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 succes­
sive stage of our political and economic development gives it a new as­
pect, 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 con­
sensus 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 as­
pects 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-

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2 Joan Biskupic, Tests of Federal Power Are Prominent on Supreme Court's Docket,
quently, for the first time in sixty years, the Court invalidated a Congressional attempt to legislate under the Commerce Clause in *United States v.e Lopez.* 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. 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. 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. 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

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5 See infra Part IV.C.2.b.


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

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

In 1992, George Bush signed the Child Support Recovery Act into law. 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. The CSRA permits a maximum fine of $5,000 and a jail term of six months for first-time offenders. Repeat offenders may be imprisoned for two years and fined $250,000. 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.”

The CSRA does not, however, re-institute some form of debtor’s prison. The willfulness requirement in the statute 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.

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

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9 *Id.*
10 *Id.* at § 228(b)(I).
12 *Id.*
14 *Id.*
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).
ing gap between the amount of child support owed and the amount actually paid.\textsuperscript{20}

In 1992, this gap was estimated to be $27 billion,\textsuperscript{21} up from an estimated $5 billion in 1989.\textsuperscript{22} When supporting parents fail to pay their child support obligations, custodial parents are more likely to seek assistance from federal welfare programs, the AFDC\textsuperscript{23} program in particular.\textsuperscript{24} Therefore, increases in the amount of unpaid child support cause corresponding increases in federal payments to custodial parents.\textsuperscript{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”\textsuperscript{26} seems an appropriate topic for federal criminal legislation, even by the standards of commentators critical of the “federalization” of criminal law.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{20} H.R. REP. No. 102-771, \textit{supra} note 11, at 5-7.
\item \textsuperscript{22} H.R. REP. No. 102-771, \textit{supra} note 11, at 6.
\item \textsuperscript{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. \textit{See} Calhoun, \textit{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).
\item \textsuperscript{24} H.R. REP. No. 102-771, \textit{supra} note 11, at 6.
\item \textsuperscript{25} \textit{Id.} \textit{See also} Editorial, \textit{Parents Who Don’t Pay}, \textit{St. Louis Dispatch}, July 23, 1994, at 14B.
\item \textsuperscript{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).
\item \textsuperscript{27} \textit{See} Thomas M. Mengler, \textit{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.” \textit{Id.} at 526. \textit{See also} Sara Sun Beale, \textit{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, roughly one-third of child support cases involve supporting and custodial parents living in different states. 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," 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 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. The United States Supreme Court reversed the California Supreme Court's decision granting a California trial court personal jurisdiction over Mr. Kulko. 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]."

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. Thus, the costs of filing and maintaining an in-state action can be prohibitive to single parents. The additional costs associated with maintaining an out-of-state suit are even

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29 Id.
30 Calhoun, supra note 21, at 924.
32 Id. at 86-88.
33 Id. at 90.
34 Id. at 91 (quoting Milliken v. Meyer, 311 U.S. 457, 463-64 (1940)).
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 Fairshare 8 (1993).
more daunting. Furthermore, efforts to encourage states to pursue "deadbeats" owing support to residents of another state have failed. After hearing extensive testimony to this effect, Congress took action to alleviate the problems associated with collecting child support payments across state lines.

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 legislation because it addressed a matter already covered by almost every state. 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. 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 held that the CSRA was "an unconstitutional exercise of Congressional power." 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.

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.


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 lead to improper redundancy between federal and state criminal justice systems).


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 State 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).

44 Id. at 1362.

45 See infra Part IV.C.2.c.a
B.e A LANDMARK DECISION PROVIDES A BASIS FOR CHALLENGING LEGISLATION PREMISED UPON THE COMMERCE POWER

The landmark decision was *United States v. Lopez*. The landmark decision was *United States v. Lopez*. Lopez involved a challenge to the constitutionality of the Gun-Free School Zones Act (GFSZA). 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.'" 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. *Lopez* appeared to identify "three broad categories of activity that Congress may regulate under its commerce power:

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.

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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 (3d Cir. 1995) (2-1 decision) (rejecting a *Lopez* challenge and upholding the constitutionality of the federal car-jacking statute) "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 504a 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 texta.

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).


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 activ[

After a lengthy analysis, the Court concluded that the GFSZA could not be upheld on this ground and affirmed the Fifth Circuit's decision holding the statute "invalid as beyond the power of Congress under the Commerce Clause."

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, possession of firearms and ammunition by convicted felons, illegal sale and transportation of machine guns, arson, blocking abortion clinic access, dealing in firearms without a license, distribution of methamphetamines, the Drug Free School Zones Act, and the Federal Child Support Recovery Act, and an

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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.
57 *Lopez*, 115 S. Ct. at 1634.
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).
assortment of other federal laws.\textsuperscript{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 \textit{Lopez}.\textsuperscript{68}

\textbf{III.e CHALLENGES TO THE CONSTITUTIONALITY OF THE CSRA: THE DISTRICT COURTS SPLIT}

\textbf{A.e AN INITIAL CONSENSUS UPHOLDS THE CSRA}

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 \textit{United States v. Hampshire},\textsuperscript{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 \textit{Lopez}, the CSRA was invalid because Congress did not have authority under the Commerce Clause to enact the statute in the first place.\textsuperscript{70} In rejecting this argument, the court analyzed the CSRA in light of \textit{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,”\textsuperscript{71} and it satisfies the “substantially affecting commerce” requirement because, according

\begin{footnotesize}
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\item \textsuperscript{67} For a thoroughly exhaustive account of the range of federal statutes subjected to \textit{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).
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} \textit{Id.} at 1332.
\end{itemize}
\end{footnotesize}
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, . . . so 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* Clause\(^{81}\) and generally exceeded Congress’s authority under the

\(^{72}\) *Id.* at 1239.

\(^{73}\) *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).


\(^{77}\) *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.


\(^{81}\) U.S. CONST. art 1, § 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. In a brief paragraph, the court dismissed Murphy's *ex post facto* claim 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." 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." Under the court's analysis, the CSRA satisfied *Lopez's* "substantial relation to interstate commerce" 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 bee little argument that a requirement that he provide money to a child in another state has a substantial effect on interstate commerce.

The *Murphy* Court reasoned that, like 18 U.S.C. § 1073, and 18 U.S.C. § 1201, 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." 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."

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.*


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.


90 *Murphy*, 893 F. Supp. at 616.
v. Hampshire\textsuperscript{91} and the conclusion that Lopez did not prevent Congress from enacting legislation affecting the obligations that arise from family relationships.\textsuperscript{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. \textbf{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 opinions\textsuperscript{93} in United States v. Mussari\textsuperscript{94} and United States v. Schroeder.\textsuperscript{95} The decisions held that the CSRA was "an unconstitutional exercise of Congress's power."\textsuperscript{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.\textsuperscript{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."\textsuperscript{98} The court, however, could not "find that the CSRA bears a substantial relation to interstate commerce"\textsuperscript{99} and proceeded with a litany of additional reasons for the conclusion that the CSRA was unconstitutional.

\textsuperscript{91} 892 F. Supp. 1327 (D. Kan. 1995).
\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{94} 894 F. Supp. 1360 (D. Ariz. 1995).
\textsuperscript{95} 894 F. Supp. 360 (D. Ariz. 1995).
\textsuperscript{96} Mussari, 894 F. Supp. at 1361.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 1363 (quoting United States v. Lopez, 115 S. Ct. 1624, 1629-30 (1995)).
\textsuperscript{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” and that the Act was necessary to solve the “difficulties associated with extradition.” 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*].”

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.

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

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.” The court found no “clear statement” of Congress’s intent to make the significant alteration in “the sensitive relation between federal and state criminal jurisdiction” that would result from upholding the CSRA. Furthermore, the CSRA violated comity because it “would force federal courts to review and apply state court orders” when de-

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

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." Under the Mussari Court's view of the Constitution, 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' and . . . such regulation [was] within the purview of the States." 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, 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, adopted the Mussari Court’s position on the CSRA. In a

\[\text{For a critique of the "federalization\$ of child support law, see Maurice A. Hartnett, III, The Uniform Interstate Family Support Act, 11 DEL. L. REV. 51 (1993)\$}\]

\[\text{111 Mussari, 894 F. Supp. at 1368.}\]

\[\text{112 18 U.S.C. §§ 3161-74 (1994) (providing specific time periods in which defendants must be arraigned and brought to trial)\$}\]

\[\text{113 Mussari, 894 F. Supp. at 1368.}\]

\[\text{114 Id. at 1369.}\]

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

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

\[\text{117 Mussari, 894 F. Supp. at 1369.}\]


\[\text{119 Judge Garcia of the San Antonio Division of the U.S. District Court for the Western District of Texas upheld the Gun Free School Zones Act. The Fifth Circuit reversed this}\]
remarkably concise opinion\textsuperscript{120} that was later amended,\textsuperscript{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."\textsuperscript{122} Second, the CSRA embroiled the federal courts in domestic relations matters that the domestic relations exception forbid them from entertaining.\textsuperscript{123}

Three weeks after Bailey,\textsuperscript{124} the United States District Court for the Southern District of Indiana, Evansville Division, rendered its opinion on the constitutionality of the CSRA in \textit{United States v. Hopper}.\textsuperscript{125} \textit{Hopper} is an interesting\textsuperscript{126} and disturbing\textsuperscript{127} opinion. The Hopper Court dis-

\textsuperscript{120} The full opinion was:

\begin{quote}

It is ORDERED that the information herein is DISMISSED.
\end{quote}


\textsuperscript{121} \textit{Id.} at 729.

\textsuperscript{122} \textit{Id.}

\textsuperscript{124} September 28, 1995, to be exact.


\textsuperscript{126} The facts of \textit{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 Vandenburgh, 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. \textit{Id.} at 390-91.

\textsuperscript{127} \textit{Hopper} is a disturbing opinion because Magistrate Judge Hussman displayed an extremely poor understanding of the facts and reasoning of \textit{Lopez}. In summarizing \textit{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 CSRA\textsuperscript{128} and the reasoning which the Hampshire and Murphy\textsuperscript{129} Courts relied upon in upholding the statute. The Hopper Court “conclud[ed] that Murphy and Hampshire [were] properly decided.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{132} Furthermore, because Mr. Hopper’s obligation was “already reduced to judgement . . . [t]here [w]ere 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.”\textsuperscript{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.\textsuperscript{134} The Hopper Court reframed the issue as whether “the act of collecting an obligation, though dealing with an intangible,” amounts to commerce.\textsuperscript{135} Avoiding the definition of commerce used by the Lopez Court,\textsuperscript{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

\textit{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)).

\textsuperscript{128} See supra Part III.A.

\textsuperscript{129} See supra Part III.B.

\textsuperscript{130} Hopper, 899 F. Supp. at 391.

\textsuperscript{131} Id. at 392.

\textsuperscript{132} Id. at 393.

\textsuperscript{133} Id. at 394.

\textsuperscript{134} See supra note 103 and accompanying text.

\textsuperscript{135} Hopper, 899 F. Supp. at 392.

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

After \textit{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.\textsuperscript{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.\textsuperscript{144} Two of these four decisions were reversed on appeal.\textsuperscript{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.\textsuperscript{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

\textsuperscript{137} \textit{Hopper}, 899 F. Supp. at 392 (quoting United States v. Shubert, 348 U.S. 222, 226 (1955)).

\textsuperscript{138} \textit{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.").

\textsuperscript{139} \textit{Lopez}, 115 S. Ct. at 1629-30.

\textsuperscript{140} \textit{Id.} at 1630-31.

\textsuperscript{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.

\textsuperscript{142} \textit{Hopper}, 899 F. Supp. at 393.

\textsuperscript{143} See \textit{supra} note 66 (listing cases).

\textit{See supra} note 66.


\textsuperscript{145} 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 objections 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." 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. 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. The domestic

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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).

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."\textsuperscript{150} As the \textit{Hampshire} Court noted,\textsuperscript{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.\textsuperscript{152} Rather, it is based upon federal question jurisdiction,\textsuperscript{153} which is valid so long as Congress has the power to legislate upon the matter over which jurisdiction is conferred.\textsuperscript{154}

Although courts may wish that they could avoid hearing CSRA prosecutions\textsuperscript{155} 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.\textsuperscript{156} Furthermore, even if the domestic relations exception could dis-

\textsuperscript{151} See supra note 77 and accompanying text.
\textsuperscript{152} 28 U.S.C. § 1332 (1994).a
\textsuperscript{153} Id. at§ 1331.
\textsuperscript{154} See generally Paul J. Mishkin, \textit{The Federal "Question" in the District Courts}, 53a \textit{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).
\textsuperscript{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 \textit{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:
\begin{quote}
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.
\end{quote}
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.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{158} The CSRA has nothing to do with divorce or custody decrees.\textsuperscript{159} Without disregarding long accepted legal definitions, it would require more than creativity to equate child support\textsuperscript{160} with alimony.\textsuperscript{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. 0 Federal-State Judicial Comity Argument

Judicial comity is “\textit{the 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}.”\textsuperscript{162} There are two types of comity—interstate comity\textsuperscript{163} 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:

\begin{quote}
[A] proper 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 theo
\end{quote}

\begin{footnotes}
\item[157] 504 U.S. 689, 703 n.6, 704 (1992).
\item[158] \textit{Id.}
\item[159] \textit{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, \textit{supra} note 11, at 4.
\item[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.” \textsc{Black’s Law Dictionary} 239 (6th ed. 1990).
\item[161] Alimony is “[a]llowances by which husband or wife by court order pays other spouse for maintenance, after they are separated, or after they are divorced, or temporarily, pending a suit for divorce.” \textit{Id.} at 73.
\item[162] \textit{Id.} at 267 (emphasis added).
\item[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. \textit{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).
\end{footnotes}
States and their institutions are left free to perform their separate functions in their separate ways.\textsuperscript{164}

Manifestations of the judicial concern for the principle of federal-state comity take two forms.\textsuperscript{165} First, federal courts may, under certain limited circumstances,\textsuperscript{166} abstain from deciding a particular case.\textsuperscript{167} Second, the Supreme Court has adopted a rule of construction for federal legislation\textsuperscript{168} “affecting the sensitive relation between state and federal criminal jurisdiction”\textsuperscript{169} which assumes that, “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”\textsuperscript{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 inconclusive\textsuperscript{171} as to the extent to which Congress intended the measure to alter the federal-state balance. This ensures that “Congress faced the[\ldots] 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 \ldots claimed by the Government at some later time.”\textsuperscript{172}

In both \textit{United States v. Bailey} and \textit{United States v. Mussari}, the district court asserted that principles of “comity also support \ldots finding that the CSRA is unconstitutional.”\textsuperscript{173} The \textit{Mussari} Court supported this conclusion with two observations. First, quoting \textit{United States v. Bass},\textsuperscript{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

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\textsuperscript{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).

\textsuperscript{165} Justice Sandra Day O’Connor, \textit{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).

\textsuperscript{166} See infra notes 181-88 and accompanying text.

\textsuperscript{167} LAURENCE H. TRIBE, \textit{AMERICAN CONSTITUTIONAL LAW} § 3-28 at 195-208 (2d ed. 1988).


\textsuperscript{169} \textit{Bass}, 404 U.S. at 349.

\textsuperscript{170} \textit{Id}.

\textsuperscript{171} \textit{Id}. at 350.

\textsuperscript{172} \textit{Id}.


\textsuperscript{174} \textit{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.1760

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 use 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 expositers 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

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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.
182 Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). a
to address the constitutional issues. 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. 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." 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" 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.

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 decree 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, there is little risk that a federal court will usurp the function of state courts as "the principle expositers 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.

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185 See Tribe, supra note 167, § 328 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).
189 See supra notes 110-13 and accompanying text.
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 unflagging obligation of the federal courts to exercise the jurisdiction given them," 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. 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.

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. 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. 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." In the legislative history of the CSRA, Congress specifically noted that:

[At 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 deal with the extradition of interstate child support defend-

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194 Tribe, supra note 167, § 3-28, at 206.
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 that 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.
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 actors since the Supreme Court decided *United States v. Darby* in 1941. 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. 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." Under this novel interpretation, the Tenth Amendment was no longer an independent, substantive limitation protecting and maintaining the federal system the Framers had created. It became just an aside, a superfluous reminder of what was evident throughout the

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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.*


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.\textsuperscript{207}

When coupled with the Commerce Clause jurisprudence that the Court developed during the New Deal era,\textsuperscript{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.\textsuperscript{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.\textsuperscript{210} Although the New Deal interpretation of the Tenth Amendment is currently being subjected to an increasing tide of criticism from scholars\textsuperscript{211} and judges\textsuperscript{212} and may in fact be eroding,\textsuperscript{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

\textsuperscript{207} \textit{Darby}, 312 U.S. 100, 124 (1941).
\textsuperscript{208} For a detailed description of the Commerce Clause jurisprudence developed during the New Deal, see \textit{infra}, Part IV.C.2.b.
\textsuperscript{209} \textit{See} \textit{Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.}, 452 U.S. 264, 289a (1981):

\textit{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.}

\textit{Id.}


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

\textsuperscript{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 Units States \textit{v.}aWall, 92 F.3d 1444, 1479-81 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting ina part).a
federal system continue to pay lipservice to\textsuperscript{214} the New Deal version of the Tenth Amendment.\textsuperscript{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 states\textsuperscript{216} 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 \textit{United States v.e 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.\textsuperscript{217} In the aftermath of \textit{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 \textit{Lopez} majority delineating the boundary of the commerce power.

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

\textsuperscript{214} Justice O’Connor accepted Justice Stone’s linguistic nihilism in New York v. United States, 505 U.S. 144, 156 (1992).

\textsuperscript{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, \textit{The Proper Scope of the Commerce Power}, 73 VAa 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 timèl which rejected the Founders’ ‘belief that government was not an unrequited good but, was at best a necessary evil.’” Id. at 1443.

\textsuperscript{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), \textit{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). \textit{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).

\textsuperscript{217} See \textit{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:

商, 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,

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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.
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.\textsuperscript{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."\textsuperscript{223} The Gibbons Court, however, emphatically stated that limitations on the commerce power existed\textsuperscript{224} 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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{227} From these cases, the Court developed its "dormant" Commerce Clause jurisprudence.

The Court had few occasions\textsuperscript{228} to pass judgment upon congressional action pursuant to the Commerce Clause until Congress made sig-

\textsuperscript{222} Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824).
\textsuperscript{223} Id. at 196.
\textsuperscript{224} Id.
\textsuperscript{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 "amongst" 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 internal 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.
\textsuperscript{226} Gunther, supra note 181, at 97.
\textsuperscript{227} Id.
\textsuperscript{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. 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." The second line of interpretation involved use of the commerce power to keep the channels of interstate commerce free from "immoral and injurious uses;" this allowed Congress to regulate the private conduct of citizens on either the sending or receiving end of interstate transactions. 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.

1. 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. 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. 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.

Justice Field's "instrumentalities of commerce" rationale was subsequently used to uphold federal railway regulation. In 1886, the Supreme
Court held that states could not regulate fares on railway runs that began in one state and terminated in another state.\textsuperscript{236} Later, in \textit{Houston, East & West Texas Railway v. United States (The Shreveport Rate Case)},\textsuperscript{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."\textsuperscript{238} The pragmatism urged by Justice Field in \textit{The Daniel Ball} won the day in the \textit{Shreveport Rate Case} and its progeny.\textsuperscript{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.\textsuperscript{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."\textsuperscript{241}

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{244} Justices with similar views were subsequently appointed to the Supreme Court.\textsuperscript{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]."\textsuperscript{246}

\textsuperscript{236} Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557 (1886).
\textsuperscript{237} 234 U.S. 342 (1914).
\textsuperscript{238} \textit{Id.} at 355.
\textsuperscript{239} The Shreveport Rate Case, 234 U.S. 342 (1914); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).
\textsuperscript{240} See \textsc{Gunther}, \textit{supra} note 181, at 99.
\textsuperscript{241} Epstein, \textit{supra} note 215, at 1421.
\textsuperscript{242} In \textit{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).
\textsuperscript{243} See, \textit{e.g.} \textsc{Gunther}, \textit{supra} note 181, at 109.
\textsuperscript{244} \textit{Id.}
\textsuperscript{245} See generally \textsc{Katherine Drinker Bowen}, \textsc{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").
\textsuperscript{246} \textsc{Gunther}, \textit{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."[^25]

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.
[^25]: See id. at 374 (Fuller, C.A., 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); *Hipopite 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, 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." 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 formalistic analysis. 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.

The first important case in the development of this facet of the commerce power was *United States v. E.C. Knight Co.* *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. 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-

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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,
unlike the one in *Knight*, did not involve manufacturing and explicitly addressed plans for interstate sales of a product.\textsuperscript{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.\textsuperscript{271} Writing for the Court, Justice Holmes explained:

\begin{quote}
[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.\textsuperscript{272}
\end{quote}

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.\textsuperscript{273} This analytic framework did not always function as a precise formula.\textsuperscript{274} In addition, the vague and subjective nature of standards such as direct versus indirect and "things harmful
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.” 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.0 The New Deal and Judicial Abdication: *Le Délyuge*

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


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. Keefer 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.

“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 product in, interstate commerce and dependent upon such commerce for the successful conduct of its business.284 Congress deemed the law necessary too 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 Hilla 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).

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.\textsuperscript{287} The Court did not, however, subject the NLRA to this test. Instead, it used the contextual and pragmatic "substantial relation" approach\textsuperscript{288} it had previously applied exclusively to regulations affecting the instrumentalities of interstate commerce.\textsuperscript{289} The Court analogized the NLRA to the regulation upheld in \textit{The Shreveport Rate Case}\textsuperscript{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."\textsuperscript{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."\textsuperscript{292} Consequently, the NLRA was upheld.\textsuperscript{293} The \textit{Laughlin} Court did, however, warn that:\textsuperscript{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.\textsuperscript{295}

\begin{footnotes}
\item[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).
\item[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).
\item[289] 301 U.S. at 36-38. The Court repeatedly cites "affecting instrumentalities of commerce cases" which sprang from the \textit{Shreveport Rate Case}. See supra Part IV.C.2.a.iii.
\item[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.iiiia
\item[291] Houston & Texas Ry. v. United States, 234 U.S. 342, 351-52 (1914).
\item[293] Id. at 49.
\item[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.
\item[295] Id. at 37 (emphasis added).
\end{footnotes}
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.\textsuperscript{296} Eventually, the vague indirect/direct distinction withered from disuse.\textsuperscript{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" test\textsuperscript{298} in United States v. Darby.\textsuperscript{299}

Darby upheld the Fair Labor Standards Act (FLSA).\textsuperscript{300} The Act prohibited placing into interstate commerce goods manufactured by labor paid below a prescribed minimum wage.\textsuperscript{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.\textsuperscript{302} The Court, however, did not apply the "goods harmful in themselves"\textsuperscript{303} test traditionally used in such cases.\textsuperscript{304} This test was expressly rejected\textsuperscript{305} by the Darby Court. Citing Justice Holmes's dissent in Hammer v. Dagenhart, the Court overruled Hammer v.eDagenhart\textsuperscript{306} and applied a "substantial effect" test.\textsuperscript{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.\textsuperscript{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,\textsuperscript{309} which delegated "few

\textsuperscript{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).

\textsuperscript{297} TRIBE, supra note 167, § 5-4, at 308-09a.


\textsuperscript{299} 312 U.S. 100 (1941).

\textsuperscript{300} Id. at 111-12, 115.

\textsuperscript{301} Id. at 112.

\textsuperscript{302} Id. at 116.

\textsuperscript{303} Id.

\textsuperscript{304} See supra Part IV.C.2.a.ii.

\textsuperscript{305} United States v. Darby, 312 U.S. 100, 117 (1941).

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

\textsuperscript{307} Id. at 119.

\textsuperscript{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.

\textsuperscript{309} See Redish & Drizin, supra note 211, at 1-5.
and defined"\textsuperscript{310} powers to the federal government and created a federal system of dual sovereignty.\textsuperscript{311} One year after \textit{Darby},\textsuperscript{312} it became clear in the case of \textit{Wickard v. Filburn}\textsuperscript{313} that the Court was no longer enforcing these remaining structural limitations on the power of the national government.\textsuperscript{314}

\textit{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.\textsuperscript{315} The opinion noted that the rationale of \textit{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."\textsuperscript{316} So, to further develop "[a] practical conception of commercial regulation,"\textsuperscript{317} the Court expanded the commerce power to permit regulation of private activities "[which] may not be regarded as commerce ... whatever [their] nature,"\textsuperscript{318} so long as the activities "might reasonably be deemed nationally significant in their aggregate economic effect."\textsuperscript{319} The aggregative test articulated in \textit{Wickard} was soon "understood to provide no limitation on the power [of Congress to legislate under the Commerce Clause]."\textsuperscript{320}

After \textit{Wickard}, the Court maintained a tripartite conception of the commerce power,\textsuperscript{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 \textit{Wickard} Court. Eventually, the "test" became a rubber stamp because the Court simply

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\item \textsuperscript{310} \textit{The Federalist} No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).
\item \textsuperscript{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. \textit{The Federalist} No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).
\item \textsuperscript{312} 312 U.S. 100 (1941).
\item \textsuperscript{313} 317 U.S. 111 (1942).
\item \textsuperscript{314} See, \textit{e.g.}, Gunther, \textit{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, \textit{supra} note 211, at 4 & n.13.
\item \textsuperscript{315} Wickard, 317 U.S. at 114-20.
\item \textsuperscript{316} Id. at 118-19.
\item \textsuperscript{317} United States v. Lopez, 115 S. Ct. 1624, 1637 (1995) (Kennedy, J. concurring).
\item \textsuperscript{318} Wickard, 317 U.S. at 125.
\item \textsuperscript{319} Tribe, \textit{supra} note 167, § 5-4, at 310 (explaining the holding and rationale of the Wickard decision).
\item \textsuperscript{320} Robert F. Nagel, \textit{Federalism as a Fundamental Value}, 1981 \textit{Sup. Ct. Rev.} 81, 81-82
\end{itemize}
\end{footnotesize}
had to find that "Congress had a rational basis for finding that [an activity] . . . affected commerce." By its plain meaning, this standard is incredibly broad because "depending upon the level of generality, any activity can be looked upon as commercial." Furthermore, simply asking whether Congress had a rational basis is a rhetorical question because "one always can" find a rational basis. This is especially so when the Court is willing "to accept Congress's word on a statute's connection to interstate commerce," as it did after *Wickard*. 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. Quite simply, this standard allowed Congress "[to] sit in final judgement on the constitutionality of their own actions." 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 Constitution 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. Nevertheless, waves of legislation premised upon the commerce power

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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).


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." 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," 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. In United States v. Lopez, 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.

In Lopez, the Supreme Court finally began to delineate substantive limits on the commerce power by declaring the Gun Free School Zones Act (GFSZA) unconstitutional because it was beyond Congress’s commerce power to enact. The Lopez majority's decision did not rest on Congress's failure to observe the formality of making legislative findings connecting the enactment to interstate commerce. 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).

333 Id.
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.
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 concurrence 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*o

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

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\(^{341}\) 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 judge-ment 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.


\(^{344}\) Id.


\(^{346}\) United States v. Lopez, 15 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” 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.

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 obliterat[ing] the [remaining] distinction between what is national and what is local.”

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).


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. 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.” 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.”

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

1. the regulation controls a commercial activity or an activity necessary to the regulation of some commercial activity,
2. the statute includes a jurisdictional nexus requirement to ensure that each regulated instance of the activity affects interstate commerce, and
3. 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.

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

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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-\textit{Lopez} Commerce Clause review was to be performed pursuant to "the type of intermediate scrutiny used in \textit{Lopez}."\textsuperscript{354}

In the course of applying his post-\textit{Lopez} analysis in \textit{Wall} to the federal Illegal Gambling Business Statute,\textsuperscript{355} which was categorized under the substantial effects prong of \textit{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.\textsuperscript{356}

In \textit{Wall}, Judge Boggs came very close to stating with perfect accuracy the analytic process \textit{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 \textit{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 \textit{Lopez} was "necessary though limited."\textsuperscript{357} The \textit{Lopez} majority was merely trying to revive what was left of the unique constitutional principles of federalism and limited and enumerated powers.\textsuperscript{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 \textit{Lopez}.\textsuperscript{359} Applying intermediate scrutiny to all Commerce Clause enactments would be contrary to the \textit{Lopez} majority's determination to consider the scope of the Commerce Clause "in the light of our dual system of government" \textit{as of 1995} in order to prevent Congress from "effectually obliterate[ing] the [remaining] distinction between what is national and what is local."\textsuperscript{360} To ensure that courts act only defensively to prevent further expansion of the commerce power at the expense of federalism, \textit{Lopez} commands intermediate scrutiny only for

\textsuperscript{354} \textit{Id.} at 1460.
\textsuperscript{356} \textit{Id.} at 1467.
\textsuperscript{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").
\textsuperscript{359} \textit{See supra} note 348 and accompanying text.
\textsuperscript{360} Five days after \textit{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).
Commerce Clause enactments implicating "paradigmatic examples of state authority,"\textsuperscript{361} e.g., education and family law.\textsuperscript{362}

This conclusion is supported by the observation that the Court clearly did not apply the intermediate scrutiny used in \textit{Lopez} when it decided \textit{United States v. Robertson}\textsuperscript{363} two days after \textit{Lopez}. In \textit{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.\textsuperscript{364} The cursory review applied in \textit{Robertson}, coupled with the \textit{Lopez} majority's concern for "paradigmatic examples of state authority,"\textsuperscript{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.\textsuperscript{366} As the Second Circuit noted: \textit{Lopez} "revealed the Court's willingness to give serious and renewed thought to issues of federalism at the foundation of our constitutional system."\textsuperscript{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 \textit{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.\textsuperscript{368} He does not, however, directly recognize the implications that intermediate scrutiny has on applying the other two facets of the commerce power.

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\textsuperscript{361} See \textit{Lopez}, 115 S. Ct. at 1630-33, 1640, 1642.
\textsuperscript{362} The majority and both concurring opinions mentioned these as areas of traditional state concern. See \textit{United States v. Lopez}, 115 S. Ct. 1624, 1630-33, 1640, 1642 (1995).
\textsuperscript{363} 514 U.S. 669 (1995) (per curiam).
\textsuperscript{364} Id. at 669.
\textsuperscript{365} \textit{Lopez}, 115 S. Ct. at 1630-33, 1640, 1642.
\textsuperscript{366} See id. at 1634, 1640.
\textsuperscript{366} United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 499 (2d Cir. 1995).
\textsuperscript{368} See \textit{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.\(^{373}\)

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\(^{369}\) 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," 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. If this inquiry is answered affirmatively, the court is then required to apply intermediate scrutiny rather than rational basis review. 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

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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.0 Appropriate Level of Scrutiny

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.0 Classifying the CSRA

1. 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.
380 See, e.g., Nichols, 928 F. Supp. at 313-14.
381 Lopez, 115 S. Ct. at 1629.
the channels of interstate commerce. 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. 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, 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 to transport 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 \textit{Lopez} or have engaged in wishful thinking.

\section*{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 \textit{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."\footnote{\textit{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).}

The most articulate and formidable argument for placing the CSRA under this prong was made by the Second Circuit in \textit{United States v. Sage} which merits closer scrutiny.\footnote{\textit{Sage}, 92 F.3d 101 (2d Cir. 1996).}

The \textit{Sage} Court's reasoning may be summarized as follows: (1) \textit{Lopez} says that Congress may "regulate and protect the instrumentalities of, or persons or things in interstate commerce;"\footnote{\textit{Id.} at 106 (citing \textit{Lopez}, 115 S. Ct. at 1629-30).} (2) in CSRA cases we have a thing—an obligation to pay child support;\footnote{\textit{Id.} at 105.} (3) this thing is "in commerce" for purposes of the Commerce Clause based on precedents defining "commerce among the several States."\footnote{\textit{Id.} at 104-05.}

In \textit{Sage}, the Second Circuit was quite correct to assume that a ruling reversing existing Commerce Clause jurisprudence could not be supported by \textit{Lopez}.\footnote{See \textit{id.}} The \textit{Sage} Court erred, however, in two important respects. First, it erred in its reading of precedent. Second, contrary to the spirit of post-\textit{Lopez} intermediate scrutiny, it construed precedent as liberally as it might have during the era of abdication. Essentially, the \textit{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.\footnote{See \textit{id.} at 105-06.} It relied upon two precedents for this conclusion—\textit{Gibbons v. Ogden}\footnote{22 U.S. (9 Wheat.) 1 (1824). Discussed \textit{supra} at Part IV.C.2.a.} and \textit{United States v. South-Eastern Underwriters Assoc.}\footnote{322 U.S. 533 (1944).} The \textit{Sage} Court misconstrued and expanded upon these precedents.
The Sage Court accurately described Gibbons as defining commerce more broadly than "traffic . . . buying, and selling or the interchange of commodities."\textsuperscript{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."\textsuperscript{395} However, Gibbons further held that Congress could only regulate commerce that "concerns more states than one."\textsuperscript{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."\textsuperscript{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.”\textsuperscript{398}

Perhaps foreseeing the transparency of its sophistic assertion and the resulting criticism, the Second Circuit attempted to justify this expansion\textsuperscript{399} 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.,\textsuperscript{400} the Sage Court declared that “sending money to another State is commerce although the transaction does not ‘concern

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

\textsuperscript{395} Gibbons, 22 U.S. (9 Wheat.) at 189 (emphasis added).

\textsuperscript{396} Id. at 194.

\textsuperscript{397} Id. at 190 (emphasis added).

\textsuperscript{398} Sage, 92 F.3d at 105.

\textsuperscript{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)).

\textsuperscript{400} Sage, 92 F.3d at 105.
the flow of anything more than electrons and information.'"\textsuperscript{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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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*.\textsuperscript{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

\textsuperscript{401} Id. at 106 (quoting United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 550 (1944)).

\textsuperscript{402} South-Eastern Underwriters, 322 U.S. at 535.

\textsuperscript{403} Id. at 538.

\textsuperscript{404} Id. at 549-50.

\textsuperscript{405} Id. at 550.

\textsuperscript{406} Id. at 540-46.
conduct, no matter how trivial, is in furtherance of a commercial enter-
prise. And, as Judge Bechtle pointed out in United States v. Parker,e
child support payments do not implicate "[a]rm's length commercial ac-
tors . . . [t]he marketplace for goods and services and prices of commodi-
ties 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 enter-
prise—i.e., the business of insurance. This view of South-Eastern is con-
sistent 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 solu-
tion"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 catego-
rized 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.e

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 trans-
portation 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.,
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);
tional 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." 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." 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*. 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." The Court then observed that the grain allotments at issue in *Wickard* involved "economic activity" subject to Commerce Clause regulation. 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." 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 had 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.

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412 *Lopez*, 115 S. Ct. 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 Clause\(^419\) 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

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\(^417\) 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.\textsuperscript{420} this rationale replicates the boundless "cost of crime" theory rejected in \textit{Lopez}.

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

\textbf{V.0 CONCLUSIONo}

In the post-\textit{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 violated\textsuperscript{422} 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."\textsuperscript{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."\textsuperscript{424} After \textit{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-\textit{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

\textsuperscript{420} \textit{Id.}

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

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


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 feel­
ing 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 sup­
port owed and the amount actually paid. Despite the sympathy this state
of affairs invites, the federal courts must not lose cite 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 be­
tween the central government and the states as affected by the Commerce
Clause and recent pronouncements by the Supreme Court in relationship
thereto.”

Despite the opinion of many lower federal courts to the contrary, a
thorough and objective review of the constitutional balance after Lopeze
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.” More importantly these courts defy
the Constitution as interpreted by the Supreme Court in Lopez. And,
even if “practical politics consists in ignoring facts,” practical adjudi­
cation does not.

Andrew M. Sifft

427 HENRY ADAMS, THE EDUCATION OF HENRY ADAMS Ch. 24 (1907).
‡ Law Clerk to the Hon. Danny J. Boggs, United States Sixth Circuit Court of Appeals,

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