-53 (1971)a See generally, Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59 (1981) (discussing instances when federal courts do and should act to protect the principle of comity).

¹⁸⁵ See TRIBE, *supra* note 167, §3-28 at 201-208.

¹⁸⁶ *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)a

¹⁸⁷ *Harrison v. NAACP*, 360 U.S. 167, 176 (1959). Courts hearing CSRA claims may wish to consider whether it is necessary to delay hearing a specific CSRA prosecution. For an excellent example of such an analysis see *United States v. Lewis*, 936 F. Supp. 1093, 1106-08 (D.R.I. 1996) (rejecting request that court abstain from hearing a CSRA prosecution until a state court decided pending motion to vacate the judgment attributing to the defendant paternity of the child benefitting from the support order).

¹⁸⁸ See *United States v. Bongiorno*, 106 F.3d 1027, 1034 (1st Cir. 1997); *United States v. Mussari*, 95 F.3d 787, 791 (9th Cir. 1996). See generally, Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (discussing the abstention doctrine). But see Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985).

¹⁸⁹ See *supra* notes 110-13 and accompanying text.

¹⁹⁰ 936 F. Supp. 1093, 1095-96, 1106-08 (D.R.Ia 1996).

¹⁹¹ *United States v. Mussari*, 894 F. Supp. 1360, 1366 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (1996).

But the relevant question when assessing the constitutional validity of the CSRA is not whether it is convenient for federal courts to adjudicate the matter. Given “the virtually unflinching obligation of the federal courts to exercise the jurisdiction given them,”¹⁹² the relevant question is whether the federal courts have jurisdiction over CSRA cases. Article III of the Constitution leaves this issue, and the policy questions surrounding it, for Congress, rather than the Judiciary, to resolve. Congress has granted the courts of the United States federal question jurisdiction to hear CSRA prosecutions.¹⁹³ This grant of jurisdiction can only be invalidated if it was beyond Congress’s inherent authority to legislate upon the matter over which jurisdiction was conferred. Accordingly, federal courts cannot in the name of federalism use the comity-based doctrine of abstention as an alternative route to the conclusion that the CSRA is unconstitutional.¹⁹⁴

The *Mussari* Court also asserted that the statutory materials surrounding the CSRA did not provide a clear statement of congressional intent to affect a change in federal-state criminal jurisdiction over failure to pay interstate child support.¹⁹⁵ Assuming, *arguendo*, that no such statement appeared in the CSRA or its legislative history, this would not justify holding the entire statute unconstitutional. It would simply permit the court to construe the scope of the statute narrowly so that it could hold particular prosecutions beyond the scope of the law.¹⁹⁶ Furthermore, it is difficult to understand how a judge reading the statutory materials accompanying the CSRA could not find a clear statement of Congress’s intent to criminalize failure to pay child support for a child residing in another state although such failure is “already denounced as criminal by the states.”¹⁹⁷ In the legislative history of the CSRA, Congress specifically noted that:

[A]t least 42 states have made willfull [sic] failure to payo child support a crime, punishable in some states by imprisonment for up to ten years. Unfortunately, the ability of those states to enforce such laws outside their own boundaries is severely limited. Although most stateso have adopted the Uniform Reciprocal Enforcement of Support Act, which includes provisions designed to dealo with the extradition of interstate child support defend-

¹⁹² *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976).

¹⁹³ 18 U.S.C. § 228 (1994).

¹⁹⁴ *TRIBE*, *supra* note 167, § 3-28, at 206.

¹⁹⁵ *Mussari*, 894 F. Supp. at 1366-67.

¹⁹⁶ *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Bass*, 404 U.S. 336, 349 (1971); Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527, 540-44 (1947).

¹⁹⁷ *Mussari*, 894 F. Supp. at 1363.

ants and the processing of requests for enforcement of support orders, interstate extradition and enforcement in fact remains a tedious, cumbersome and slow method of collection. [The CSRA] addresses the problem of interstate enforcement of child support by taking the incentive out of moving interstate to avoid payment. The [law] is designed to target interstate cases only. These are the cases which state officials report to be clearly the most difficult to enforce, especially the “hard core” group of parents who flagrantly refuse to pay and whom traditional [interstate] extradition procedures have utterly failed to bring to justice.¹⁹⁸

Clearly, neither of the doctrines used to enforce the federalism-based principle of federal-state comity—abstention and the clear-statement rule—provide even a colorable basis for declaring the CSRA *unconstitutional*. Efforts to invoke comity as a grounds to invalidate the CSRA, or any statute for that matter, constitute wishful thinking.¹⁹⁹ The portions of the First and Ninth Circuit opinions recognizing this fact should be followed by other circuits.

C. THE TENTH AMENDMENT/COMMERCE CLAUSE ARGUMENT: ACTUALLY THE SAME QUESTION

Opponents of the CSRA have made an attack on the Statute thato cannot be dismissed as easily as those based on the domestic relations exception and federal-state comity. This attack focuses on the scope of Congress’s power to legislate under the Commerce Clause and whether or not the CSRA infringes upon the powers the Tenth Amendment reserves to the states. The key to determining the merits of these arguments is understanding the impact *Lopez* will have on Congress’s ability to legislate under the Commerce Clause. *Lopez* requires federal courts to decide whether Congress exceeded its commerce power by enacting a measure in the first instance.²⁰⁰ However, before discussing whether or not the CSRA is likely to be upheld as a constitutional exercise of Congress’s commerce power in the post-*Lopez* era, it is necessary to explain why it is impossible to analyze the merits of Tenth Amendment argu-

¹⁹⁸ H.R. REP. NO. 102-771, *supra* note 11, at 6. Many commentators concur in Congress’s conclusion that the Uniform Reciprocal Enforcement of Support Act and other efforts to enforce support decrees across state lines are grossly inadequate. *See, e.g.*, Calhoun, *supra* note 21.

¹⁹⁹ “If wishes were horses then beggars would ride.” KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 18 (9th ed. 1991).

²⁰⁰ The ramifications of *Lopez* have been considered in every challenge to the CSRA. *See supra* Part III.

ment²⁰¹ against the CSRA without first determining the scope of the commerce power.

1. *Why the Tenth Amendment Argument Cannot Be Resolved in Isolation*

The Tenth Amendment has not been an independent limitation upon congressional power to regulate private actors²⁰² since the Supreme Court decided *United States v. Darby* in 1941.²⁰³ In *Darby*, the Court decided that the auxiliary precautions the Framers placed in the Constitution to limit the scope of the national government's power posed an inconvenient obstacle to New Deal legislation.²⁰⁴ The Supreme Court accommodated "the era's perceived necessity" by declaring the Tenth Amendment "but a truism [stating] that all is retained which has not been surrendered."²⁰⁵ Under this novel interpretation, the Tenth Amendment was no longer an independent, substantive limitation protecting and maintaining the federal system the Framers had created.²⁰⁶ It became just an aside, a superfluous reminder of what was evident throughout the

²⁰¹ See *supra* Part III.B.

²⁰² In 1941, the Court re-interpreted the Tenth Amendment as posing no independent barrier to Congress's ability to regulate private activity under the Commerce Clause. *United States v. Darby*, 312 U.S. 100, 124 (1941).

²⁰³ The Court continues to hold that regulation of states as entities, rather than of private actors, may in certain instances cause congressional action to be an unconstitutional violation of the state sovereignty reserved by the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress may not simply commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory scheme.").

²⁰⁴ See generally Harry N. Scheiber, *State Law and "Industrial Policy" in American Development 1789-1987*, 75 CAL. L. REV. 415 (1987) (discussing how the concept of dual sovereignty reinforced by the Tenth Amendment affected American industrial policy and was eventually abandoned during the New Deal to permit Congress to pass legislation, which was of questionable value in relieving the economic dislocation of the Great Depression); William W. Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 773 n.3 (stating that Justice Stone's view that the Tenth amendment stated a mere truism "was more hubris than insight, a reflection of judicial values in the age of the national state").

Prior to the New Deal the Court often invoked the Tenth Amendment as an independent, substantive limit upon the power of the federal government. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895):

It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, the power to govern men and things within the limits of its dominion is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly constrained by the Constitution of the United States, and essentially exclusive.

Id.

²⁰⁵ *United States v. Darby*, 312 U.S. 100, 124 (1941) (upholding the Fair Labor Standards Act).

²⁰⁶ For cases in which the Court had interpreted the Tenth Amendment as such a limitation see, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895); *Munn v. Illinois*, 94 U.S. 113, 124-25 (1876); *United States v. DeWitt*, 76 U.S. (9 Wall.) 41, 45 (1869); *New Orleans v. United States*, 35 U.S. 662, 736 (1836).

Constitution—that the Framers established a federal system of dual sovereignty.²⁰⁷

When coupled with the Commerce Clause jurisprudence that the Court developed during the New Deal era,²⁰⁸ this view of the Tenth Amendment left the states with residual authority to regulate only those private activities that Congress did not presently feel like regulating.²⁰⁹ As a result, courts are correct in stating that modern Tenth Amendment inquiries into legislation affecting private parties consist of simply asking whether or not Congress possesses authority under the Commerce Clause, or one of the other enumerated powers, to enact the law in question.²¹⁰ Although the New Deal interpretation of the Tenth Amendment is currently being subjected to an increasing tide of criticism from scholars²¹¹ and judges²¹² and may in fact be eroding,²¹³ the Supreme Court has yet to clearly indicate that it has abandoned Justice Stone's brainchild. Even Justices considered the most ardent defenders of the

²⁰⁷ *Darby*, 312 U.S. 100, 124 (1941).

²⁰⁸ For a detailed description of the Commerce Clause jurisprudence developed during the New Deal, see *infra*, Part IV.C.2.b.

²⁰⁹ See *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 289a (1981):

To object to [the Surface Mining Control and Reclamation Act of 1977] appellees must assume that the Tenth Amendment limits Congressional power to pre-empt or displace state regulations of private activities. . . . This assumption is incorrect . . . the Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers.

Id.

²¹⁰ For CSRA cases properly construing and clearly articulating the current framework for Tenth Amendment challenges to regulation that does not regulate "States as States" see, e.g., *United States v. Bongiorno*, 106 F.3d 1027, 1033-34 (1st Cir. 1996); *United States v. Mussari*, 95 F.3d 787, 791 (9th Cir. 1996); *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996); *United States v. Nichols*, 928 F. Supp. 302, 315 (S.D.N.Y. 1996); *United States v. Hopper*, 899 F. Supp. 389, 393 (S.D. Ind. 1996). See also D. Bruce LaPierre, *Political Accountability in the National Political Process—the Alternative to Judicial Review of Federalism*, 80 NW. U. L. REV. 577, 618-24 (1985).

²¹¹ See, e.g., LEARNED HAND, *THE BILL OF RIGHTS* (1958); Martin H. Redish & Karin La Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 8-14 & nn. 33-56 (1987).

²¹² Recently, one member of the Supreme Court reminded his compeers that the Court has "turn[ed] the Tenth Amendment on its head." *United States v. Lopez*, 115 S. Ct. 1624, 1645 (1995) (Thomas, J., concurring).

²¹³ For the clearest and most comprehensive catalogue of evidence that "the times theya are-a-changin'" in Tenth Amendment analysis of regulation of private actors, see the powerful argument of Judge Danny J. Boggs of the U.S. Sixth Circuit Court of Appeals in *United States v. aWall*, 92 F.3d 1444, 1479-81 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part).a

federal system continue to pay lipservice to²¹⁴ the New Deal version of the Tenth Amendment.²¹⁵

The Supreme Court's schizophrenia regarding whether or not the Tenth Amendment serves as a substantive barrier to federal regulation affecting the states as states²¹⁶ will not affect the fate of the CSRA because it is a criminal sanction that regulates only private actors. Therefore, courts are supported by sound precedent if they collapse the question of whether the CSRA violates the Tenth Amendment into the question of whether Congress exceeded the scope of its commerce power when it enacted the CSRA.

2.0 *The Commerce Clause*

Prior to the Supreme Court's landmark decision in *United States v. Lopez*, it would not have been possible to convince a federal court that Congress exceeded the limits of its commerce power by enacting the CSRA.²¹⁷ In the aftermath of *Lopez*, however, courts must take such arguments seriously because the Supreme Court made clear that there is a boundary that Congress cannot transgress with its commerce power. The analysis federal courts have used in the CSRA cases, which will be discussed later, indicates that the lower courts are, either through wilful blindness or honest misinterpretation, failing to recognize the markers left by the *Lopez* majority delineating the boundary of the commerce power.

The remainder of this Note will focus on deciphering the message of *Lopez* and its implications for the CSRA. The process of discerning where the limits of the Commerce Clause lie after *Lopez* can be facili-

²¹⁴ Justice O'Connor accepted Justice Stone's linguistic nihilism in *New York v. United States*, 505 U.S. 144, 156 (1992).

²¹⁵ Professor Epstein has ably illustrated that, contrary to the arguments of proponents of the New Deal expansion of federal power, Justice Stone's interpretation of the Tenth Amendment was a sharp break from any previous interpretation of the Constitution. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 *Va. L. Rev.* 1387, 1400-54 (1987).

Professor Epstein also shows that rather than being the result of any principled textual interpretation of the Constitution, the New Deal expansion of federal power resulted from the fact that "a narrow majority of the Court was in sympathy with the dominant intellectual belief of the time" which rejected the Founders' "belief that government was not an unrequited good but, was at best a necessary evil." *Id.* at 1443.

²¹⁶ See *National League of Cities v. Usery*, 426 U.S. 833 (1976) (relying on the Tenth Amendment to invalidate application of federal wage and hour regulations as to State governments), *overruled by Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985) (holding that the Tenth Amendment provides no substantive barrier to applying congressional wage and hour regulations to state governments). *But see New York v. United States*, 505 U.S. 144 (1992) (holding that the Tenth Amendment prohibits Congress from commandeering the state legislative process).

²¹⁷ See *TRIBE*, *supra* note 167, § 5-8 at 316 (discussing judicial review of congressional acts under the Commerce Clause and concluding Court review amounted to a mere "formality").

tated by briefly reviewing where the boundary has been and where it was prior to *Lopez*. The history of the Commerce Clause can be divided into three general periods. The first period consists of the Commerce Clause jurisprudence prior to the New Deal. The second period begins with the New Deal and ends with *Lopez*. The third period consists of the post-*Lopez* era.

a. Before the New Deal: Meaningful Review of the Commerce Power

When the founding fathers convened in Philadelphia to design “a more perfect Union,”²¹⁸ they were determined to design a government free “from the defect of power in the existing Confederacy to regulate the commerce between its several members.”²¹⁹ This determination resulted in Article I, Section 8, Clause 3 of the Constitution, which empowers Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.”

The first meaningful judicial interpretation of the Commerce Clause came in the 1824 case of *Gibbons v. Ogden*.²²⁰ The case involved exactly the kind of “interfering and unneighbourly [commercial] regulations of . . . States” which the Founders intended to prevent by placing the Commerce Clause in the Constitution.²²¹ Writing for the Court, Chief Justice Marshall rejected Mr. Ogden’s narrow definition of commerce, which excluded navigation, and explained that:

Commerce, undoubtedly, is traffic, but it 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. The mind can scarcely conceive a system for regulating commerce between nations,

²¹⁸ U.S. CONST. pmbl.

²¹⁹ See generally THE FEDERALIST NO. 42 (James Madison) (Clinton Rossiter ed., 1961) (discussing the impetus for and scope of the Commerce Clause).

²²⁰ 22 U.S. (9 Wheat.) 1 (1824). In this case, the state of New York had granted Robert Fulton and Robert Livingston an exclusive franchise to operate steamships in New York waters. Fulton and Livingston subsequently sold an interest in the franchise to Mr. Ogden. Vessels using steam power in New York water without the permission of the franchisees were sued for damages in New York courts. New Jersey retaliated by enacting a law allowing New Jersey residents fined in New York courts for operating steam vessels without permission to recover treble damages in New Jersey courts against the parties for whom New York courts entered judgment. Mr. Gibbons of New Jersey claimed the right to operate a steam vessel between New York and New Jersey under his federal coasting license, which he claimed exempted him from having to get permission from the New York franchisees. The New York Supreme Court granted Ogden an injunction against Gibbons. Gibbons appealed to the U.S. Supreme Court. *Id.* at 3-5, 194-95.

²²¹ THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying or selling, or of barter.²²²

After defining “commerce” for purposes of the Commerce Clause, Marshall explained that the commerce power “is the power to regulate; that is to prescribe the rule by which commerce is to be governed” and that “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.”²²³ The *Gibbons* Court, however, emphatically stated that limitations on the commerce power existed²²⁴ and used commercial transactions occurring within the borders of a single state as an example of the type of commerce Congress could not reach under the Commerce Clause.²²⁵

For quite some time after *Gibbons v. Ogden*, Commerce Clause jurisprudence developed almost exclusively through “cases dealing with limits on state action affecting interstate commerce.”²²⁶ In these cases, the Court was not scrutinizing congressional regulations enacted under the commerce power. The Court was instead scrutinizing commercial regulations passed by states to determine whether they interfered with the “freedom of interstate commerce allegedly guaranteed by Art. I, § 8, cl. 3.”²²⁷ From these cases, the Court developed its “dormant” Commerce Clause jurisprudence.

The Court had few occasions²²⁸ to pass judgment upon congressional action pursuant to the Commerce Clause until Congress made sig-

²²² *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824).

²²³ *Id.* at 196.

²²⁴ *Id.*

²²⁵ It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary.

Comprehensive as the word “among” is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose . . . The enumeration presupposes something not enumerated, and that something, if we regard the language of the subject of the sentence, must be the exclusively internal commerce of a State.

Id. at 194-95a

²²⁶ GUNTHER, *supra* note 181, at 97.

²²⁷ *Id.*

²²⁸ Among the few instances the Supreme Court had to determine the limits of Congress’s authority under the Commerce Clause during the nineteenth century were: The Trade Mark Cases, 100 U.S. 82 (1879) (holding Congress exceeded its Commerce Clause powers by establishing a trademark registration system because the statute was “designed to govern commerce

nificant use of its commerce power during the latter part of the nineteenth century.²²⁹ Judicial interpretation of Congress's commerce power eventually progressed along three lines. The first line was the progeny of *Gibbons v. Ogden* and dealt with regulating the "instrumentalities of interstate commerce."²³⁰ The second line of interpretation involved use of the commerce power to keep the channels of interstate commerce free from "immoral and injurious uses;"²³¹ this allowed Congress to regulate the private conduct of citizens on either the sending or receiving end of interstate transactions.²³² The third line of cases involved Congress's ability to reach wholly intrastate commercial activities as a means of implementing broader regulation of interstate commercial activities.

i. *Instrumentalities of Commerce*

The facet of the commerce power allowing Congress to regulate the instrumentalities of interstate commerce, such as ships, evolved from the reasoning of *Gibbons v. Ogden*. This branch of the commerce power developed into a mature form when the Supreme Court decided the case of *The Daniel Ball* in 1870.²³³ In *The Daniel Ball*, the Court upheld the 1852 Inspection Act as applied to ships that operated solely within the waters of one state, so long as the ship transported cargo as part of a plan to place commodities in interstate commerce.²³⁴ Speaking for the Court, Justice Field explained that Congress's authority to regulate the instruments of interstate commerce must be considered from a broad and practical viewpoint because a narrow conception prevented Congress from using the Commerce Clause to solve the type of problems it was intended to ameliorate.²³⁵

Justice Field's "instrumentalities of commerce" rationale was subsequently used to uphold federal railway regulation. In 1886, the Supreme

wholly between citizens of the same state"); *United States v. DeWitt*, 76 U.S. (9 Wall.) 41 (1870) (holding that Congress could not prohibit all sales of illuminating oil which required heat in excess of 110 degrees fahrenheit to ignite because it was a "police regulation, relating exclusively to the internal trade of states.â).

²²⁹ Congress passed the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890.

²³⁰ Epstein, *supra* note 215, at 1409.

²³¹ *Caminetti v. United States*, 242 U.S. 470, 491 (1917).

²³² *See* *Champion v. Ames*, 188 U.S. 321, 374 (1903) (Fuller, C.J., dissenting).

²³³ 77 U.S. (10 Wall.) 557 (1870).

²³⁴ *Id.* at 565.

²³⁵ Justice Field stated that Congress must be able to regulate instrumentalities of interstate commerce, i.e., ships, within the boundaries of a single state because if "[s]everal agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line of the other end, [can avoid federal regulation] . . . Federal jurisdiction would be entirely ousted and [the commerce power] would be a dead letter.â *Id.*

Court held that states could not regulate fares on railway runs that began in one state and terminated in another state.²³⁶ Later, in *Houston, East & West Texas Railway v. United States (The Shreveport Rate Case)*,²³⁷ Congress's power to regulate the instrumentalities of commerce was interpreted to include "control over . . . interstate carrier[s] in all matters having a *close and substantial relation* to interstate commerce."²³⁸ The pragmatism urged by Justice Field in *The Daniel Ball* won the day in the *Shreveport Rate Case* and its progeny.²³⁹ These cases showed that rather than requiring a narrow, abstractly logical nexus between the local activity Congress wished to regulate and instrumentalities of interstate commerce, a practical, realistic relationship would suffice.²⁴⁰ Under this facet of the commerce power, Congress had significant and undisputed power to regulate the "instrumentalities of commerce" by the early twentieth century. This power was, however, limited to regulations concerning "transportation by rail, river [and] road."²⁴¹

ii. *Immoral and Injurious Uses of Interstate Commerce*

It was not until the mid-twentieth century that the Court read a quasi-"police power" into the Commerce Clause.²⁴² In the late nineteenth and early twentieth centuries, however, the idea of national reform measures to cure evils ranging from impure foods, gambling, drinking, prostitution, and white slavery gained widespread popular support.²⁴³ Proponents of national legislation to cure the perceived evils of the day, such as Albert Beveridge and Theodore Roosevelt, were elected to national office.²⁴⁴ Justices with similar views were subsequently appointed to the Supreme Court.²⁴⁵ During this era, Congress was permitted to enact legislation "far removed from the economic concerns that . . . had prompted the Commerce Clause" and which "seemed to be primarily moral [legislation]."²⁴⁶

²³⁶ *Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557 (1886).

²³⁷ 234 U.S. 342 (1914).

²³⁸ *Id.* at 355.

²³⁹ *The Shreveport Rate Case*, 234 U.S. 342 (1914); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

²⁴⁰ See GUNTHER, *supra* note 181, at 99.

²⁴¹ Epstein, *supra* note 215, at 1421.

²⁴² In *United States v. DeWitt*, the Court explicitly rejected the idea that the Commerce Clause imparted a "police power" to Congress. 76 U.S. (9 Wall.) 4, 45 (1870).

²⁴³ See, e.g., GUNTHER, *supra* note 181, at 109.

²⁴⁴ *Id.*

²⁴⁵ See generally KATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS* (2d ed., 1961) (biography of Justice Holmes, who was appointed to the Court by Theodore Roosevelt and accepted, for pragmatic reasons, that the Constitution permitted Congress to pass national measures to respond to the "felt necessities of the times").

²⁴⁶ GUNTHER, *supra* note 181, at 106.

Congress's power to pass measures under the Commerce Clause aimed at keeping the channels of interstate commerce free from immoral and injurious uses was recognized by the Court in *Champion v. Ames* (*The Lottery Case*).²⁴⁷ *Ames* involved the constitutionality of the Federal Lottery Act of 1895. The Act prohibited the movement of lottery tickets across state lines.²⁴⁸ Writing for the Court, Justice Harlan concluded that:

[A]s a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" . . . may prohibit the carrying of lottery tickets from one State to another.²⁴⁹

This vague standard was more clearly defined in later cases which picked up on a statement by the dissent in *Ames*.²⁵⁰ The later opinions limited this facet of commerce power regulation to "things in themselves injurious."²⁵¹

In *Hammer v. Dagenhart*,²⁵² the Court showed that a "things harmful in themselves" standard could serve as an enforceable limit on this second branch of the commerce power. *Dagenhart* held that the 1916 Child Labor Act, which prohibited the shipment in interstate commerce of any goods manufactured at any plant employing child laborers under the age of fourteen,²⁵³ was unconstitutional because the regulated goods were "themselves harmless."²⁵⁴ Therefore, the law infringed upon the police power reserved to the states by the Tenth Amendment and was beyond Congress's reach under the Commerce Clause.²⁵⁵

²⁴⁷ 188 U.S. 321 (1903).

²⁴⁸ *Id.* at 321-25.

²⁴⁹ *Id.* at 359.

²⁵⁰ *See id.* at 374 (Fuller, C.J., dissenting) (arguing that lottery tickets should not be subject to congressional regulation because he did not find lottery tickets to be "in themselves injurious").

²⁵¹ *See, e.g.,* *Hoke v. United States*, 227 U.S. 308 (1913) (upholding the Mann Act, which prohibited the transportation of women and girls in interstate commerce for immoral purposes); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (upholding the Pure Food and Drug Act of 1906, which prohibited transporting adulterated foods in interstate commerce).

²⁵² 247 U.S. 251 (1918).

²⁵³ The act also prohibited employing laborers between the ages of fourteen and sixteen for more than eight hours a day, six days a week. The Child Labor Act was not an effort to solve a problem states were neglecting to address, but rather an effort to establish a uniform rule for child labor that would override the laws each state had already enacted on the subject. *Id.* at 268-69 n.1.

²⁵⁴ *Id.* at 272.

²⁵⁵ *Id.* at 273-74.

The *Dagenhart* majority sympathized with the substance and purpose of the Child Labor Act,²⁵⁶ but it refused to bend the limit on this facet of the commerce power. Justice Holmes, in a dissent in which three other Justices joined, asserted that the “things dangerous in themselves” test was simply a way for the court to “intrude its judgment upon questions of policy or morals.”²⁵⁷ Despite the uneasiness many Justices felt about displacing congressional enactments under a standard as vague and subjective as “things harmful in themselves,” this test remained a meaningful limit on Congress’s commerce power until the New Deal.

iii. *Congressional Regulation of Local Activities—The Direct/Indirect Distinction*

The third branch of the early commerce power allowed Congress to regulate wholly intrastate activities in order to facilitate broader regulation of interstate commerce. This branch of the commerce power grew out of cases which challenged Congress’s authority under the Commerce Clause to prohibit various activities under the Sherman Antitrust Act of 1890. To delimit the scope of Congress’s authority to regulate local activities that affected interstate commerce but were unrelated to the instrumentalities of interstate commerce, the Court adopted a formalistic²⁵⁸ analysis.²⁵⁹ This approach seemed the antithesis of the broad, pragmatic approach used to assess regulation of local activities which did affect the instrumentalities of interstate commerce.²⁶⁰

The first important case in the development of this facet of the commerce power was *United States v. E.C. Knight Co.*²⁶¹ *Knight* involved the government’s effort to use the Sherman Act to prevent the American Sugar Refining Company from gaining almost absolute control of American domestic sugar refining capacity by purchasing four large sugar refineries in Pennsylvania.²⁶² The case centered around two issues: first, “whether a preliminary step (be it merger or cartel) toward a proposed sale of goods in interstate commerce was itself part of interstate com-

²⁵⁶ *Id.* at 275 (“That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit”).

²⁵⁷ *Id.* at 280 (Holmes, J., dissenting, joined by McKenna, Brandeis, and Clarke, J.J.).

²⁵⁸ Unlike many in the legal community, I use the word “formalistic” to connote only those legal constructs that are inappropriately formal. By no means do I intend to condemn all manifestations of formality. Form and the values it serves are essential to our legal system, even if they are often overlooked by many American academics. For more on this, see, e.g., Robert S. Summers, *Theory Formality and Practical Legal Criticism*, 1990 L. Q. REV. 407 (explaining the deficiencies in modes of criticism condemning legal doctrine for being overly formal).

²⁵⁹ GUNTHER, *supra* note 181, at 99.

²⁶⁰ See *supra* Part IV.C.2.a.i.

²⁶¹ 156 U.S. 1 (1894).

²⁶² See *id.* at 9.

merce; and second, even if a preliminary step were part of interstate commerce, could Congress reach it by regulating manufacture?"²⁶³

The American Sugar Refining Company argued that the Government did not have the power under the Sherman Act to obstruct local activities, such as manufacturing, unrelated to the instrumentalities of interstate commerce when such activities affected interstate commerce "only incidentally and indirectly."²⁶⁴ The *Knight* Court agreed. The Court held that even if the merger of Pennsylvania and New Jersey sugar refineries at issue was itself part of interstate commerce, Congress could not prevent it by regulating manufacturing at sugar refineries.²⁶⁵ The majority explained:

Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only *incidentally and indirectly*. Commerce succeeds to manufacture, and is not a part of it.²⁶⁶

The indirect/direct distinction the Court applied to regulation of local affairs premised upon the commerce power but not involving instrumentalities of commerce was clarified four years after *Knight* in *Addyston Pipe & Steel Co. v. United States*.²⁶⁷ In this case, a unanimous Supreme Court upheld a Sherman Act challenge to a contract between several large midwest cast iron pipe manufacturers.²⁶⁸ The contract segmented the Midwestern market for their product in a manner that gave each company a local monopoly.²⁶⁹ *Addyston Pipe* was similar to *E.C. Knight* in that both involved preliminary consolidation arrangements; but the cases differed in that the preliminary agreement at issue in *Addyston*,

²⁶³ Epstein, *supra* note 215, at 1437. This description of the issues in *Knight* is consistent with the Court's characterization of the issues, but it is much more clearly articulated than any of the Justices' explanations. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 9-46 (1895).

²⁶⁴ *Knight* involved the government's challenge to efforts by the American Sugar Refining Company (a New Jersey corporation) to acquire four Pennsylvania sugar refineries. The government claimed authority under the Sherman Antitrust Act to prevent the merger because it was "a combination or contract in restraint of trade or commerce among the several states." *E.C. Knight Co.*, 156 U.S. at 9. The government contended that permitting the merger would make American Sugar the refiner of 98% of the nation's sugar, thus allowing them a virtual monopoly and the ability to set prices without having to consider competitive influences. *Id.* at 18.

²⁶⁵ *Id.* at 16-18.

²⁶⁶ *Id.* at 12 (emphasis added).

²⁶⁷ 175 U.S. 211 (1899).

²⁶⁸ *Id.* at 226-48.

²⁶⁹ *Id.* at 213-25.

unlike the one in *Knight*, did not involve manufacturing and explicitly addressed plans for interstate sales of a product.²⁷⁰

It was upon this distinction that the Court based its holding in the 1905 *Swift* case involving an agreement among meat dealers to contractually fix bidding in livestock markets across the nation.²⁷¹ Writing for the Court, Justice Holmes explained:

[I]t is a direct object [of the agreement], it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *U.S. v. E.C. Knight Co.*, where the subject matter of the combination was manufacture [of sugar] and the direct object monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement it was not a necessary consequence nor a primary end. Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales.²⁷²

Thus, by the early twentieth century, the Supreme Court developed a jurisprudence that allowed it to review congressional enactments premised upon the Commerce Clause by classifying acts into one of three categories: (1) regulation of matters having a close and substantial relation to the instrumentalities of interstate commerce; (2) regulations aimed at preventing immoral and injurious uses of the channels of interstate commerce; and (3) regulation of wholly intrastate activities unrelated to the instrumentalities of interstate commerce. Once the Court classified an act, it proceeded to decide whether or not Congress had exceeded the distinct limitation established for the facet of the commerce power under which the act fell.²⁷³ This analytic framework did not always function as a precise formula.²⁷⁴ In addition, the vague and subjective nature of standards such as direct versus indirect and “things harmful

²⁷⁰ *Id.* at 240-41.

²⁷¹ *Swift & Co. v. United States*, 196 U.S. 375, 394 (1905).

²⁷² *Id.* at 397 (citation omitted).

²⁷³ See Epstein, *supra* note 215, at 1441-43.

²⁷⁴ Sometimes the Court was unable to convince itself which category a measure fell into. Such confusion resulted in difficulty determining which limitation was applicable. See, e.g., *Chicago Bd. of Trade v. Olsen*, 262 U.S. 1 (1923) (The Grain Futures Act of 1922 was upheld. The Court first gave a long explanation of how the facts related to “instrumentalities of interstate commerce” and then shifted to reliance on *Swift*.); *Stafford v. Wallace*, 258 U.S. 495, 517 (1922) (The Court upheld the Packers and Stockyard Act of 1921 regulating middlemen who arranged for the purchase and transportation of cattle from the Western States to slaughterhouses and processors in the Midwest. The opinion displays the Court’s uncertainty as to whether the act fell under the “instrumentalities of commerce” line of analysis or the direct/indirect line of cases. The opinion first analogized the facts of the case to the pattern in its

in themselves” left the Court’s Commerce Clause jurisprudence open to Justice Holmes’s criticism that it was merely a way for the Court to “intrude its judgment upon questions of policy and morals.”²⁷⁵ Nevertheless, in an era when a majority of the Court viewed the evils incumbent with judicial enforcement of the constitutional principles of federalism and limited and enumerated powers as a lesser evil than granting Congress boundless authority to regulate every facet of human life under the pretext of regulating commerce, this jurisprudence provided a means of ensuring that there were limits to the commerce power.

b.o The New Deal and Judicial Abdication: *Le Déluge*²⁷⁶

The unparalleled economic and social upheaval of the Great Depression and the expedients intended to alleviate it²⁷⁷ provided the backdrop for the greatest test of the Court’s ability to uphold the counter-majoritarian structural mechanisms²⁷⁸ in the Constitution that limit the power of the federal government.²⁷⁹ The Court failed this test. Despite

“instrumentalities of commerce” cases and then shifted to asserting that *Swift* (a direct/indirect precedent) justified upholding the law).

²⁷⁵ *Hammer v. Dagenhart*, 247 U.S. 251, 280 (1918) (Holmes, J., dissenting).

²⁷⁶ From the statement attributed to Jeanne, Marquis De Pompadour in reply to Louis XV after the defeat of the French and Austrian armies by Frederick the Great in the battle of Rossbach on November 5, 1757. “Après nous le déluge” (After us the Deluge). JOHN BARTLETT, *FAMILIAR QUOTATIONS* 324 (16th ed., 1992).

²⁷⁷ For summaries of the unparalleled distress that ensued in the wake of the Great Depression, which began in 1929 and continued until 1941, and the efforts made to remedy the situation see, e.g., *THE READER’S COMPANION TO AMERICAN HISTORY* 279-82 (Eric Foner & John A. Garraty eds., 1991); WILLIAM J. KEEFE ET AL., *AMERICAN DEMOCRACY: INSTITUTIONS, POLITICS AND POLICY* 456-59 (1986); GUNTHER, *supra* note 181, at 115.

²⁷⁸ Professor Redish explains that the Founders’ decision to expressly enumerate in the Constitution those powers the federal government was to have along with the Tenth Amendment clearly demonstrates that they intended to have a non-majoritarian branch pass upon the constitutionality of enactments by the majoritarian branches regardless of the adequacy of the political process from which such measures derived. Redish & Drizin, *supra* note 211, at 12-16 (1987). See also, *THE FEDERALIST* No. 78 at 466-67 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority Limitations of this kind can only be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Id.

²⁷⁹ See Redish & Drizin, *supra* note 211, at 10-13; Justice William Rehnquist, *The Notion of A Living Constitution*, 54 *TEX. L. REV.* 693, 699 (1976). But see William Cohen, Speech to the Association of American Law Schools (AALS) Constitutional Law Meeting, Washington, D.C. (Oct. 8, 1987) (arguing that the Court’s departure from its traditional Commerce Clause jurisprudence was an inevitable and proper response to the historical forces of the time and legitimated by the landslide re-election of Franklin Delano Roosevelt in 1936).

“doubts as to Constitutionality, however reasonable,”²⁸⁰ the Court proved unable to endure the majoritarian pressures urging it to uphold New Deal legislation and eventually “acceded to political pressures.”²⁸¹ A majority of the Court no longer saw the evils incumbent in enforcing the constitutional principles of federalism and limited and enumerated powers as less malevolent than the evils that would accompany granting Congress unchecked authority to legislate pursuant to the Commerce Clause.

It was clear that the Supreme Court was curtailing meaningful review of Congress’s commerce power in 1937 with its decision in *NLRB v. Jones & Laughlin Steel Corp.*²⁸² At issue in *Jones & Laughlin* was the constitutionality of the National Labor Relations Act (NLRA).²⁸³ The NLRA granted the National Labor Relations Board (NLRB) broad regulatory authority over labor relations in any enterprise receiving a substantial part of its material from, or shipping a substantial part of its products in, interstate commerce and dependent upon such commerce for the successful conduct of its business.²⁸⁴ Congress deemed the law necessary to alleviate the “paralyzing consequences” of industrial strife.²⁸⁵ The NLRB was attempting to sanction the Jones & Laughlin Steel Corporation for violating a provision in the Act that prevented employers from firing union organizers and other pro-union workers.²⁸⁶ Jones & Laughlin attempted to avoid the sanction by having the NLRA invalidated as beyond Congress’s commerce power.

Under the Court’s existing framework for analyzing statutes enacted under the commerce power, the NLRA fell under the facet concerning regulation of local activities unrelated to the instrumentalities of interstate commerce. Therefore, the parties expected the Court to apply the

280 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 212, 297-98 (1938) (Letter from President Franklin Roosevelt to Congressman Hill, chairman of the House committee in which the Bituminous Coal Conservation Act of 1935 was pending, urging the Congressman to support the bill and ignore arguments regarding doubts as to the constitutionality of the Act).

Emboldened by his landslide re-election in 1936, President Roosevelt publicly questioned the Court’s role as arbiter of the Constitution declaring “we must take action to save the Constitution from the Court . . . We cannot rely on an amendment as the immediate or only answer to our present difficulties. [An] amendment like the rest of the Constitution is what the Justices say it is rather than what . . . you might hope it is.” President Franklin D. Roosevelt in his Weekly Radio Address to the Nation (Mar. 9, 1937), reprinted in GUNTHER *supra* note 181, at 123.

281 TRIBE, *supra* note 167, § 5-4 at 309.

282 301 U.S. 1 (1937).

283 *Id.* at 29-30.

284 *Id.* at 22-25.

285 *Id.* at 41.

286 *Id.* at 24-25.

indirect/direct test.²⁸⁷ The Court did not, however, subject the NLRA to this test. Instead, it used the contextual and pragmatic “substantial relation” approach²⁸⁸ it had previously applied exclusively to regulations affecting the instrumentalities of interstate commerce.²⁸⁹ The Court analogized the NLRA to the regulation upheld in *The Shreveport Rate Case*²⁹⁰ on the basis that, in both cases, “the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce.”²⁹¹ The Court concluded that because the regulation bore a “close and substantial relation to interstate commerce [the regulation is] within the reach of federal power . . . although the industry when separately viewed is local.”²⁹² Consequently, the NLRA was upheld.²⁹³ The *Laughlin* Court did, however, warn that:²⁹⁴

Undoubtedly the scope of [the commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce *so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.*²⁹⁵

²⁸⁷ See *supra* Part IV.C.2.a.iii. The government’s argument evidenced its belief that the indirect/direct test would be applied. The government argued that cases in which legislation was invalidated because it regulated matters only indirectly affecting interstate commerce were inapplicable in this case because the labor disruptions the NLRA sought to regulate and prevent “constitute[d] an interruption to commerce operating directly without an ‘efficient intervening agency or condition.’” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 11 (1937).

²⁸⁸ “The case that seems to mark the Court’s definitive commitment to the practical conception of the commerce power is *NLRB v. Jones & Laughlin Steel Corp.*” *United States v. Lopez*, 115 S. Ct. 1624, 1636 (1995) (Kennedy, J., concurring).

²⁸⁹ 301 U.S. at 36-38. The Court repeatedly cites “affecting instrumentalities of commerce cases” which sprang from the *Shreveport Rate Case*. See *supra* Part IV.C.2.a.iii.

²⁹⁰ This was a seminal decision in the cases creating the instrumentalities of interstate commerce facet of Commerce Clause jurisprudence. See *supra* Part IV.C.2.a.iii.

²⁹¹ *Houston & Texas Ry. v. United States*, 234 U.S. 342, 351-52 (1914).

²⁹² *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37-38 (1937).

²⁹³ *Id.* at 49.

²⁹⁴ The court stated:

[There is a] limitation upon the federal power which inheres in the constitutional grain, as well as because of the explicit reservation of the Tenth Amendment. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, between commerce “among the several States” and internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

Id. at 30.

²⁹⁵ *Id.* at 37 (emphasis added).

After *Jones & Laughlin*, the Court continued to apply the “substantial relation” test developed to assess regulations affecting the instrumentalities of interstate commerce (i.e., ships, railroads, and automobiles) to regulations affecting local activities unrelated to instrumentalities of interstate commerce.²⁹⁶ Eventually, the vague indirect/direct distinction withered from disuse.²⁹⁷ In 1941, the Court made clear that it had united all three heads of the commerce power under the pragmatic and context-specific “substantial relation” test²⁹⁸ in *United States v. Darby*.²⁹⁹

Darby upheld the Fair Labor Standards Act (FLSA).³⁰⁰ The Act prohibited placing into interstate commerce goods manufactured by labor paid below a prescribed minimum wage.³⁰¹ Under the Court’s pre-1937 Commerce Clause jurisprudence, the FLSA appeared to be a regulation intended to keep the channels of interstate commerce free from immoral and injurious uses.³⁰² The Court, however, did not apply the “goods harmful in themselves”³⁰³ test traditionally used in such cases.³⁰⁴ This test was expressly rejected³⁰⁵ by the *Darby* Court. Citing Justice Holmes’s dissent in *Hammer v. Dagenhart*, the Court overruled *Hammer v. Dagenhart*³⁰⁶ and applied a “substantial effect” test.³⁰⁷

The opinion proceeded to plow more new ground when it emasculated the Tenth Amendment by declaring it a mere “truism,” thereby removing an obstacle in the path of the accreting commerce power.³⁰⁸ With the Tenth Amendment rendered impotent, the only limitations left upon Congress’s ability to regulate private actors under the commerce power inhered in the Constitution’s structure,³⁰⁹ which delegated “few

²⁹⁶ After *Laughlin*, the Court constantly applied the “affecting interstate commerce test” to all three facets of the commerce power. See, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) (upholding regulation of electrical production facilities); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (upholding federal statute prohibiting interstate shipment of filled milk).

²⁹⁷ TRIBE, *supra* note 167, § 5-4, at 308-09a

²⁹⁸ See JAMES AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 161-64 (1984)a

²⁹⁹ 312 U.S. 100 (1941).

³⁰⁰ *Id.* at 111-12, 115.

³⁰¹ *Id.* at 112.

³⁰² *Id.* at 116.

³⁰³ *Id.*

³⁰⁴ See *supra* Part IV.C.2.a.ii.

³⁰⁵ *United States v. Darby*, 312 U.S. 100, 117 (1941).

³⁰⁶ *Id.* at 116-17. For a more complete description of the *Dagenhart* case, see *supra* Part IV.C.2.a.ii.

³⁰⁷ *Id.* at 119.

³⁰⁸ Our conclusion is unaffected by the Tenth Amendment which 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’. The amendment states but a truism that all is retained which has not been surrendered.

Id. at 123-24.

³⁰⁹ See Redish & Drizin, *supra* note 211, at 1-5.

and defined³¹⁰ powers to the federal government and created a federal system of dual sovereignty.³¹¹ One year after *Darby*,³¹² it became clear in the case of *Wickard v. Filburn*³¹³ that the Court was no longer enforcing these remaining structural limitations on the power of the national government.³¹⁴

Wickard upheld amendments to the Agricultural Adjustment Act of 1938 penalizing wheat production in excess of government quotas, even if it was grown for home consumption.³¹⁵ The opinion noted that the rationale of *Darby*, permitting regulation of matters having a close and substantial relation to interstate commerce, may not be broad enough to cover “production not intended in any part for commerce but wholly for consumption on the farm.”³¹⁶ So, to further develop “[a] practical conception of commercial regulation,”³¹⁷ the Court expanded the commerce power to permit regulation of private activities “[which] may not be regarded as commerce . . . whatever [their] nature,”³¹⁸ so long as the activities “*might reasonably be deemed* nationally significant in their *aggregate* economic effect.”³¹⁹ The aggregative test articulated in *Wickard* was soon “understood to provide no limitation on the power [of Congress to legislate under the Commerce Clause].”³²⁰

After *Wickard*, the Court maintained a tripartite conception of the commerce power,³²¹ but applied a single “test” to determine whether an act of Congress exceeded the scope of a particular facet of the commerce power. This single test evolved into an even more permissive standard than the “cumulative effects” test articulated by the *Wickard* Court. Eventually, the “test” became a rubber stamp because the Court simply

³¹⁰ THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

³¹¹ In the compound republic of America, the power surrendered by the people is first divided between two distinct [and separate] governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

THE FEDERALIST No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

³¹² 312 U.S. 100 (1941).

³¹³ 317 U.S. 111 (1942).

³¹⁴ See, e.g., GUNTHER, *supra* note 181, at 131 (“in effect [the *Wickard* Court] abandon[ed] all judicial concern with federalistic limits on congressional power” to regulate private actors); Redish & Drizin, *supra* note 211, at 4 & n.13.

³¹⁵ *Wickard*, 317 U.S. at 114-20.

³¹⁶ *Id.* at 118-19.

³¹⁷ *United States v. Lopez*, 115 S. Ct. 1624, 1637 (1995) (Kennedy, J. concurring).

³¹⁸ *Wickard*, 317 U.S. at 125.

³¹⁹ TRIBE, *supra* note 167, § 5-4, at 310 (explaining the holding and rationale of the *Wickard* decision).

³²⁰ Robert F. Nagel, *Federalism as a Fundamental Value*, 1981 SUP. CT. REV. 81, 81-82

³²¹ See, e.g., *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995); *Hodel v. Virginiaa Surface Mining & Reclamation Assn.*, 452 U.S. 264, 276-77 (1981); *Perez v. United States*, 402 U.S. 146, 150 (1971) (all stating that there are three facets of the commerce power).

had to find that “Congress had a rational basis for finding that [an activity] . . . affected commerce.”³²² By its plain meaning, this standard is incredibly broad because “depending upon the level of generality, any activity can be looked upon as commercial.”³²³ Furthermore, simply asking whether Congress had a rational basis is a rhetorical question because “one always can” find a rational basis.³²⁴ This is especially so when the Court is willing “to accept Congress’s word on a statute’s connection to interstate commerce,”³²⁵ as it did after *Wickard*.³²⁶ Even when Congress neglected the formality of making findings as to how an activity related to interstate commerce, under this “standard” the Court imputed a rational basis to Congress’s actions.³²⁷ Quite simply, this standard allowed Congress “[to] sit in final judgement on the constitutionality of their own actions.”³²⁸ Consequently, it also amounted to judicial abdication of the Court’s duty to enforce the limitations on federal power inherent in the structure and text of the Constitution³²⁹ by providing meaningful review to congressional regulation of private activity premised upon the commerce power.

c.o Complete Abdication Ends: *United States v. Lopez*

Over the years, voices expressed concern over the Court’s abdication of meaningful review of Commerce Clause enactments.³³⁰ Nevertheless, waves of legislation premised upon the commerce power³³¹

³²² *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (upholding Title II of the 1964 Civil Rights Act which was enacted pursuant to the Commerce Clause)

³²³ *United States v. Lopez*, 115 S. Ct. 1624, 1633 (1995).

³²⁴ Joseph Calve, *Anatomy of a Landmark Ruling*, LEGAL TIMES, Aug. 14, 1995 at 9 (quoting Scalia, J., during oral argument for *United States v. Lopez* 115 S.Ct. 1624 (1995))

³²⁵ *Id.*

³²⁶ For instances where the Court has accepted, at face value, Congressional findings concerning an activity’s connection to interstate commerce see, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981) (“The Court *must* defer to a congressional finding that a regulated activity affects interstate commerce”) (emphasis added); *Perez v. United States* 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

³²⁷ See, e.g., *Perez v. United States*, 402 U.S. 146, 156 (1971) (asserting Congress need not “make particularized findings in order to legislate [under the Commerce Clause]”).

³²⁸ *Redish & Drizin*, *supra* note 211, at 16.

³²⁹ See *id.* at 15-17.

³³⁰ See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 311 (1981) (“[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so”) (Rehnquist, J., concurring); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (“[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question.”) (Black, J., concurring).

³³¹ The wave of Commerce Clause legislation became a tsunami under the Bush and Clinton administrations as the Executive and Legislative branches got “tough on crime” and passed reams of new federal criminal legislation. These statutes, premised upon the commerce

continued to erode “the distinction between what is national and what is local.”³³² The echo of the *Jones & Laughlin* Court’s warning that “the scope of th[e] [commerce] power must be considered in light of our dual system of government,”³³³ did not resonate with a majority of the Court until fifty-eight years after it was given. Once again, a majority of the Court viewed any evils flowing from fulfilling its duty to honor the constitutional values of federalism and limited and enumerated powers as less malevolent than allowing Congress unlimited power to legislate pursuant to the Commerce Clause.³³⁴ In *United States v. Lopez*,³³⁵ this majority took action before the tide of Commerce Clause legislation engulfed one of the last elements defining the distinction between what is national and what is local—education.³³⁶

In *Lopez*, the Supreme Court finally began to delineate substantive limits on the commerce power³³⁷ by declaring the Gun Free School Zones Act (GFSZA) unconstitutional because it was beyond Congress’s commerce power to enact.³³⁸ The *Lopez* majority’s³³⁹ decision did not rest on Congress’s failure to observe the formality of making legislative findings connecting the enactment to interstate commerce.³⁴⁰ It resulted instead from an acute fear that upholding the GFSZA and the attenuated causal chain which connected it to interstate commerce would effectively

power, covered matters ranging from liberation of research animals (18 U.S.C. § 43 (1993)) to the theft of artwork (18 U.S.C. § 668 (1994)) to possession of a handgun by a juvenile (18 U.S.C. § 922(x)(1) (1994)). Thanks in large part to the Violent Crime Control and Law Enforcement Act of 1994, the number of federal crimes created via the Commerce Clause has risen to over 3,000. *See generally* Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits For Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Mengler, *supra* note 27 (both recounting the massive increase in federal criminal laws enacted under the commerce power in recent years and the negative effects this trend has had on the federal courts).

³³² *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

³³³ *Id.*

³³⁴ *See* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1816 (1995).

³³⁵ *United States v. Lopez*, 115 S. Ct. 1624, 1633 (1995). For a thorough discussion of the facts of *Lopez* see *supra* Part II.B.

³³⁶ Although Congress has passed legislation pertaining to education, it has done so under the Spending Clause. When Congress initiates legislation under its spending power, it is not invading the domain of states because states may opt out of the program at the risk of losing federal funds. States have no such discretion when a statute is premised upon the commerce power. *See* *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). *But see* Joshua Kaden, *Politics, Money and State Sovereignty*, 79 COLUM. L. REV. 847 (1979) (arguing that opting out of federal programs and foregoing federal monies is no longer a realistic option).

³³⁷ *See* Dailey, *supra* note 334, at 1816.

³³⁸ *Lopez*, 115 S. Ct. at 1633 (1995).

³³⁹ Justice Rehnquist wrote the opinion of the Court in which Justices Scalia, Thomas, O’Connor and Kennedy joined. Justices O’Connor and Kennedy wrote a concurring opinion and Justice Thomas also wrote a separate concurrence.

³⁴⁰ *See, e.g.*, Harvey Berkman, *Second Commerce Clause Ruling Calms the Waters*, NAT’L L.J., May 15, 1995, at A7 (quoting Lawrence H. Tribe, “Congress made no effort to connect what it was doing to interstate activity or commerce”).

“obliterate the distinction between what is national and what is local and create a completely centralized government.”³⁴¹ Having recognized that “the basic constitutional ‘test’ of whether or not Congress had a rational basis for believing a regulation affected commerce provide[d] no limitation upon federal power,”³⁴² the Court began laying the foundation for a “line of constitutional defense against federal overreaching,”³⁴³ by demarcating an “enclave of ‘local affairs’ committed . . . to state regulation.”³⁴⁴ Courts that have heard challenges to the CSRA do not appear to understand the guidance the *Lopez* majority gave for assessing when a Commerce Clause enactment constitutes unconstitutional federal overreaching on the post-*Lopez* map of the federal balance.

3.0 *Judicial Review in the Post-Lopez Era: Deciphering Lopez*

Some courts striking down the CSRA have apparently interpreted *Lopez* as “the first drops of a coming storm of judicial activism”³⁴⁵ to correct the “wrong turn”³⁴⁶ taken in Commerce Clause jurisprudence

³⁴¹ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). During oral argument the Court showed little concern for the lack of congressional findings but repeatedly expressed concern that “if [possession of a firearm within 1,000 feet of a school] is covered [under the Commerce Clause] what is there that Congress cannot do under this rubric?” Transcript at 5 (O’Connor, J.). “Is there any stopping point?” Transcript at 10 (Scalia, J.).

Are we left with the proposition, then, that it is for Congress, not the Court to preserve the Federal structure? . . . But with reference to the commerce point, realistically, that’s where we are. None of us at least, can think of anything under our present case law, or at least under [the Government’s argument], that Congress can’t do if it chooses under the Commerce Clause, so if the Federal system must be preserved by someone, and the Commerce Clause is a means by which the Federal structure can be obliterated, and if we have no tools or analytic techniques to make these distinctions then it follows that the Federal balance is remitted to the judgment of Congress If that’s the test, it’s all over.

Transcript at 18-19 (Kennedy, J.).

In his concurrence, Justice Kennedy was refreshingly candid when he noted that Congress has:

[T]he sworn obligation to preserve and protect the Constitution in maintaining the federal balance At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against the complete renunciation of the judicial role The federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other levels of government has tipped the scales too far.

United States v. Lopez, 115 S. Ct. 1624, 1639 (1995).

³⁴² Robert F. Nagel, *Federalism as a Fundamental Value*, 1981 SUP. CT. REV. 81, 81 n.3. (1982).

³⁴³ John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 701 (1971).

³⁴⁴ *Id.*

³⁴⁵ Harvey Berkman, *Second Commerce Clause Ruling Calms the Waters*, NAT’L L.J., a May 15, 1995, at A7.

³⁴⁶ *United States v. Lopez*, 115 S. Ct. 1624, 1649 (1995) (Thomas, J., concurring) (arguing that the Commerce Clause jurisprudence which developed during the New Deal was a radical

during the New Deal. Courts so interpreting *Lopez*, however, are misconstruing the opinion. The holding was “necessary though limited”³⁴⁷ because it was a *defensive* measure to: (1) re-establish that the Constitution mandates a federal system with a national government of limited and enumerated powers, and (2) preserve the islands of state authority which have *not yet* been engulfed by congressional enactments premised upon the commerce power. Both the majority opinion and the concurrences made clear that the Court was not going on the offensive to regain any of the territory the federal government had wrested from the states during the nearly sixty years in which the Court granted Congress plenary authority to regulate private conduct under the guise of regulating commerce.³⁴⁸ Thus, *Lopez* signifies the Court’s determination to consider the scope of the commerce power “in light of our dual system of government,” *as of 1995*, so as to prevent Congress from “effectually obliterate[ing] the [remaining] distinction between what is national and what is local.”³⁴⁹

Few federal judges have understood this subtle but important message. One that has, however, recently articulated his view of the implications this message has for federal courts reviewing Commerce Clause legislation. In *United States v. Wall*, Judge Danny J. Boggs of the Sixth Circuit explains how federal courts should assess whether a Commerce Clause enactment constitutes unconstitutional federal overreach-

departure from precedent and makes the majority of Article I of the Constitution “mere surplussage”).

³⁴⁷ *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995) (Kennedy, J., concurring).

³⁴⁸ Justice Rehnquist’s majority opinion rationalized even the most controversial exercises of the commerce power during the era of abdication, such as the 1964 Civil Rights Act. See *Lopez*, 115 S. Ct. at 1628-30. The majority opinion, however, also said:

To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. *This we are unwilling to do.*

Id. at 1634 (emphasis added).

The Kennedy/O’Connor concurrence discussed *stare decisis* considerations that precluded disturbing the “Commerce Clause jurisprudence as it has evolved to this point.” *Id.* at 1637. Justice Thomas’s concurrence pointed out that existing Commerce Clause jurisprudence was “far removed from both the Constitution and the [Court’s] early case law.” Nevertheless, he conceded that “it is too late in the day to undertake a fundamental reexamination of the past 60 years. Considerations of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.” *Id.* at 1650.

³⁴⁹ *Lopez*, 115 S. Ct. at 1628-29 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

ing in the post-*Lopez* era.³⁵⁰ The analysis of this Note posits that Judge Boggs has slightly misconstrued the message and spirit of *Lopez*, but is much closer to the mark than most of the federal bench. Briefly articulating Judge Boggs's analysis will help illustrate this Note's view of proper post-*Lopez* analysis by providing a basis of comparison that in most respects accurately translates *Lopez*.

Judge Boggs's analysis correctly assumes that "*Lopez* means something and is not simply an aberration designed to strike down one statute."³⁵¹ His analysis honors the analytic implications of *Lopez* by requiring the placement of a Commerce Clause enactment under one of the three facets of the commerce power recognized in *Lopez*:

- (1) regulations affecting "the use of the channels of interstate commerce,"
- (2) regulations that "protect the instrumentalities of interstate commerce, or persons, or things in interstate commerce," and
- (3) regulation of "those activities having a substantial relation to interstate commerce."³⁵²

Judge Boggs's analysis further tracks *Lopez* by requiring enactments falling under the third prong to survive three additional inquiries as to whether:

- (a) the regulation controls a commercial activity or an activity necessary to the regulation of some commercial activity,
- (b) the statute includes a jurisdictional nexus requirement to ensure that each regulated instance of the activity affects interstate commerce, and
- (c) the rationale offered to support the constitutionality of the statute (i.e., statutory findings, legislative history, arguments of counsel, or a reviewing court's own attribution of purposes to the statute being challenged) has a logical stopping point, so that the rationale is not so broad as to regulate on a similar basis all human endeavors, especially those traditionally regulated by the states.³⁵³

Judge Boggs also astutely notes that, in *Lopez*, the Court did not apply rational basis scrutiny. He apparently interpreted this to mean that all

³⁵⁰ *United States v. Wall*, 92 F.3d, 1444, 1454 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part).

³⁵¹ *Id.* at 1455.

³⁵² *See id.* at 1455-56 (quoting *United States v. Lopez*, 115 S. Ct. 1624, 1629-30 (1995)).

³⁵³ *Id.* (quoting *Lopez*, 115 S. Ct. at 1629-33).

post-*Lopez* Commerce Clause review was to be performed pursuant to “the type of intermediate scrutiny used in *Lopez*.”³⁵⁴

In the course of applying his *post-Lopez* analysis in *Wall* to the federal Illegal Gambling Business Statute,³⁵⁵ which was categorized under the substantial effects prong of *Lopez*, Judge Boggs reached the conclusion that the Act was unconstitutional. This was because the proffered rationale for the statute had no logical stopping point. This, of course, meant that the enactment failed the third part of the inquiry required for statutes classified under the “substantial effects” prong.³⁵⁶

In *Wall*, Judge Boggs came very close to stating with perfect accuracy the analytic process *Lopez* commands federal courts to undertake in assessing the validity of Commerce Clause enactments. His analysis, however, goes both too far and not far enough in certain respects. It goes too far in asserting that the intermediate scrutiny applied in *Lopez* must now be applied to all exercises of the commerce power. Such an assertion fails to recognize the extent to which the holding in *Lopez* was “necessary though limited.”³⁵⁷ The *Lopez* majority was merely trying to revive what was left of the unique constitutional principles of federalism and limited and enumerated powers.³⁵⁸ Remember, both the majority opinion and the concurrences made clear that the Court was not going on the offensive to roll back the commerce power that developed in the years prior to *Lopez*.³⁵⁹ Applying intermediate scrutiny to all Commerce Clause enactments would be contrary to the *Lopez* majority’s determination to consider the scope of the Commerce Clause “in the light of our dual system of government” *as of 1995* in order to prevent Congress from “effectually obliterate[ing] the [remaining] distinction between what is national and what is local.”³⁶⁰ To ensure that courts act only defensively to prevent further expansion of the commerce power at the expense of federalism, *Lopez* commands intermediate scrutiny only for

³⁵⁴ *Id.* at 1460.

³⁵⁵ 18 U.S.C. § 1955 (1994).

³⁵⁶ *Id.* at 1467.

³⁵⁷ *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995) (Kennedy, J. concurring).

³⁵⁸ BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 195-233 (1967) (describing the Framers’ ideas of divided sovereignty and enumerated powers as “radical”).

³⁵⁹ *See supra* note 348 and accompanying text.

Five days after *Lopez*, the Court made good on its implicit promise to refrain from ousting the federal government from territory it had already claimed under the commerce power in *United States v. Robertson*, 115 S. Ct. 1732 (1995).

³⁶⁰ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). The *Lopez* majority cited this language. 115 S. Ct. 1624, 1628-29 (1995).

Commerce Clause enactments implicating “paradigmatic examples of state authority,”³⁶¹ e.g., education and family law.³⁶²

This conclusion is supported by the observation that the Court clearly did not apply the intermediate scrutiny used in *Lopez* when it decided *United States v. Robertson*³⁶³ two days after *Lopez*. In *Robertson*, the Court summarily dismissed arguments that the defendant was not “engaged in or affecting interstate commerce” after noting that while residing in Arizona he had purchased a goldmine in Alaska, hired and transported workers from outside Alaska to operate the mine, and transported some \$30,000 worth of gold out of Alaska.³⁶⁴ The cursory review applied in *Robertson*, coupled with the *Lopez* majority’s concern for “paradigmatic examples of state authority,”³⁶⁵ indicate that congressional actions premised upon the Commerce Clause will be subjected to intermediate scrutiny only if the measure on its face threatens an expansion of the commerce power into remaining areas of traditional state concern.³⁶⁶ As the Second Circuit noted: *Lopez* “revealed the Court’s willingness to give serious and renewed thought to issues of federalism at the foundation of our constitutional system.”³⁶⁷ It makes sense, however, to infer that the Court will only risk the inevitable criticism that will follow from seriously second-guessing Congress and possibly striking down measures that facilitate noble policy goals, such as reducing violence in schools, only when doing so promotes important countervailing constitutional values at the foundation of our constitutional system, such as the remnants of federalism.

While Judge Boggs’s analysis goes too far in implying that intermediate scrutiny will be applied to review of all Commerce Clause enactments, it does not go far enough in assessing the implications of applying intermediate scrutiny when it is warranted. Judge Boggs does recognize the implications of intermediate scrutiny as to the application of the “substantial effects” prong of *Lopez* by stating that enactments seeking to be justified under this prong must satisfy *all three* of the additional inquiries he correctly attributes to this facet of the commerce power.³⁶⁸ He does not, however, directly recognize the implications that intermediate scrutiny has on applying the other two facets of the commerce power

³⁶¹ See *Lopez*, 115 S. Ct. at 1630-33, 1640, 1642.

³⁶² The majority and both concurring opinions mentioned these as areas of traditional state concern. See *United States v. Lopez*, 115 S. Ct. 1624, 1630-33, 1640, 1642 (1995).

³⁶³ 514 U.S. 669 (1995) (per curiam).

³⁶⁴ *Id.* at 669.

³⁶⁵ *Lopez*, 115 S. Ct. at 1630-33, 1640, 1642.

³⁶⁶ See *id.* at 1634, 1640.

³⁶⁷ *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 499 (2d Cir. 1995).

³⁶⁸ See *United States v. Wall*, 92 F.3d 1444, 1460-61 (1996).

recognized in *Lopez*.³⁶⁹ Of course, it was not necessary for Judge Boggs to discuss these facets because the government conceded that the statute at issue in *Wall* could only be defended under the substantial effects prong.³⁷⁰ Nevertheless, it is important to understand how intermediate scrutiny will effect the application of the other two prongs of the commerce power.

Lopez itself provides insight into this inquiry. The *Lopez* majority acknowledged that many decisions of the Court during the abdication era went a long way toward converting the commerce power into “a general police power of the sort retained by the states” and that “[t]he broad language of these opinions suggested the possibility of additional expansion.”³⁷¹ They refused “to proceed any further,” however, because they were unwilling to further erode the “distinction between what is truly national and what is truly local.”³⁷² This adamant refusal to expand the scope of abdication-era Commerce Clause precedents to justify statutes that implicate areas of traditional state concern is important. It implies that the Court will not sanction applications of the first two facets of the commerce power which are so fast and loose that any statute can be placed under them as opposed to the more demanding third prong.

For example, if the GFSZA at issue in *Lopez* had contained a jurisdictional nexus requirement making it a crime to possess on a school campus a firearm that had moved in interstate commerce, then under intermediate scrutiny the Court would not have allowed the GFSZA to be classified as a regulation of things (firearms) in interstate commerce, despite the fact that at some level of abstraction the statute was indeed such a regulation. This analysis could not be permitted because the logical result of allowing such fast and loose categorization would be that a positive response to the jurisdictional nexus inquiry under the substantial relation prong would prove that the initial classification of the GFSZA under that prong was improper. The entire jurisdictional nexus inquiry would be question begging.

Depending upon the level of generality employed, any activity could be said to involve a “thing” that moved in interstate commerce. A court that refuses “to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local” is unlikely to sanction reasoning that would permit such a simple end run around its efforts to prevent such a state of affairs.³⁷³

³⁶⁹ See *Lopez*, 115 S. Ct. at 1629-30.

³⁷⁰ See *Wall*, 92 F.3d at 1460.

³⁷¹ *Lopez*, 115 S. Ct. at 1634.

³⁷² *Id.*

³⁷³ *Id.*

Therefore, it is implicit in *Lopez* that the Court will not permit Commerce Clause enactments triggering intermediate scrutiny to be stealthily sheltered under the first two prongs unless it can be placed there under a narrow reading of abdication-era precedent. In this vein, the Court will likely also refuse to extend by artful analogy the reasoning of broadly phrased abdication era precedents. Admittedly, the question of whether a new enactment falls within the zone created by a narrow reading of precedents under the first two facets of the commerce power "is necessarily one of degree,"³⁷⁴ but it is still clear that the outer limit will not be stretched as far as the language of abdication-era precedents imply it might.

From this discussion, a clear picture of post-*Lopez* analysis consistent with the words and spirit of the majority opinion emerges. This analysis requires a court to first ask if a Commerce Clause enactment implicates a paradigmatic example of traditional state concern, e.g. education, family law, or criminal law.³⁷⁵ If this inquiry is answered affirmatively, the court is then required to apply intermediate scrutiny rather than rational basis review.³⁷⁶ This intermediate scrutiny requires, (1) that the court not defer to Congress's assessment of an activity's connection to interstate commerce, as it does under rational basis scrutiny; and (2) that the court should read precedents under each prong of the commerce power recognized in *Lopez* conservatively and refuse to expand upon precedents from the era of abdication. If an enactment falls under the "substantially affecting" commerce prong of *Lopez* then it must survive each of the following additional inquiries as to whether:

- (a) the regulation controls a commercial activity or an activity necessary to the regulation of some commercial activity,
- (b) the statute includes a jurisdictional nexus requirement to ensure that each regulated instance of the activity affects interstate commerce, and
- (c) the rationale offered to support the constitutionality of the statute (i.e., statutory findings, legislative history, arguments of counsel, or a reviewing court's own attribution of purposes to the statute being challenged) has a logical stopping point, so that the rationale is not so

³⁷⁴ *Id.* at 1633.

³⁷⁵ *See id.* at 1632.

³⁷⁶ *See, e.g., id.* at 1653-54 (Souter, J., dissenting) (objecting to the fact the majority was not using rational basis review); *United States v. Wall*, 92 F.3d 1444, 1459 (6th Cir. 1996) (Boggs, J. concurring in part and dissenting in part) (reading *Lopez* "as requiring more than mere rational basis scrutiny"); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 177 (1996) (explaining that *Lopez* majority heightened the level of scrutiny "from rational basis . . . to intermediate scrutiny").

broad as to regulate on a similar basis all human endeavors, especially those traditionally regulated by the states.³⁷⁷

Most federal courts that have heard challenges to the CSRA have failed to apply this analysis and have clearly disregarded the message of the *Lopez* majority. This is evident when the opinions of the courts that have upheld the CSRA are analyzed against the above reading of *Lopez*.

4.0 *Applying post-Lopez Analysis to the CSRA*

a.o Appropriate Level of Scrutinyo

Courts scrutinizing the CSRA in a manner consistent with the text and spirit of the *Lopez* opinion should apply the same intermediate scrutiny applied to the GFSZA in *Lopez*. This is because, like the GFSZA, the CSRA on its face represents federal regulation involving *two* areas of traditional state concern—family law and criminal law.³⁷⁸ Many courts have erred by applying rational basis scrutiny.³⁷⁹ Once a court complying with *Lopez* correctly concludes that it must apply intermediate scrutiny, it must then proceed to classify the CSRA under one of the three prongs of the commerce power recognized in *Lopez*.

b.o Classifying the CSRAo

i. *Regulating the Use of the Channels of Interstate Commerce Prong*

Some courts³⁸⁰ have erroneously attempted to categorize the CSRA under the first facet of the commerce power recognized in *Lopez*, which permits Congress to “regulate the *use* of the channels of interstate commerce.”³⁸¹ First of all, the precedents cited by the Supreme Court and other courts for this facet of the commerce power either attach conditions to the *use* of the channels of interstate commerce or prohibit the *use* of

³⁷⁷ *Wall*, 92 F.3d at 1455-56 (quoting *Lopez*, 115 S.Ct. at 1629-33).

³⁷⁸ The CSRA deals with criminal sanctions for failing to make child support payments. Family law is traditionally viewed as encompassing marriage, divorce, child custody, *child support*, alimony, property division, termination of parental rights, adoption and foster care. *See, Lopez*, 115 S.Ct. at 1632 (stating family law, education and criminal law are areas “where States have historically been sovereign.”); *see also* Dailey, *supra* note 334, at 1792.

³⁷⁹ *See, e.g., United States v. Hampshire*, 95 F.3d 999, 1001-02 (10th Cir. 1996) (rejecting *Lopez* challenge after applying rational basis review); *United States v. Lewis*, 936 F. Supp. 1093, 1096 (D.R.I. 1996) (applying rational basis review and rejecting *Lopez* challenge); *United States v. Nichols*, 928 F. Supp. 302, 308 (S.D.N.Y. 1996) (applying rational basis and rejecting *Lopez* challenge).

³⁸⁰ *See, e.g., Nichols*, 928 F. Supp. at 313-14.

³⁸¹ *Lopez*, 115 S. Ct. at 1629.

the channels of interstate commerce.³⁸² None of these precedents support a congressional power to force a party *refusing to use* the channels of interstate commerce to do so. This facet presupposes a party is using the channels of interstate commerce. Therefore, it would apply if the CSRA prohibited the use of the channels of interstate commerce to willfully avoid making child support payments. Instead, the CSRA criminalizes the failure to use the channels of interstate commerce to pay child support.

A hypothetical example based upon the famous case of *Wickard v. Filburn* illustrates why a conception of this facet of the commerce power broad enough to encompass the CSRA should be rejected after *Lopez*. Suppose that, instead of trying to keep wheat prices up by restricting the supply of wheat, Congress enacted a law to lower the price of wheat by requiring that half of all arable land be used to produce wheat and further requiring: (1) that all wheat be placed in interstate commerce; and (2) that all farmers are prohibited from keeping (hoarding) any wheat. The logic that would permit the CSRA to fall under this first facet of the commerce power would also permit Congress to enact this hypothetical law under this facet. After all, the regulation is triggered only after willful failure to comply with a legal obligation that requires the party to engage in interstate commerce. Furthermore, the willful failure to place the wheat in interstate commerce represents an immoral and injurious *failure to use* the channels of interstate commerce.³⁸³ Clearly this would mean conceding that the “use” of the channels of interstate commerce prong swallowed the activities substantially affecting interstate commerce prong under which *Wickard* was justified. There is nothing to indicate that the Supreme Court intended any of the three prongs of the commerce power to be superfluous. Under intermediate scrutiny, the Court will not tolerate such a fast and loose application of the three facets of the commerce power,³⁸⁴ especially when doing so results in such

³⁸² See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding statute keeping the channels of interstate commerce free from immoral and injurious *use* as a means of imposing racial segregation); *Cleveland v. United States*, 329 U.S. 14 (1946) (upholding statute regulating the *use* of the channels of interstate commerce to transport women for immoral purposes); *United States v. Darby*, 312 U.S. 100 (1941) (upholding statute prohibiting the *use* of the channels of interstate commerce as the instrument of “the distribution of goods produced under substandard labor conditions”); *United States v. Hill*, 248 U.S. 420 (1919) (upholding statute regulating the *use* of the channels of interstate commerce to transport liquor); *Hoke & Economides v. United States*, 227 U.S. 308 (1913) (upholding statute prohibiting the *use* of the channels of interstate commerce to transport women for prostitution); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (upholding statute prohibiting the *use* of the channels of interstate commerce to transport impure food and drugs); *Champion v. Ames* 188 U.S. 321 (1903) (upholding statute prohibiting the *use* of interstate commerce to transport lottery tickets across state lines).

³⁸³ See *Nichols*, 938 F. Supp. at 314 (applying identical reasoning).

³⁸⁴ See *supra* Part IV.C.3 (on deciphering *Lopez*).

perverse results. Courts classifying the CSRA under this prong have either grievously misread *Lopez* or have engaged in wishful thinking.

ii. *Regulating Instrumentalities, Persons, or Things in Interstate Commerce*

Many courts have classified the CSRA under the second prong of the commerce power recognized in *Lopez*: “regulat[ing] and protect[ing] the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”³⁸⁵ The most articulate and formidable argument for placing the CSRA under this prong was made by the Second Circuit in *United States v. Sage*³⁸⁶ which merits closer scrutiny.

The *Sage* Court’s reasoning may be summarized as follows: (1) *Lopez* says that Congress may “regulate and protect the instrumentalities of, or persons or things in interstate commerce;”³⁸⁷ (2) in CSRA cases we have a thing—an obligation to pay child support;³⁸⁸ (3) this thing is “in commerce” for purposes of the Commerce Clause based on precedents defining “commerce among the several States.”³⁸⁹

In *Sage*, the Second Circuit was quite correct to assume that a ruling reversing existing Commerce Clause jurisprudence could not be supported by *Lopez*.³⁹⁰ The *Sage* Court erred, however, in two important respects. First, it erred in its reading of precedent. Second, contrary to the spirit of post-*Lopez* intermediate scrutiny, it construed precedent as liberally as it might have during the era of abdication. Essentially, the *Sage* Court attributed to existing precedent the assertion that any obligation that came to entail transferring money across state lines, for whatever purpose, was subject to Congressional regulation under the Commerce Clause.³⁹¹ It relied upon two precedents for this conclusion—*Gibbons v. Ogden*³⁹² and *United States v. South-Eastern Underwriters Assoc.*³⁹³ The *Sage* Court misconstrued and expanded upon these precedents.

³⁸⁵ *Lopez*, 115 S. Ct. at 1629. For cases classifying the CSRA under this prong see, e.g., *United States v. Bongiorno*, No. 96-1052, 1997 U.S. App. LEXIS 2170, at *8-9 (1st Cir. Feb. 7, 1997); *United States v. Hampshire*, 95 F.3d 999, 1002 (10th Cir. 1996); *United States v. Mussari*, 95 F.3d 789, 790 (9th Cir. 1996); *United States v. Sage*, 92 F.3d 101, 107 (2d Cir. 1996).

³⁸⁶ 92 F.3d 101 (2d Cir. 1996).

³⁸⁷ *Id.* at 106 (citing *Lopez*, 115 S. Ct. at 1629-30).

³⁸⁸ *Id.* at 105.

³⁸⁹ *Id.* at 104-05.

³⁹⁰ *See id.*

³⁹¹ *See id.* at 105-06.

³⁹² 22 U.S. (9 Wheat.) 1 (1824). Discussed *supra* at Part IV.C.2.a.

³⁹³ 322 U.S. 533 (1944).

The *Sage* Court accurately described *Gibbons* as defining commerce more broadly than “traffic . . . buying, and selling or the interchange of commodities.”³⁹⁴ The *Sage* Court was also accurate in noting that this broader conception entailed “*commercial* intercourse between nations, and parts of nations, in all *its* branches.”³⁹⁵ However, *Gibbons* further held that Congress could only regulate commerce that “concerns more states than one.”³⁹⁶ Given this definition of commerce by Justice Marshall in *Gibbons*, the Supreme Court held that the Commerce Clause allowed Congress to prescribe “rules for carrying on *that* intercourse.”³⁹⁷

These passages make clear that Justice Marshall was defining commerce that could be regulated under the Commerce Clause as traffic, buying, selling, and the exchange of commodities, and also activities incident to engaging in this commercial-type conduct—such as navigating interstate waterways. He never held that *any* intercourse between the states could be regulated pursuant to the Commerce Clause, but only *commercial intercourse*. Marshall’s words clearly imply that there is a broad concept of intercourse and that commercial intercourse Congress may regulate pursuant to its commerce power is a subcategory of, and not coextensive with, this broader category of intercourse. Dissociating the word “intercourse” from the restrictive modifier “commercial” would render the words “commercial” and “that” superfluous in the above statements from Justice Marshall’s opinion. The *Sage* Court abused and distorted what Justice Marshall meant by commerce in the phrase “*commercial* intercourse . . . in all its branches” when it proclaimed that: “this case involves matters that plainly meet John Marshall’s definition of commerce among the several States [because it] presupposes *intercourse*, an obligation to pay money, and the *intercourse* concerns more States than one.”³⁹⁸

Perhaps foreseeing the transparency of its sophistic assertion and the resulting criticism, the Second Circuit attempted to justify this expansion³⁹⁹ of Justice Marshall’s definition of “commerce” by implying that it was justified by a later precedent. Citing *United States v. South-Eastern Underwriters Ass’n*,⁴⁰⁰ the *Sage* Court declared that “sending money to another State is commerce although the transaction does not ‘concern

³⁹⁴ *United States v. Sage*, 92 F.3d 101, 104 (2d Cir. 1996) (quoting *Gibbons*, 22 U.S. (9 Wheat.) 1, 189 (1824)).

³⁹⁵ *Gibbons*, 22 U.S. (9 Wheat.) at 189 (emphasis added).

³⁹⁶ *Id.* at 194.

³⁹⁷ *Id.* at 190 (emphasis added).

³⁹⁸ *Sage*, 92 F.3d at 105.

³⁹⁹ In his brilliant concurrence in *Lopez*, Justice Thomas thoroughly discredits the assertion “that *Gibbons* ‘described the federal commerce power with a breadth never yet exceeded.’” *Lopez*, 115 S. Ct. at 1647 (quoting *Wickard v. Filburn*, 317 U.S. 111, 120 (1942)).

⁴⁰⁰ *Sage*, 92 F.3d at 105.

the flow of anything more than electrons and information.’”⁴⁰¹ This seems to imply that the Supreme Court has held that *any* transfer entailing any form of transmission across state lines *is in fact* viewed by the Court to be commerce for purposes of the Commerce Clause. Fairly read, however, the precedent cited does not support such a broad statement.

South-Eastern Underwriters Ass’n involved an insurance conglomerate indicted under the Sherman Act for conspiring to restrain interstate commerce “by fixing and maintaining arbitrary and non-competitive premium rates on fire . . . insurance in” seven states.⁴⁰² The case presented the question of whether “fire insurance transactions which stretch across state lines constitute ‘Commerce among the several States’ so as to make them subject to regulation by Congress under the Commerce Clause.”⁴⁰³ In deciding whether *South-Eastern Underwriters* was engaged in interstate commerce, the Supreme Court stated that transactions across state lines “*may* be commerce though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information.”⁴⁰⁴ The Court did not say that *all* such transactions are *always* in fact commerce for purposes of the Commerce Clause. The Court went on to say that, on the facts before them, the transactions *South-Eastern* engaged in did constitute interstate commerce. This was because they were “part of the conduct of a legitimate and useful commercial enterprise” and they entailed “integrated operations in many states and involve[d] the transmission of great quantities of money, documents, and communications across dozens of state lines.”⁴⁰⁵ The Court clearly attributed great weight to not only the fact that *South-Eastern* was engaged in affirmative conduct across state lines, but also to the fact that conduct was incident to engaging in a commercial enterprise or business, as was the navigation in *Gibbons*.⁴⁰⁶

Clearly, *South-Eastern* alone does not support the Second Circuit’s expansion of “commerce” to include the failure to meet an obligation to send money for child support across state lines. It may not even support the assertion that every instance of sending money across state lines to pay child support constitutes commerce for purposes of the Commerce Clause. Fairly read, the opinion stands for the proposition that conduct consisting of transactions across state lines may place an individual or entity “in commerce” for purposes of the Commerce Clause, when such

⁴⁰¹ *Id.* at 106 (quoting *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, a 550 (1944)).

⁴⁰² *South-Eastern Underwriters*, 322 U.S. at 535.a

⁴⁰³ *Id.* at 538.a

⁴⁰⁴ *Id.* at 549-50.a

⁴⁰⁵ *Id.* at 550.a

⁴⁰⁶ *Id.* at 540-46.

conduct, no matter how trivial, is in furtherance of a commercial enterprise. And, as Judge Bechtel pointed out in *United States v. Parker*,⁴⁰⁷ child support payments do not implicate “[a]rm’s length commercial actors . . . [t]he marketplace for goods and services and prices of commodities are not affected at all.”⁴⁰⁷ Child support payments are simply in no way incidental to a commercial enterprise in the way wiring actuarial data across interstate telegraph lines is incidental to a commercial enterprise—i.e., the business of insurance. This view of *South-Eastern* is consistent with the case law that the *Lopez* majority cites as representing the basis of the second prong of the commerce power.⁴⁰⁸ It is also consistent with the *Lopez* majority’s refusal to further expand the commerce power into areas of traditional state concern. The Second Circuit’s effort to classify the CSRA under this prong is a mistake because child support payments are in no way associated with or incidental to a commercial enterprise of the type implicated by other regulations classified under this second prong of *Lopez*. The *Sage* Court’s transformation of the second facet of the commerce power into the “problems that defy local solution”⁴⁰⁹ prong represents a significant and novel expansion of this facet of the commerce power. As such, it cannot survive under the intermediate scrutiny *Lopez* demands in CSRA cases.

iii. *Activities Substantially Affecting Interstate Commerce*

As explained above, under existing Commerce Clause jurisprudence viewed in a manner consistent with *Lopez*, the CSRA cannot be categorized as a valid exercise of Congressional authority under either of the first two facets of the commerce power recognized in *Lopez*. Many courts hearing CSRA cases have realized this and attempted to classify the CSRA as a regulation of an activity “having a substantial relation to interstate commerce.”⁴¹⁰ The courts have disagreed as to whether this classification of the CSRA is permissible in light of *Lopez*.

⁴⁰⁷ *United States v. Parker*, 911 F. Supp. 830, 835 (E.D. Pa. 1995) (declaring the CSRA unconstitutional).

⁴⁰⁸ See *United States v. Lopez*, 115 S.Ct. 1624, 1629 (1995) (citing *Shreveport Rate Case*, 234 U.S. 342 (1914)) (allowing Congress to regulate aspects of the interstate rail transportation industry); *Southern Ry. Co. v. United States*, 222 U.S. 20 (1911) (allowing Congress to regulate safety of vehicles used in interstate commerce related to the rail industry)).

⁴⁰⁹ *Sage*, 92 F.3d at 105.a

⁴¹⁰ *Lopez*, 115 S. Ct. at 1629-30. For cases attempting to so classify the CSRA, see, e.g., *United States v. Lewis*, 936 F. Supp. 1093, 1098-1100 (D.R.I. 1996) (upholding CSRA under “substantial effects” prong); *United States v. Ganapolski*, 930 F. Supp. 1076, 1082-83 (M.D. Pa. 1996) (upholding CSRA under “substantial effects” prong); *United States v. Kegel*, 916 F. Supp. 1233, 1237-39 (M.D. Fla. 1996) (upholding CSRA under “substantial effects” prong); *United States v. Parker*, 911 F. Supp. 830, 834-43 (E.D. Pa. 1995) (declaring CSRA unconstitutional after applying “substantial effects” prong).

Applying the *Lopez* majority's tripartite inquiry recognized by Judge Boggs as the prerequisite to properly classifying an enactment under the "substantial effects" prong of the commerce power reveals that *Lopez* does not sanction such a classification of the CSRA. The first step in this inquiry entails asking whether the "regulation controls a commercial activity or an activity necessary to the regulation of some commercial activity."⁴¹¹ As explained in the previous section, the payment of child support is not "commerce" within the meaning ascribed to this term in existing Commerce Clause jurisprudence. *Lopez* refused to expand these precedents in cases such as this one where doing so would further "obliterate the distinction between what is national and what is local."⁴¹² Nevertheless, the CSRA may survive under the second phrase of this first sub-inquiry—"an activity necessary to the regulation of some commercial activity."

The CSRA regulates the willful failure to pay child support for a child residing in another state. The inquiry into whether this is "necessary to some commercial activity," as that term was used by the *Lopez* majority, can be assisted by reviewing the *Lopez* majority's discussion of *Wickard v. Filburn*.⁴¹³ Because post-*Lopez* analysis prohibits the extension of abdication-era Commerce Clause precedents, it is important to note that the Court's discussion of *Wickard* was prefaced with the caveat that the case was "the most far reaching example of Commerce Clause authority."⁴¹⁴ The Court then observed that the grain allotments at issue in *Wickard* involved "economic activity" subject to Commerce Clause regulation.⁴¹⁵ This was because "one of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market."⁴¹⁶ The Court refused to analogize from *Wickard* to cover the GFSZA under the "necessary to the regulation of some commercial activity" caveat to the substantial relation prong. This was because the GFSZA was a "criminal statute that by its terms ha[d] nothing to do with 'commerce'." Why was this so? and may the same be said of the CSRA?

The CSRA is like the GFSZA in that it is also a criminal statute. Nevertheless, it seems more related to economic activity in one sense discussed in *Wickard* because it criminalizes the failure to make a money payment. Beyond this point the analogy to *Wickard* grows weaker. The

⁴¹¹ *United States v. Wall*, 92 F.3d 1444, 1455 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part) (citing *Lopez*, 115 S. Ct. at 1629).

⁴¹² *Lopez*, 115 S. Ct. at 1634 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

⁴¹³ *Id.* at 1630.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* (quoting *Wickard v. Filburn*, 317 U.S. 111, 128 (1942)).

conduct proscribed in *Wickard*—growing wheat for home consumption—affected the wheat markets and the supply and demand of a commercial commodity that was a subject of interstate commerce. Congress was clearly attempting to regulate the supply and price of this commodity. The conduct proscribed by the CSRA—failing to transfer funds to an individual in another state—affects the economy by preventing a redistribution of wealth. But this redistribution will not necessarily alter either the supply or demand of any product or commodity that is a subject of interstate commerce. Furthermore, it is not a necessary part of a plan by Congress to regulate the supply or demand of a subject of interstate commerce. Similarly, the conduct proscribed by the GFSZA—possession of a handgun on a school premises—could not be shown to affect the supply and demand of a particular subject of interstate commerce that Congress was attempting to regulate.⁴¹⁷

The foregoing analysis clarifies what constitutes “an activity necessary to the regulation of some commercial activity.” Under post-*Lopez* intermediate scrutiny no Commerce Clause enactment can survive this inquiry unless the government can demonstrate that the regulated conduct is on its face commercial, or necessary to regulate a commercial activity in that it: (1) regulates human conduct that can be demonstrated to effect the supply or demand of a specific subject of interstate commerce (e.g., wheat); and (2) Congress is attempting to regulate the supply, demand and/or price of that subject of interstate commerce. The government cannot meet this burden with the CSRA. Therefore, the CSRA cannot be classified as a regulation of an activity having a substantial affect on interstate commerce.

Furthermore, even if the CSRA passed this aspect of the substantial relation test, it would fail the third prong of the substantial relation test because the rationale connecting it to commerce relies upon the fact that failure to pay child support affects federal monies.⁴¹⁸ This rationale has no logical stopping point. Under this rationale Congress’s authority under the Commerce Clause would be coextensive with its Spending Clause⁴¹⁹ authority. Congress could simply decide to expend funds on education, and then any activity implicating those federal expenditures could be regulated pursuant to the Commerce Clause. Given the fact that Congress can spend money on anything that garners enough support to

⁴¹⁷ In its substantial effects analysis, the *Lopez* majority explicitly noted that the GFSZA was “not an essential part of a larger regulation of economic activity.” *Id.*

⁴¹⁸ *See, e.g.*, *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996) (holding that the CSRA may be justified under the substantial relation prong of *Lopez* and citing to House reports discussing the effects the failure to pay child support has on federal programs).

⁴¹⁹ U.S. CONST. art. I, § 9, cl. 7 (limiting appropriations only by the processual requirement that they be “made by Law” but providing no limitation as to the subject of expenditures).

enact an appropriations bill,⁴²⁰ this rationale replicates the boundless “cost of crime” theory rejected in *Lopez*.^e

The foregoing analysis demonstrates that the CSRA cannot be classified under either the channels of interstate commerce or the instrumentalities of interstate commerce prongs of the commerce power recognized in *Lopez*. Nor can it survive the tripartite test for the substantial relation prong of the post-*Lopez* Commerce Clause analysis. Therefore the CSRA “is invalid as beyond the power of Congress under the Commerce Clause.”⁴²¹

V. CONCLUSION

In the post-*Lopez* world, the CSRA must be sacrificed on the altar of federalism. While this is understandably difficult for many to accept, it must be remembered that just as releasing the poison-pedaling drug dealer because his constitutional rights were violated⁴²² serves the higher purpose of protecting individual liberty, so too does striking down the CSRA to protect the federal structure. Federalism serves to prevent tyranny and the loss of individual liberty that follows in its wake. Sometimes, to serve this noble purpose, federalism protects us from “our own best intentions” by ensuring the division of “power among sovereigns . . . so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”⁴²³ When courts uphold the constitutional value of federalism against pleas of necessity they are simply heeding history’s lesson that tyranny has most often “grown out of power called for on pressing exigencies.”⁴²⁴ After *Lopez*, it is also clear that federal courts invalidating the CSRA are honoring a Constitutional command to avoid repeating this lesson of history by giving meaningful review to Commerce Clause enactments implicating areas of traditional state concern.

Of course, it can only be expected that such pleas to a higher good will sound hollow to those affected by deadbeat parents, just as pleas to a higher good cannot be expected to resonate with the victims of the released criminal. It is also easy to see why lower federal courts might allow their view of post-*Lopez* Commerce Clause analysis to be skewed in favor of upholding the CSRA. It is undeniably distasteful and unpopular to invalidate a law that discourages, or at least provides effective

⁴²⁰ *Id.*

⁴²¹ *United States v. Lopez*, 115 S. Ct. 1624, 1626 (quoting 2 F.3d 1342, 1367-68 (5th Cir. 1993)).

⁴²² *Massiah v. United States*, 377 U.S. 201 (1964) (throwing out confession of drug dealer obtained in violation of Sixth Amendment).

⁴²³ *New York v. United States*, 505 U.S. 144, 187 (1992).

⁴²⁴ THE FEDERALIST NO. 20, at 136-37 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 1961).

retribution against heartless, amoral, deadbeat parents who fail to honor their legal obligation to support the children they brought into this world. It is even more distasteful in an age when the federal government is feeling the financial pinch and there is a very real danger that it will not be able to continue to cover the shortfall between the amount of child support owed and the amount actually paid. Despite the sympathy this state of affairs invites, the federal courts must not lose sight of the fact that the primary issue in challenges to the constitutionality of the CSRA is not the moral or legal obligation of a parent to support his child. "Rather, the question to be addressed is the constitutional balance of federalism between the central government and the states as affected by the Commerce Clause and recent pronouncements by the Supreme Court in relationship thereto."^{425a}

Despite the opinion of many lower federal courts to the contrary, a thorough and objective review of the constitutional balance after *Lopez* indicates that the CSRA is an invalid assertion of congressional authority pursuant to the Commerce Clause. Courts failing to see this exemplify the way "one falls so easily into thinking that because he would like to get somewhere, he has arrived."⁴²⁶ More importantly these courts defy the Constitution as interpreted by the Supreme Court in *Lopez*. And, even if "practical politics consists in ignoring facts,"⁴²⁷ practical adjudication does not.

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⁴²⁵ *United States v. Bailey*, 902 F. Supp. 727, 728 (W.D. Tex. 1995) (citing *Lopez*).

⁴²⁶ KARL N. LEWELLYN, *THE BRAMBLE BUSH* 9 (9th ed. 1991).

⁴²⁷ HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* Ch. 24 (1907).

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