The Child Support Recovery Act and Its Constitutionality after *US v. Morrison*

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I. INTRODUCTION

More than one million American children are robbed of over $18 billion of needed financial support annually because their parents fail to pay child support.[1] In an effort to alleviate this problem, Congress passed the Child Support Recovery Act (CSRA)[2] in 1992. The Act makes it a federal criminal offense to willingly refuse to pay child support. The rule is simple: if you fail to pay support you go to jail.

Though the Act is clearly intended to punish those who deliberately fail to pay support, there is a reoccurring question as to whether, through the use of the Commerce Clause, Congress is entering into the realm of family law and enforcing criminal sanctions where state governments traditionally control. The Supreme Court rulings in *Unites States v. Lopez*[3] and *Unites States v. Morrison*[4] established a recent trend to substantially limit Congress' Commerce Clause powers. This article aims to show that Congress did not overstep its bounds by entering a traditionally state governed area of law when enacting the Child Support Recovery Act because courts have found it to fall within all the prongs established by the Supreme Court in *United States v. Lopez* and later amended in *United States v. Morrison*.

This article begins with an in depth analysis of the federal child support program. Part II analyzes the creation and subsequent history of the federal child support system. Part III describes the evolution and foundation for the CSRA and the Deadbeat Parent's Punishment Act (DPPA) and some of the problems associated with the acts. Part IV, examines the history of the Commerce Clause and the two most recent cases restricting Congress' powers to regulate interstate commerce. Part V then looks at two recent decisions applying the Constitutional standards to the CSRA and the DPPA and analyzes two differing opinions.

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Finally, Part VI tries to determine other methods of enforcing child support recovery across state lines as a precautionary measure in case the Court decides in the future that the CSRA is unconstitutional.

II. AMERICA'S HISTORY OF CHILD SUPPORT ENFORCEMENT ACROSS STATE LINES

Family law has traditionally been recognized as a state matter. However due to interstate travel, the federal government has been dealing with it for decades. Below is a brief synopsis of the government's role in family law issues.

A. The Creation of a Federal System

In the United States, there is a long tradition of leaving the governance of family law matters to the states.[5] However, throughout the 20th and into the 21st century, the federal government has come to recognize the mobility of citizens and the need to create a system of child support collection that crosses state lines.[6] This new system, initiated in the 1930s with the creation of the Aid to Families with Dependant Children (AFDC) under Title IV-A of the Social Security Act,[7] was originally enacted in connection with national welfare legislation. Since the AFDC, the government has enacted new systems that reach many families with no connection to the welfare system. Each attempt has led to inconsistent collection practices among the states, in addition to representing a shift from state control over child support to a national child support program.[8]

B. Aid to Families with Dependent Children

In 1935, the government became a provider for America's children when Congress passed the AFDC, more commonly known as welfare. This legislation was originally intended to give support to needy children or orphans whose fathers were disabled, deceased or had abandoned their families.[9] The purpose of the law has evolved to encourage the care of dependant children in their own homes or in the homes of relatives by enabling each state to furnish financial assistance and rehabilitation to needy dependant children.[10]

The AFDC is usually applicable when the non-supporting parent fails to pay his or her obligation to the child and the parent supporting the child is forced below the poverty level due to the lack of payment.[11] The AFDC acts to support the child with support needed to bring the family back above the poverty line. By the mid-1980s, almost ninety percent of AFDC recipients had a locatable parent who was alive and living outside the home but simply not paying any form of child support.[12] Though the

AFDC is not an enforcement system on non-supporting parents, it is an early acknowledgement by the government of a blossoming national child support problem.

In 1996, the AFDC was transformed into the Temporary Aid to Needy Families Act (TANF). "TANF consolidates federal funding for prior welfare programs and administers these funds as a block grant to each state," says one commentator.[13] TANF gives states broad discretion in constructing their own assistance programs and eliminates the AFDC guarantee of aid to individuals.[14]

C. The Uniform Reciprocal Enforcement of Support Act

In 1950, the National Conference of Commissioners on Uniform State Laws enacted the Uniform Reciprocal Enforcement of Support Act ("URESA"),[15] popularly known as "The Runaway Pappy Act."[16] URESA was designed to allow a custodial mother to enforce a child support order across state lines.[17] "Within seven years, some version of URESA was adopted by all states," says Shannon Braden.[18]

URESA was supposed to be a simple system that made a support order entered in one state easily enforceable in any other state. "In an URESA proceeding, the "initiating jurisdiction" would notify the "responding jurisdiction" to enforce the order . . . [and] the responding jurisdiction would then proceed against the absent parent using its own law to avoid conflict of law problems," says Braden.[19]

While URESA seemed like the ultimate solution on paper, in practice it was really quite ineffective. A number of problems stemmed from the law that made any enforcement almost impossible. First, each state did not adopt URESA uniformly; some states failed to adopt the 1958 and 1968 amendments while other states left out entire sections of the code.[20] These discrepancies in the law were so drastic that many times prosecution of the non-supporting parent could not be commenced at all. Additionally, since the enforcement system was judicially based, it was inaccessible to a custodial parent who could not afford to hire a lawyer and pay the initial fee and costs.[21] Finally, even when a victim could afford a lawyer, enforcement of URESA was erratic because state courts did not place a high priority on URESA cases, so they were rarely ever pursued.[22]

It became clear after years of failed suits that URESA was not the solution. Through various lobbying efforts and special interest group reports,[23] Congress was convinced that it had to make yet another attempt to alleviate this problem.

D. Title IV-D

Congress believed the solution to the problem was Title IV-D, an addition to the Social Security Act of 1975.[24] This new law required every state to provide child support enforcement services to recipients of AFDC at no charge.[25] The legislative

foundation for Title IV-D can be summed up in the language of its legislative history that states:

> The problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents. Of the 11 million recipients who are now receiving [AFDC funds], 4 out of every 5 are on the rolls because they have been deprived of the support of a parent who has absented himself from the home . . . .
>
> The committee believes that all children have the right to receive support from their fathers . . . . The immediate result [of Title IV] will be a lower welfare cost to the taxpayer but, more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.[26]

The law itself required the states to assist non-welfare families in child support collections for only a nominal fee.[27] The states were required to locate absent parents, to establish paternity, and to obtain, modify and enforce support orders of children receiving AFDC benefits. The federal government would then issue AFDC grants to the states and recoup state administrative costs of up to sixty-six percent.[28]

Additionally, Title IV-D created the Office of Child Support Enforcement (OCSE).[29] This agency oversees the Child Support Recovery Units (CSRUs), state agencies required under Title IV-D to administer and run the IV-D and AFDC programs. States cannot collect their expenditures until the CSRUs demonstrate to the OCSE that they have complied with all federal guidelines.[30]

Yet again, what Congress thought to be a fix to the system became a bureaucratic nightmare. Confusion and inconsistency resulted from the many different and incongruent state systems and an overload of cases.[31] "The state child support agencies were underfunded and understaffed to handle the rapidly increasing volume of cases," says Janelle T. Calhoun .[32] Custodial parents still were not receiving the necessary funds they were expecting, so Congress had to go yet another route.

E. The Uniform Interstate Family Support Act

The Uniform Family Support Act (UIFSA) was the first act aimed directly at the collection of interstate child support. In 1988, Congress formed the United States Commission on Interstate Child Support through the Family Support Act.[33] The Act's main purpose was to "improve interstate enforcement of child support obligations."[34]

The major difference between URESA and UIFSA is that with UIFSA, one state, the original issuing state, maintains jurisdiction over the support order until it is terminated through specific long arm jurisdiction provisions.[35] This change clearly alleviates the problems of filing suits in one state and then having them docketed in

another state, which would result in one state's laws controlling the terms and the other state's laws controlling the enforcement. While UIFSA is clearly a substantial improvement to URESA, it is unclear how much of an improvement it truly is because the states have been slow to adopt the new law. So as children continued to live in poverty and debts continued to increase under the UIFSA, the federal government became aware that some type of criminal measures needed to be passed to punish those who were fleeing out of state to avoid paying child support. This is when Congress turned to the Child Support Recovery Act.

III. THE CHILD SUPPORT RECOVERY ACT AND THE DEADBEAT PARENT'S PUNISHMENT ACT

The CSRA and its sister act, the Deadbeat Parents Punishment Act, are complicated. Specifically, one might ask: (1) exactly what are these acts, (2) why were they adopted, and (3) do they interfere with traditional states' rights?

A. What Are These Acts and How Do They Work?

In 1992, Congress passed The Child Support Recovery Act (CSRA).[36] For the first time in American history it became a federal criminal offense to fail to pay child support across a state line.[37] As long as the child and the non-supportive parent live in different states and the non-supportive parent willfully fails to pay more than $5,000 of child support in one year, the parent is subject to both imprisonment and fines.[38] When the CSRA was passed in 1992, approximately four million non-supportive parents were transformed overnight into potential federal criminals.[39]

Later in 1998, President Clinton signed The Deadbeat Parents Punishment Act (DPPA),[40] to stiffen the penalties imposed on those who fail to take their child support responsibilities seriously. The Act amends the criminal statute for failure to pay child support by increasing the maximum jail sentence and providing for mandatory restitution equal to the total support obligation.[41]

The Act focuses on three categories of deadbeats, and sets forth differing potential punishment ranges for each. The first category is for persons willfully more than one year behind in their child support obligations for a child living in another state, or, if less than one year in arrears, who owe more than $5,000.[42] If found guilty, they may be sentenced to a fine and up to six months of imprisonment.[43] The second category is for persons traveling to another state intending to avoid their child support obligation, and who are more than one year in arrears or owe at least $5,000.[44] The third category is for persons more than two years behind on support payments for a child living in another state, or who owe more than $10,000.[45] If found guilty, those

persons in the second and third categories, or a person from the first category with a subsequent conviction under this Act, can be fined and imprisoned for not more than two years.[46]

The U.S. Attorney General has issued guidelines for prosecuting non-supportive parents. First, before the U.S. Attorney accepts a case for prosecution, the support obligee must provide thorough information on the obligor's ability to pay, and must show that he or she has exhausted "all reasonably available remedies" to obtain payment.[47] After this is completed, "the U.S. Attorney will send a letter to the deadbeat parent before proceeding further. If the first letter does not motivate payment, then a second letter is sent. If payment is still not made at this point, the FBI is finally brought in to pursue the individual and eventually bring charges."[48]

In order for the CSRA or the DPPA to apply in cases, two conditions must be satisfied. First, there is the requirement for the noncustodial parent to live in a state different from that of the custodial parent and the child.[49] It is clear that a parent who flees a state to avoid payment has satisfied this requirement. However, moving out of state is not required. For example, if a non-supportive parent's child is moved out of the state by the custodial parent and the non-supportive parent remains in the original state and chooses not to pay support, then the parent can be held liable under the CSRA and end up in jail.[50]

The second ambiguity is the meaning of 'willfully fails to pay,' a requirement of offenders found in the CSRA's definition of the offense.[51] When debating the CSRA, Congress stated that the CSRA should be interpreted in the same manner that Federal courts have interpreted felony tax provisions.[52] Therefore, to establish "willfulness" using this standard the government must establish beyond a reasonable doubt that at the time payment was due the parent possessed sufficient funds to enable him to meet his obligations 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 the financial circumstances of the taxpayer.[53] Under this standard parents must intentionally violate the statute and have a "bad purpose or evil motive," and this standard must be proven beyond a reasonable doubt.[54]

B. Why Were the Acts Adopted?

As one proponent stated, "[n]onpayment of child support should be a crime because children are far too precious a resource to be abandoned without penalty."[55] This statement, made on the floor of Congress when debating the CSRA in 1992, goes to the heart of Congress' goals. For years, Congress had seen ineffective laws passed with the victimization of children as the only result. The time had come to stand up for children and punish the non-supportive parents.

The House Judiciary Committee authored a report accompanying the CSRA.[56] According to the report, approximately one-third of child support cases involve children whose non-custodial parent lives in a different state than the child and whose custodial parent must therefore rely on interstate payments of child support. Fifty-seven percent of the custodial parents among that group reported receiving child support payments either only occasionally, seldom or never.[57] After noting that "at least 42 states have made willful failure to pay child support a crime," the report concluded that "the ability of those states to enforce such laws outside their own boundaries is severely limited."[58] Congress realized that while state laws had been adopted to deal with the problems within individual states, there was no successful procedure for enforcing such laws across state borders.[59] Custodial parents testified at Congressional hearings, describing how their spouses would travel from one state, stay just long enough for the legal process to catch up with them, and then move on to another state.[60]

C. Does the CSRA Interfere With Traditional State Rights?

Because family law has traditionally been governed by the states, many defendants in interstate child-support cases have argued that the CSRA is an intrusion by the federal government into the typical role of the state government's family law autonomy.[61] However, state laws have been unable to enforce interstate child support payments due to state sovereignty issues. Many states enacted reciprocal support statutes, but as Representative Adam B. Schiff of California stated when debating the CSRA, these statutes were "bogged down and unable to perform with the efficiency [Congress] would like to see."[62]

In addition, since the 1930s and creation of the AFDC, the Federal government has consistently been involved in various efforts to enforce child support payments across state lines. In response to the argument that these laws interfere with traditional state rights, the Sixth Circuit Court of Appeals stated that the CSRA "does not supplant or preempt state law because it does not implicate the states' ability or authority to order child support payments, nor does it compel states to enforce such orders." Instead, the Sixth Circuit concluded that "the CSRA merely reinforces state laws which the states were unable to enforce themselves."[63]

IV. THE COMMERCE CLAUSE, *UNITED STATES V. LOPEZ*, AND *UNITED STATES V. MORRISON*

Of course, Congress may interfere with states' rights as long as it adheres to the Commerce Clause. This clause has undergone judicial scrutiny in recent years, especially in *United States v. Lopez* and *United States v. Morrison.*

A. The Evolution of the Commerce Clause

The Tenth Amendment of the Constitution states that those powers not delegated to the Federal Government are "reserved to the States respectively, or to the people."[64] In order for Congressional legislation to be constitutional, Congress must link its action to an enumerated power given to Congress by the Constitution.[65] Article I of the United States Constitution states "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes."[66] This clause, typically known as the Commerce Clause, is where Congress traditionally looks for authority to enact legislation that regulates any potential form of commerce.[67]

The first Supreme Court case involving the Commerce Clause was *Gibbons v. Ogden*.[68] In *Gibbons*, the Court held that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."[69] The only commercial activities free from federal power were those "completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of government."[70]

In 1937, the Court began to modify the scope of its rulings involving congressional authority under the Commerce Clause in *N.L.R.B. v. Jones & Laughlin Steel Corp*.[71] In that case, the Court ruled that Congress could regulate intrastate activities if the activities had "a close and substantial relation to interstate commerce."[72]

The Court continued to strengthen congressional authority under the Commerce Clause in the 1964 case, *Heart of Atlanta Motel, Inc. v. United States*.[73] The case involved a hotel that refused to rent rooms to African-Americans, with the resulting lack of accommodations impacting the African-Americans' ability to conduct interstate business.[74] The Court deferred to Congress' fact-finding expressed when passing the statute, stating the Court's "only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."[75] The Court went on to emphasize its role in this issue by stating that "whether 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, and can be settled finally only by this Court."[76] The Court ruled that since the public accommodations provision of the Civil Rights Act of 1954 met the two-prong test, the act was valid under the Commerce Clause.[77] As time went on, the Court continued to uphold Commerce Clause cases until the *United States v. Lopez* case in 1995.[78]

B. *United States v. Lopez*

United States v. Lopez concerned the prosecution of a Texas high school senior for violating the Gun Free School Zones Act of 1990, a statute that makes it a federal crime "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."[79] The defendant, Alfonso Lopez, Jr., challenged his conviction on the theory that the statute exceeded Congress' power under the Commerce Clause. The Court of Appeals for the Fifth Circuit agreed, reversing Lopez's conviction.[80] The United States Supreme Court granted certiorari and affirmed.

The Court rationalized its holding by stating that the law did not fall into the historical categories of activity that Congress may reach under its commerce power. The Court defined the three categories as follows: (1) Congress may regulate the use of the channels of interstate commerce, (2) Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) Congress may regulate those activities having a substantial relation to interstate commerce.[81]

The Court clarified the definition of "those activities that have a substantial relation to interstate commerce," by stating that case law has previously been unclear as to whether the activity must "affect" or "substantially affect interstate commerce," and determining that the latter is the proper definition.[82] The word "substantial" was given a different meaning than in the past. In *Lopez*, "substantial" meant that the "relationship between the regulated activity and interstate commerce must be strong enough or close enough to justify federal intervention," whereas prior to *Lopez*, "substantial" was more of a quantitative term, weighing the effect in the aggregate and allowing for great judicial deference.[83]

The Court's conclusion that there was not a sufficient link between guns in schools and commerce was based on three arguments. First, the Court described the statute as:

> a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. [The Act is not] an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the interstate activities were regulated.[84]

Second, the Court noted that the statute "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[85] Finally, the majority indicated its disagreement with the evidence and arguments authored in Justice Breyer's dissent, which took the position that possession of firearms in school zones did have a demonstrable effect on the national economy.[86]

It is this last point that appears to be the most important for the majority. Justice Rehnquist stated that the dissent's opinion implies that "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce and child custody), for example."[87] This passage makes it clear that the Court believes there is some point where a line must be drawn to protect the state's enumerated interests. This line, however, is not easily defined. The decision stated that Congress 'intrudes' when it "forecloses the States from experimenting and exercising their own judgment' and 'when it legislates in a manner to "displace state regulation in areas of traditional state concern."[88] Education and criminal law enforcement are established areas of traditional state concern;[89] the legislation analyzed in *Lopez* addressed both. While family law was not addressed in the opinion, several of the other opinions include dicta suggesting that statutes affecting some aspects of family life would be subject to this "intrudes" inquiry as well.

C. *United States v. Morrison*

Five years later, the Court again addressed the Commerce Clause. In *United States v. Morrison*,[90] Christy Brzonkala filed a lawsuit alleging that Antonio J. Morrison raped her while they were students at a University. Brzonkala claimed the attack violated 42 U.S.C. §13981, the Violence Against Women Act (VAMA), which provides a federal civil remedy for the victims of gender-motivated violence. The Supreme Court held that gender-motivated crimes of violence were not considered economic activities, and therefore, the Commerce Clause did not vest Congress with the authority to enact a statute regulating them. The Court reasoned, "Gender-motivated crimes of violence are not in any sense of the phrase, economic activity . . . . [T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[91]

The Court continued by stating that the Act was beyond Congress' scope, because by holding such a law within Congress' bounds would "not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce and childrearing on the national economy is undoubtedly significant."[92] Finally, the Court stated that it "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."[93]

Morrison yet again stressed the Court's concern that Congress was stepping into what has traditionally been considered the states' rights. The emphasis on family law in the decision makes it clear that the Court has no intention of allowing Congress to interfere with states' rights pertaining to family law. This decision had an immediate effect on the CSRA and its viability as a law.

V. THE CONSTITUTIONAL QUESTION OF THE CSRA: THE *LOPEZ* AND *MORRISON* EFFECT

In the aftermath of *Lopez* and *Morrison*, it is necessary to re-analyze the constitutionality of the CSRA. Courts have done just that in two recent cases: *United States v. Faassee,* and *United States v. King*.

A. The CSRA's Constitutionality after *Lopez*

Immediately following *Lopez*, deadbeat parents began filing actions based on the theory that the CSRA is unconstitutional because it does not fall within any of the three categories established by the Court in *Lopez*. For a short while, many district courts upheld the constitutional challenges and invalidated the law;[94] however, as the cases began to reach the appellate level, it became clear that all the circuits would hold the CSRA constitutional. Today every circuit has analyzed the CSRA on the *Lopez* grounds and at this point every district has found the act to be constitutional.[95] Most often, the courts have found that the CSRA has satisfied *Lopez's* second prong, the ability to regulate a "thing" in interstate commerce.[96] The Seventh Circuit established "things" as "payments stemming from a support obligation," or their absence.[97] Using this definition, the Sixth Circuit stated, "[I]f Congress may validly restrict one industry's restraint on trade or prevent intrastate extortion because it obstructs the flow of interstate commerce, certainly Congress may regulate [a parent's] failure to send payments from California to Michigan as a similar obstruction of interstate commerce."[98]

All of the above-referenced decisions pertaining to the CSRA, with the exception of the Sixth Circuit's decision in *United States v. Faasse*, were made prior to *United States v. Morrison*. The recent *Morrison* decision has created a new debate as to whether or not the Act affects "things" in interstate commerce. The next two sections explain two recent decisions since *Morrison* and the reasoning for the difference of opinion.

B. *United States v. Faasse*—The CRSA is Constitutional

United States v. Faasse[99] was the first federal circuit court decision to review the constitutionality of the CSRA after *United States v. Morrison*. It involved a father who was employed in California and was responsible for child support payments to his child in Michigan. Over a number of years Faasse failed to pay more than $10,000 of child support and the government finally filed a criminal complaint against him in 1997.[100] Faasse tried to argue that the CSRA was unconstitutional but the Sixth Circuit upheld the CSRA on the grounds that it fit into all three of the Lopez prongs.

The Sixth Circuit primarily focused on the second prong of the *Lopez* test and determined that payments non-supportive parents fail to make are payments stemming from a support obligation that travels in interstate commerce by mail, wire, or electronic transfer, and they are for that reason a "thing" in interstate commerce.[101] Once the court established that the payments were "things," it next looked to laws in the past that had been upheld even though they restricted one's ability to obstruct the flow of interstate commerce. The court focused on *Perez v. United States*,[102] where the Supreme Court upheld a law making intrastate loan sharking activities a federal crime. The court emphasized Congress' concern "that loan sharking, a significant component of organized crime, was a national affliction and required a federal antidote because 'the problem simply [could not] be solved by the states alone.'"[103] Combining the fact that the lack of payments are "things" in interstate commerce and the Supreme Court's history of upholding laws that prohibit certain interstate actions, the court reasoned that if "Congress may validly restrict one industry's restraint on trade or prevent intrastate extortion because it obstructs the flow of interstate commerce, certainly Congress may regulate Faasse's failure to send payments from California to Michigan as a similar obstruction of interstate commerce."[104]

With regard to the argument that the CSRA regulates a traditional area of family law, the court responded by stating that the CSRA "does not supplant or preempt state law because it does not implicate the states' ability or authority to order child support payments, nor does it compel states to enforce such orders. Instead, the CSRA merely reinforces state laws which the states were unable to enforce themselves."[105]

Finally, the court explained that not only is the CSRA constitutional under the second prong of the *Lopez* test, but the court also believed it could conceive of situations in which the CSRA would also be considered constitutionally sound under the first and third prongs of the test.[106] The court used the Supreme Court's rulings in *United States v. Darby*[107] and *Heart of Atlanta Motel, Inc. v. United States*[108] to illustrate that a permissible situation under the first prong encompasses more than simple regulation of the nation's highways, railroads or other literal "channels" of commerce.[109] It claimed that these cases illustrate that Congress has the power, under

the first prong, to regulate or exclude certain categories of goods from flowing across state lines through the channels of commerce; therefore, based upon its power to regulate the use of the channels of interstate commerce, the CSRA was validly enacted under the first prong of *Lopez*.[110]

Additionally, the court found the CSRA to validly fall within the third prong of *Lopez* for three reasons. First, the statute regulates financial obligations that must move in interstate commerce, via mail, wire, or electronic transfer. Second, the statute has an explicit jurisdictional nexus to interstate commerce—the child and non-custodial parent must reside in different states. Third, the statute is supported by Congressional findings explaining the effect that failure to make court-ordered child support payments has on commerce.

C. *United States v. King*—The CSRA is Unconstitutional

United States v. King[111] was the first district court decision analyzing the constitutionality of the CSRA after the *Morrison* decision expounded on *Lopez's* three-prong test. This case involved Eric King, an unsupportive parent who failed to make payments of approximately $3,000 a month for an eight-year period. During these eight years, King resided in Texas while the child and her mother resided in New York.[112] King was arrested and charged with violating the CSRA. He filed a motion to dismiss the charges, claiming that the section of the CSRA under which he was charged violated the Tenth Amendment because it exceeded Congress' power to regulate commerce among the states. The United States District Court for the Southern District of New York granted King's motion to dismiss.

The court recognized that the Second Circuit had already considered a Tenth Amendment challenge to the CSRA and found it to be constitutional in *United States v. Sage*.[113] However, the court rationalized its holding on the new *Morrison* decision handed down from the Supreme Court in 2000. The court looked to the language in *Morrison* that warns against "overly elastic conceptions of the Commerce Clause that would give Congress authority over family law."[114]

When comparing *King* to the previous Second Circuit *Sage* decision, the court focused on the second prong of the *Lopez* reasoning. In *Sage*, the court concluded that the CSRA was constitutional because the failure to make child support payments obstructs interstate commerce, and Congress may regulate this failure pursuant to its power to regulate "things in interstate commerce," in other words, under the second *Lopez* prong.[115] The *King* court stated that the Supreme Court's holding in *Morrison* "clarified that Congress may regulate conduct that obstructs interstate commerce through the Commerce Clause only where the conduct has a "substantial effect" on such commerce—in other words, under the third prong of *Lopez*."[116] Using this language, the *King* court determined that the CSRA does not fall into the second prong

of *Lopez* because Congress can only regulate conduct that obstructs interstate commerce under the third prong of *Lopez*. Additionally, the court held that the CSRA was similar to the VAWA in that it only creates "but-for" causation from a failure to pay child support, rather than having a "substantial effect" on interstate commerce, so it also did not fall into the third prong of the *Lopez* test.[117]

King also argued that the CSRA was an invasion on state laws because it took away the states' rights to govern what is truly local.[118] The court agreed with King's argument and specifically stated:

> The Supreme Court's current federalism jurisprudence teaches that the CSRA, by making it a federal crime to fail to make child support payments . . . based merely on the fact that the parent and the child reside in different states, upsets the delicate balance between what is truly national and what is truly local.[119]

D. The Future of the CSRA's Constitutionality

Currently, *King* is the only decision holding the CSRA unconstitutional. It is also only one of few decisions to take into account the effect *Morrison* should have on the CSRA. It is uncertain at this time whether the *King* decision will be similar to the many lower court decisions after *Lopez* that have held the CSRA unconstitutional, only to get overturned by the higher courts,[120] or if it will be the catalyst for a number of changed opinions in the future. However, the *King* decision aside, there is strong evidence in all other CSRA cases that the CSRA will likely be upheld as constitutional in future appeals.

The most telling factor in each of the decisions addressing the *Lopez* prongs is the rationale that the CSRA is constitutional under all three of the *Lopez* prongs. In *Faasse*, the circuit court developed a reason why the CSRA would fall within all three prongs of the test. The court's analysis makes it clear the CSRA is constitutional on any and all grounds challengeable under *Lopez*.

Another troubling factor for those who believe the CSRA is unconstitutional is the reasoning of the *King* decision. In *King*, the Second Circuit Court of Appeals determined that the CSRA was not constitutional because after *Morrison* it no longer falls within the second prong of the *Lopez* test. Unfortunately, in *Morrison*, the Supreme Court acknowledged that neither prong one nor prong two of the *Lopez* Commerce Clause test was implicated by the statute challenged in *Morrison*. Rather, the Court focused on whether the VAWA could satisfy the third prong of the Lopez inquiry.[121] This rationale thoroughly hampers the logic of the *King* decision. If the *Morrison* decision did not pertain to the first two prongs of the *Lopez* test, there is no justification for the Second Circuit to overturn the previous *Sage* decision that was based on the second prong of the *Lopez* test.

Also, in *King*, the court justified its decision by stating that the CSRA is a law that interferes with family law, which is typically a state right. This reasoning is flawed for two reasons. The government has been involved in an effort to enforce child support payments since the 1930s. Though the laws governing family law are still local, the means to enforce those laws have not been state governed for more than seventy years. Additionally, the Sixth Circuit addressed the same issue in *Faasse* and made a clear distinction by stating that the CSRA enforces state rights where the states cannot act on their own.

Another telling sign of the CSRA's constitutionality is the Supreme Court's refusal to grant certiorari to any of the CSRA cases in the circuit courts. Prior to *Morrison*, every circuit court had decided the CSRA was a valid law under any of the three *Lopez* prongs and the Supreme Court did not grant certiorari. While the Supreme Court has begun to constrict Congress' Commerce Clause powers through *Lopez* and *Morrison*, it appears as though it does not intend to completely eliminate Congress' federal powers by nullifying necessary bills such as the CSRA.

VI. THE FUTURE OF THE CSRA AND OTHER ALTERNATIVES

The CSRA faces a difficult future, as opponents continue to argue it is unconstitutional. In case the CSRA is eventually rendered an unconstitutional intrusion into states' powers, Congress should look at other alternatives to enforce child support judgments.

A. The Constitutionality Issue

Since the *Lopez* decision and the more recent *Morrison* decision, it is evident that the CSRA will be facing a continuing constitutional battle. The Supreme Court decisions make it abundantly clear that Congress' power to interfere with traditional state law issues is slowly becoming constrained. The times when Congress could pass almost any law pertaining to commerce under the Commerce Clause no longer exist. Whether or not the Supreme Court ever addresses the CSRA, it may be wise to look to other methods of enforcing interstate child support payments as a proactive measure if the Supreme Court continues to constrict Congress' Commerce Clause power and future circuit court decisions change the current status quo.

Many states have passed laws in an effort to deter willful failure to pay child support that could conceivably be adopted by the federal government. These laws include things such as posting "most wanted" lists,[122] revoking licenses[123] or the most drastic of all measures, preventing an offender from procreating.[124]

B. "Most Wanted" Lists

Mississippi has authored a statute that authorizes the creation of a "most wanted" list that allows its child support enforcement agency to release to the public the name, photo, last known address, arrearage amount and other necessary information of a parent who has a judgment against him for child support and is currently in arrears in the payment of this support.[125] These lists are generally published in newspapers within the state and turned into posters that are then posted in public buildings.[126] Such a statute would be conceivable on a federal level with enforcement done through a government agency. The agency could obtain information from states with regard to deadbeat parents and post "most wanted lists" in national newspapers or on the Internet. The lists would contain the offenders' pictures. This would make it more probable that offenders would be spotted and forced to pay their obligations throughout the country.

Though this particular statute may raise issues as to an individual's right to privacy, there are at least two reasons why such statutes appear to be a good addition or alternative to the CSRA. First, the statute would not require incarceration, thereby providing additional sentencing options to the courts. Additionally, such a federal statute would not need to fall into Congress' Commerce Clause power because it would not provide criminal penalties for offenders.

C. License Revocation

In Arizona, a statute has been enacted that suspends a person's driver's or and/or occupational license if he or she fails to pay child support obligations.[127] The underlying goal of license revocation or denial statutes is to prevent the "deadbeat parent" from maintaining his or her traditional lifestyle. The goal is to take away drivers' or occupational licenses that are essential to the parents for earning a living.[128]

A federal license revocation program would require an extensive computerized system to inform all states of the parents who are failing in their payments. Such a system would not be difficult to create through the use of each state's Child Support Recovery Units. Additionally, like the "most wanted" lists mentioned above, it too would provide judges with additional sentencing options in cases where incarceration is deemed inappropriate.

D. Denying Procreation

In *State v. Oakley*,[129] the Wisconsin Supreme Court upheld a trial court decision that prevented an individual from procreating until he showed that he could adequately support all of his current children for whom he failed provide. While this is

clearly an extreme situation and a highly controversial decision that will likely invite many constitutional challenges, it is yet another alternative to the CSRA. In the decision, the court rationalized that incarcerating an individual because of his failure to pay child support is anti-productive because once incarcerated he will have no way of paying the support and the ultimate victim is the child.[130] On October 7, 2002, the United States Supreme Court chose not to accept *Oakley* on appeal, rendering this a very powerful decision that will hopefully limit deadbeat parents from becoming more indebted to more children.

VII. CONCLUSION

Since its inception, the federal child support system has been marked with inefficiency and legal problems. Congress attempted to alleviate the legal problems and increase efficiency by enacting the Child Support Recovery Act and making it a crime punishable by incarceration to fail to pay child support. The CRSA withstood all constitutional challenges when the Supreme Court decided *United States v. Lopez* in 1993. However, the latest Commerce Clause decision in 2000, *United States v. Morrison*, suggests that the CSRA will face the same challenges yet again. Immediately after the *Morrison* decision, defendants filed new motions claiming the CSRA was unconstitutional on the grounds that Congress overstepped its Commerce Clause rights, invading the fundamental rights of the states to control family law. The Sixth Circuit decision in *Faasse* in 2001 held that even in light of the *Morrison* decision, the CSRA still falls within all three of the prongs previously established in *Lopez*. With the exception of the *King* decision coming out of the Southern District of New York in 2001, it appears that the *Morrison* decision did not persuade lower courts to limit Congress' power to help children get the needed support they deserve.

Though the CSRA may ultimately withstand all constitutional challenges, it is important to take additional steps to protect the children who have fallen victim to non-supportive parents. The federal government should implement supplementary means of enforcing interstate child support payments. It is time for the federal government to be proactive and look to different state laws for suggestions rather than being reactive to CSRA challenges and continuing to battle this issue in the court.

Notes

1. Sara L. Gottovi, *United States v. Lopez, Theoretical Bang and Practical Whimper? An Illustrative Analysis Based on Lower Court Treatment of the Child Support Recovery Act,* 38 Wm. & Mary L. Rev. 677, 701 (1997).
2. 18 U.S.C. § 228 (1994). The statute reads in pertinent part as follows:
   § 228. Failure to pay legal child support obligations
   (a) OFFENSE – Whoever willfully fails to pay a past due support obligation with respect to a child who resides in another State shall be punished as provided in subsection (b)
   (b) PUNISHMENT – the punishment for an offense under this section is –
   (1) in the case of a first offense under this section, a fine under this title, imprisonment for not more than 6 months, or both
   (2) in any other case, a fine under this title, imprisonment for not more than 2 years, or both.
3. 514 U.S. 549 (1995).
4. 529 U.S. 598 (2000).
5. Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541, 542-43 (Spring 1998).
6. *See* Janelle T. Calhoun, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 MERCER L. REV. 921 (Winter 1995).
7. Act of Aug. 14, 1935, ch. 531, Title IV, 401, 49 Stat. 627.
8. Estin, *supra* note 5, at 544.
9. *See* Calhoun, *supra* note 6, at 925.
10. Shannon Braden, *Battling Deadbeat Parents: The Constitutionality of the Child Support Recovery Act in light of United States v. Lopez*, 7 Kan. J.L. & Pub. Pol'y 161, 164 (Spring 1998) (*quoting* 42 U.S.C. § 601 (1976)).
11. *Id*.
12. Calhoun, *supra* note 6, at 925.
13. A. Mechele Dickerson, *Bankruptcy Reform: Does the Ends Justify the Means?*, 75 Am. Bankr L. J. 243, 254 (2001).
14. *Id*.
15. The National Conference of Commissioners on Uniform State Laws, *Unif. Reciprocal Enforcement of Support Act*, Martindale-Hubbell Law Digest Uniform and Model Acts, (1958, rev. 1968).
16. Braden, *supra* note 10, at 164.
17. *See* Calhoun, *supra* note 6, at 927.
18. *Id*.
19. *Id*.
20. Braden, *supra* note 10, at 164.
21. Calhoun, *supra* note 6, at 927.
22. *Id*.
23. *Id*.
24. Pub. L. No. 93-647 (codified at 42 U.S.C. § 651-87 (1990)).
25. *See id*.

26. Calhoun, *supra* note 6, at 930 (quoting the Social Services Amendments of 1974, S. Rep. No. 93-1356, 93d Cong. 2d Sess. 42 (1974)).
27. Pub. L. No. 93-647 (codified at 42 U.S.C. § 651-87 (1990)).
28. *See id*.
29. *See* 45 C.FR. 301.0 (2002).
30. *See id*.
31. *See* Calhoun, *supra* note 6, at 931.
32. *Id.*
33. *See* Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (42 U.S.C. § 666(a)(10)(B) (1988)).
34. Calhoun, *supra* note 4, at 932.
35. Braden, *supra* note 10, at 166.
36. 18 U.S.C. § 228 (Supp IV 1992).
37. *See id*.
38. *Id*.
39. Martha Katherine Waltz, *Part Seven: Modification and Enforcement of Support: Does the Child Support Recovery Act Violate Due Process and the Right to Travel?*, 11 J. Contemp. Legal Issues 450, 451 (2000).
40. The Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (1998) (codified as amended at 18 U.S.C.A. § 228 (West 2000)).
41. *See id*.
42. *Id.* § 228(a)(1).
43. *Id.* § 228(c)(1).
44. *Id* § 228(a)(2).
45. *Id.* § 228(a)(3).
46. *Id*. § 228(c)(2).
47. Robyn Shields, *Can the Feds Put Deadbeat Parents in Jail?: A Look at the Constitutionality of the Child Support Recovery Act*, 60 ALB. L. REV. 1409, 1420 (1997).
48. *Id.* at 1421.
49. *See* 18 U.S.C. §228(a)
50. *See* United States v. Hopper 899 F. Supp 389, 391 (S.D. Ind. 1995) (defendant was charged with violating the CSRA because his wife and son moved to another state while the defendant remained in original state)
51. 18 U.S.C. § 228(a).
52. Shields, *supra* note 47, at 1419.
53. H.R. Rep. No. 102-771, at 6 (citing United States v. Poll, 521 F.2d 329, 333 (9th Cir. 1975)).
54. H.R. Rep. No. 102-771, at 6.
55. 138 Cong. Rec. H7324 (daily ed. Aug. 4, 1992) (statement of Rep. Lloyd).
56. H.R. Rep. No. 102-771, at 5-6 (1992).
57. *Id.* at 5.
58. *Id.* at 5-6.
59. Complicated extradition laws and "snarls of redtape" hampered the states' ability to enforce these laws once the parent left the state. 138 Cong. Rec. H7325 (daily ed. Aug. 4, 1992) (statement of Rep. Schumer).
60. *Id.*

61. *See* United States v. Faasse, 265 F.3d 475 (6th Cir. 2001).
62. 138 Cong. Rec. H7326 (daily ed. Aug. 4, 1992).
63. *Faasse*, 265 F.3d at 488.
64. U.S. CONST. amend. X
65. *See generally* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 134-45 (11th ed. 2001).
66. U.S. CONST. art. I, VII.
67. *See* COHEN & VARAT , *supra* note 65, at 162-216.
68. 22 U.S. 1 (1824).
69. COHEN & VARAT, *supra* note 65, at 195-96.
70. *Id.*
71. 301 U.S. 1 (1937).
72. *Id.* at 37.
73. 379 U.S. 241 (1964).
74. *Id.* at 252-53.
75. *Id.* at 258-59.
76. *Id.* at 273.
77. *Id.*
78. 514 U.S. 549 (1995).
79. 18 U.S.C. § 922(q)(1)(a) (1988), quoted in *Lopez*, 514 U.S. at 551.
80. United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993).
81. *See* United States v. Lopez, 115 S.Ct. 1624, 1624 (1995).
82. *Id.* at 1630.
83. Shields, *supra* note 47, at 1428.
84. *Lopez*, 115 S.Ct. at 1625.
85. *Id.*
86. *See id.* at 1657.
87. *Id.* at 1632 (1995).
88. *Id.* at 1641.
89. *See*, Estin *supra* note 5 at 563.
90. 120 S.Ct. 1740 (2000).
91. *Id.* at 1751.
92. *Id.* at 1753.
93. *Id.* at 1754.
94. *See* US v. Mussari, 168 F.3d 1141 (9th Cir. 1999); US v. Bailey, 115 F.3d 1222 (5th Cir. 1997); and US v. Parker, 911 F.Supp. 830 (Pa. E.D. 1995).
95. *See* United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997) (upholding statute under Lopez's category two); United States v. Sage, 92 F.3d 101 (2nd Circ. 1996) (upholding statute under category two); United States v. Parker, 108 F.3d 28(3rd Cir. 1997) (upholding statute under category three); United States v. Johnson, 114 F.3d 476 (4th Circ. 1997) (upholding statute under category two); Unites States v. Bailey, 115 F.3d 1222 (5th Cir. 1997) (upholding statute under categories one and two); United States v. Faasse, 265 F.3d 475 (6th Cir. 2001) (upholding statute under all three categories); United States v. Black, 125 F.3d 454 (7th Cir. 1997) (upholding statute under category two); United States v. Crawford 115 F.3d 1397 (8th Cir. 1997) (upholding statute under all three categories); United States v. Mussari, 95 F.3d 787 (9th Cir. 1996)

(upholding statute under category two); United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996) (upholding statute under categories two and three); United States v. Williams, 121 F.3d 615, (11th Cir. 1997) (upholding statute under category two).

96. United States v. Bongiorno, 106 F.3d 1027, 1031 (1st Cir. 1997).
97. United States v. Black, 125 F.3d 454, 460 (7th Cir. 1997).
98. United States v. Faasse, 265 F.3d 475, 487 (6th Cir. 2001).
99. *Id.*
100. *Id*.
101. *Id* at 485-86.
102. *Id* at 484; Perez v. United States, 402 U.S. 146 (1971).
103. *Faasse*, 265 F.3d at 484-85.
104. *Id* at 487.
105. *Id* at 488.
106. *See id* at 490-91.
107. United States v. Darby, 312 U.S. 100 (1941).
108. 379 U.S. 241, 256 (1964).
109. *Faasse*, 265 F.3d at 481 (quoting *United States v. Lopez*, 514 U.S. at 558 (1995)).
110. *Id* at 490.
111. United States v. King, 2001 WL 111278 (S.D.N.Y. 2001).
112. *Id* at *1.
113. United States v. Sage, 92 F.3d 101 (2d Cir. 1996).
114. *King*, 2001 WL 111278 at *2.
115. *See Sage*, 92 F.3d at 106.
116. *King* , 2001 WL 111278 at *4.
117. *Id*.
118. *Id* at *3.
119. *Id* at *6.
120. *See* US v. Mussari, 168 F.3d 1141 (9th Cir. 1999); US v. Bailey, 115 F.3d 1222 (5th Cir. 1997); US v. Parker, 911 F.Supp. 830 (Pa. E.D. 1995).
121. *See* United States v. Morrison, 529 U.S. 598, 609 (2000).
122. *See* Pamela Forrestall Roper, Note, *Hitting Deadbeat Parents Where it Hurts: 'Punitive' Mechanisms in Child Support Enforcement*, 14 ALASKA L. REV. 41, 42 (1997).
123. *See* Susan Nicholas, Note, *A Constitutional Analysis of An Arizona Enforcement Mechanism*, 34 ARIZ. L. REV. 163 (1992).
124. State v. Oakley, 629 N.W.2d 200 (2001).
125. *See* MISS. CODE ANN. § 43-19-45 (1993).
126. *See Roper*, *supra* note 122, at 72.
127. *See* Nicholas, *supra* note 123.
128. Russell J. Marnell, *Enforcing State and Federal Child Support Orders*, N.Y. L.J. (April 20, 2000).
129. *Oakley*, 629 N.W. 2d at 200 (2001).
130. *See id*.