

The Federalization of Child Support A Shift in the Ruling Paradigm: Child Support as Outside the Contours of “Family Law”

by

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Introduction

“Family law” has long been singled out by the United States Supreme Court as the one area, more than any other, into which the federal government may not intrude, either by legislation, regulation, or assertion of federal jurisdiction. The apotheosis of this principle may be found in *United States v. Lopez*,¹ where the Court held that the Gun-Free School Zones Act of 1990 exceeded Congress’s authority under the Commerce Clause. In reaching this conclusion, the Court noted that Congress, and the federal courts could not regulate “family law (including marriage, divorce, and child custody).”² This proposition was repeated no less than three more times in the body of the opinion.³ Even the dissent of Justice Breyer, who would have found the

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¹ 514 U.S. 549 (1995).

² *Id.* at 564 (“[U]nder the government’s ‘national productivity’ reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce and child custody), for example.”).

³ *Id.* at 564-65 (“Justice Breyer posits that there might be some limitations on Congress’s commerce power, such as family law or certain aspects of education. These suggested limitations, when viewed in the light of the dissent’s extensive analysis, are devoid of substance.”); *id.* at 565 (“This analysis [by the dissent] would be equally applicable, if not more so, to subjects such as family law and direct regulation of education”); *id.* at 565 (“Under the dissent’s rationale, Congress could just as easily look at child rearing as ‘falling on the commercial side of the line’ because it provides a ‘valuable service’ - namely, to equip [children] with the skills they need to survive in life, and more specifically, in the workplace.”).

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Act constitutional, stated that an expansive reading of the Commerce Clause would not and could not threaten the “exclusive state jurisdiction” over family law.⁴

Despite this recent affirmation that “family law” is an area into which neither Congress, by federal legislation, nor the federal courts, by assertion of jurisdiction, can trespass, the federalization of child support continues apace. The Family Support Act of 1988,⁵ the Child Support Recovery Act of 1992,⁶ and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996⁷ are but the most recent examples of federal authority over child support. How is it that child support is seemingly exempt from the ban on federal regulation of family law?

This article will attempt to answer this question.⁸ Part I will trace the history of the “domestic relations exception” to federal legislation and federal jurisdiction. Part II will summarize federal legislation concerning child support arising under the Spending Power, more particularly the Family Support Act of 1988 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Part II will conclude that Congress’s power to regulate child support as a matter of the general welfare appears plenary. Part III will discuss federal legislation concerning child support arising under the Commerce Clause, more particularly the Child Support Recovery Act of 1992 (CSRA). Part III also will compare cases upholding the CSRA with cases finding the Violence Against Women Act (VAWA) unconstitutional. This section will reach the conclusion that child support has come to be viewed as outside the purview of family law, and is, instead, viewed as a matter of direct federal concern because of the history of federal subsidies to the family. Consequently, regulation of child support comes within the power of Congress’s regulatory authority under the Commerce Clause as well, and such regula-

⁴ *Id.* at 624 (Breyer, J., dissenting).

⁵ Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C. (1988)).

⁶ 18 U.S.C. § 228 (Supp. 1999).

⁷ Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, 24, and 42 U.S.C. (1996)).

⁸ The federalization of child support was addressed in this journal previously by Professor Linda Elrod, in *The Federalization of Child Support Guidelines*, 6 J. Am. Acad. Matrim. Law. 103 (1990). This article, therefore, will focus more on developments since that time.

tion does not violate the Tenth Amendment. Finally, in Part IV, this article will discuss whether the federal government has the authority to enact national child support guidelines, and whether the federal government should do so if it has such authority. Part IV will conclude that the federal government does have the authority to require states to enact a uniform child support guideline, and will outline the principles such a guideline should embody.

I. Family Law: The Domain of the States

The firm position of the Supreme Court, concerning the impropriety of federal jurisdiction over family law manifested in *United States v. Lopez*, has its origins in a line of cases that established what is now known as the “domestic relations exception” to federal diversity jurisdiction.⁹ In *Ex Parte Burrus*,¹⁰ a case that may be considered the father of the “domestic relations exception” to federal diversity jurisdiction, the Court, relying on dictum from *Barber v. Barber*,¹¹ unequivocally stated that “the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”¹² From *Burrus*, it was a short step to *Ohio ex rel. Popovici v. Agler*.¹³ In that case, the Court held that divorce and alimony claims against a foreign official living in the

⁹ See generally Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 Iowa L. Rev. 1073 (1994).

¹⁰ 136 U.S. 586 (1890).

¹¹ 62 U.S. (21 How.) 582 (1859). *Barber* endorsed the doctrine of marital unity, which held that a woman’s civil identity merged into her husband’s at marriage. For jurisdictional purposes, this means that a wife’s legal domicile was that of her husband’s; thus, diversity jurisdiction between a husband and wife was impossible in the ordinary course. In *Barber*, however, the husband and wife were living separate and apart under a judicial decree of separation. The Court ultimately held that in such a case, the female plaintiff could invoke diversity jurisdiction to enforce a state alimony award. In so holding, however, the Court in dictum disclaimed altogether any jurisdiction in the Court of the United States to grant divorce or alimony decrees in the first instance. *Id.* at 584. Since the doctrine of marital unity no longer exists, it may be right to question whether the Supreme Court’s decision in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), discussed *infra* in text at notes 15-18, can withstand scrutiny.

¹² 136 U.S. at 593-94.

¹³ 280 U.S. 379 (1930).

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United States had to be brought in state court, even though Article III and federal statutes provided no exception to the requirement that federal courts exercise exclusive jurisdiction over suits against foreign diplomats.¹⁴

The “domestic relations exception” to federal diversity jurisdiction reached its modern apex in the 1992 decision *Ankenbrandt v. Richards*.¹⁵ In that case, petitioner Carol Ankenbrandt, a citizen of Missouri, brought a suit on behalf of her daughters against respondents Jon A. Richards and Debra Kesler, citizens of Louisiana, in the United States District Court for the Eastern District of Louisiana. Alleging federal jurisdiction based on diversity of citizenship, Ankenbrandt’s complaint sought monetary damages for alleged sexual and physical abuse of the children committed by Richards, the divorced father of the children, and Kesler, his companion. The Court in *Ankenbrandt* offered as its reason for sustaining the domestic relations exception the “specific proficiency” the states have in family law.¹⁶ The Court further stated that it was “unwilling to cast aside an understood rule that has been recognized for nearly a century and a half,”¹⁷ even though that very rule may have its basis in faulty historical precedents:

We thus are content to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress’ apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to “suits of a civil nature at common law or in equity.” As the court in *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 514 (CA2 1973), observed: “More than a century has elapsed since the *Barber* dictum without any intimation of Congressional dissatisfaction. . . . Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant.” Considerations of stare decisis have particular strength in this context, where “the legislative power is

¹⁴ *Id.* at 383.

¹⁵ 504 U.S. 689 (1992).

¹⁶ *Id.* at 704.

¹⁷ *Id.* at 694-95. See also *id.* at 703 (“Our conclusion is rooted in respect for this long-held understanding.”); *id.* at 715 (Blackmun, J., concurring) (“The unbroken and unchallenged practice of the federal courts since before the War Between the States of declining to hear certain domestic relations cases”).

implicated, and Congress remains free to alter what we have done.”
Patterson v. McLean Credit Union, 491 U.S. 164, 172-173 (1989).¹⁸

The historical domestic relations exception to federal diversity jurisdiction has allowed the Supreme Court, in the context of ruling on substantive matters of family law, to reiterate that “family law” is a matter for the states.¹⁹ In *Sosna v. Iowa*,²⁰ the Court upheld Iowa’s one-year residency requirement for divorce. In so doing, the Court declared family law to be a “virtually exclusive” state domain.²¹ In *Thompson v. Thompson*,²² the Court held that the Parental Kidnapping Prevention Act²³ does not create a private federal cause of action because, in the words of Justice Marshall, federal judicial involvement in matters of substantive domestic relations determinations was inappropriate, given the longstanding tradition of reserving domestic relations matters to the States.²⁴ The court employed the same reasoning when holding that Congressional enactments concerning federal benefits preempted state law *only* when state law worked major damage to a clear and substantial federal interest.²⁵ Even in

¹⁸ *Id.* at 700. As the Supreme Court noted, at least a few federal cases had called into question the historical basis of the exception. *See Solomon v. Solomon*, 516 F.2d 1018, 1031 (3d Cir. 1975) (Gibbons, J., dissenting) (“[Prior opinions] made it clear that it simply has never been the law that because the dispute is between a present or former husband and wife and involves the marital status it is nonjusticiable in a federal district court.”); *Phillips*, 490 F.2d 509, 514 (2d Cir. 1973) (“We have no disposition to question that conclusion [in *Barber*], whether the history was right or not.”); *Spindel v. Spindel*, 283 F. Supp. 797, 806 (E.D.N.Y. 1968) (“The historical reasons relied upon to explain the federal courts’ complete lack of matrimonial jurisdiction are not convincing.”).

¹⁹ The “domestic relations exception” is a concept that relates to federal diversity jurisdiction. This article extends that concept to include those cases disdaining federal legislation on matters of family law generally.

²⁰ 419 U.S. 393 (1975).

²¹ *Id.* at 404.

²² 484 U.S. 174 (1988).

²³ 28 U.S.C. § 1738A (Supp. 1998).

²⁴ 484 U.S. at 186 n.4.

²⁵ *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) (“Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area.”); *McCarty v. McCarty*, 453 U.S. 210, 229 (1981) (“This Court repeatedly has recognized that the whole subject of domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the

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Santosky v. Kramer,²⁶ where the Supreme Court held that the United States Constitution demanded, as a matter of due process, that termination of parental rights requires a clear and convincing standard of proof, Justice Rehnquist stated in his dissent:

If ever there were an area in which federal courts should heed the admonition of Justice Holmes that “a page of history is worth a volume of logic,” it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good.²⁷

Although *Ankenbrandt* stated that “family law” comprised marriage, divorce, alimony, and child custody, seemingly leaving child support outside the rubric of family law, it is clear that the antagonism toward any kind of federal legislation or jurisdiction over “family law” also extends to matters of child support. In *Rose v. Rose*,²⁸ the Court was careful to make the point that the federal laws governing veterans’ disability benefits did not preempt a state child support statute. Indeed, with regards to child support obligations, the Court stated:

Given the traditional authority of state courts over the issue of child support, their unparalleled familiarity with local economic factors affecting divorced parents and children, and their experience in applying state statutes such as Tennessee’s former 36-820 that contain detailed support guidelines and established procedures for allocating resources following divorce, we conclude that Congress would surely have been more explicit had it intended the Administrator’s apportionment power to displace a state court’s power to enforce an order of child support. Thus, we do not agree that the implicit preemption appellant

United States.”); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 582 (1979) (California’s application of community property principles to Railroad Retirement Act benefits worked an injury to federal interests: “On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has ‘positively required by direct enactment’ that state law be preempted. . . . State family and family-property law must do ‘major damage’ to ‘clear and substantial’ federal interests before the Supremacy Clause will demand that state law be overridden.”); *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956) (“The scope of a federal right [in this case copyright] is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.”).

²⁶ 455 U.S. 745 (1982).

²⁷ *Id.* at 770.

²⁸ 481 U.S. 619 (1987).

finds in 3107(a)(2) is “positively required by direct enactment,” or that the state court’s award of child support from appellant’s disability benefits does “major damage” to any “clear and substantial” federal interest created by this statute.²⁹

The *Rose* Court went on to state that family support obligations are even *more* of a local concern than equitable distribution or community property rights, because they are “deeply rooted moral responsibilities, while the community property concept is more akin to an amoral business relationship.”³⁰

The Supreme Court has, thus, left a jurisprudence that holds “family law” in general,³¹ and family support obligations in particular, to be matters of state concern.³²

²⁹ *Id.* at 628 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. at 581). *Accord* *Boggs v. Boggs*, 520 U.S. 833, 841 (1997) (“As a general matter, ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’ Support obligations, in particular, are deeply rooted moral responsibilities that Congress is unlikely to have intended to intrude upon.”). *But see* *Ridgway v. Ridgway*, 454 U.S. 46, 60-61 (1981) (holding a state court’s divorce decree conflicted with and was therefore pre-empted by the express provision of the federal statute giving the husband an unqualified right to designate the beneficiary under a federal military life insurance policy, and rejecting a proposed construction that would have barred its application to the children’s equitable claim, stating there was no distinction between community property claims and family support obligations).

³⁰ 481 U.S. at 632 (citing *Wissner v. Wissner*, 338 U.S. 655 (1950)).

³¹ One commentator has suggested that family law comprises: (1) the law determining what constitutes a family, i.e., who may be a spouse, parent, child, or family member; (2) the law governing the creation and dissolution of these relationships, i.e., marriage, divorce, annulment, adoption, paternity, termination of parental rights; (3) the law establishing duties and responsibilities within those relationships, i.e., alimony, child support, community property, equitable distribution, abuse and neglect, as well as federal tax, citizenship, social welfare, and social security laws that turn on those relationships. Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 U.C.L.A. L. Rev. 1297, 1372-73 (1998). *See also* Ann Laquer Estin, *Federalism and Child Support*, 5 Va. J. Soc. Pol. & L. 541 (1998).

³² This is not to suggest, of course, that the Supreme Court and federal courts may not rule upon questions of constitutional law, in particular due process, equal protection, and liberty interests under the Fifth Amendment, that arise in the family law context. *E.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding state statute creating presumption that child born to married woman living with her husband is husband’s child and allowing only husband or wife, not third party, to rebut that presumption); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that race cannot be a factor in resolving custody disputes be-

II. Child Support: The Domain of the Federal Government Under the Spending Power

A. *Establishment of Child Support*

Prior to 1935, the establishment of child support was viewed as particularly a state concern.³³ This dynamic necessarily changed in 1935, when Congress enacted legislation establishing the Aid to Families with Dependent Children Program (AFDC).³⁴ AFDC established a partnership between the federal government and the states by providing appropriations to those states that adopted plans approved by the Secretary of Health, Education and Welfare, now Health and Human Services. The states in turn provided a minimum monthly subsistence payment to families meeting established federal need requirements. The most basic of these requirements was that a child in a family was not being properly supported because a parent was absent and

tween biological parents); *Mills v. Hableutzel*, 456 U.S. 91 (1982) (striking down as unconstitutional statute that provided that paternity action for purpose of obtaining child support must be brought within one year of child's birth); *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that state may terminate rights of natural parents only on clear and convincing evidence); *Orr v. Orr*, 440 U.S. 268 (1979) (striking down, on equal protection grounds, gender-based alimony statutes); *Caban v. Mohammed*, 441 U.S. 380 (1979) (striking down statute permitting mother, but not unwed father, to block adoption of child by withholding consent); *Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding statute conditioning inheritance of illegitimate children from their father on filiation order made during father's lifetime); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down statute requiring residents subject to child support order to obtain court permission to marry and conditioning approval on ability to support existing children); *Quilloin v. Wolcott*, 434 U.S. 246 (1978) (holding that equal protection does not require that unwed father of illegitimate child have same rights as married or divorced father to veto adoption); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down city housing ordinance barring extended family members from living together); *Stanton v. Stanton*, 421 U.S. 7 (1975) (striking down state child support statute providing that daughters attain majority at age 18 but sons attain majority at 21); *Stanley v. Illinois*, 405 U.S. 645 (1982) (holding that state was barred from taking custody of children of unwed father, absent hearing and particularized finding that father was unfit parent); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state laws prohibiting interracial marriage).

³³ *Rose*, 481 U.S. 619.

³⁴ Title IV-A of the Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified at 42 U.S.C. §§ 601-617 (1935)).

not paying support. Thus, in a very real sense, AFDC benefits were a substitute for child support.³⁵

In 1974, Congress passed the Family Support Act (FSA), Title IV-D of the Social Security Act, requiring states receiving AFDC funds to establish and enforce child support obligations.³⁶ Every state receiving AFDC funds had to establish a child support enforcement agency popularly known as a "IV-D Agency" that was required to meet standards promulgated by the newly established Office of Child Support Enforcement (OCSE), a division of the Department of Health and Human Services. The primary goal of the FSA was to reduce the federal cost of the AFDC program by sharpening enforcement of support obligations: the more child support collected, the less the cost of AFDC to the federal government. As stated by Congress, "The problem of welfare in the United States is, to a considerable extent, a problem of the nonsupport of children by their absent parents."³⁷ The enactment of Title IV-D, thus, gave the federal government the role of "active stimulator, overseer and financier of state collection systems."³⁸

In 1984, Congress enacted the Child Support Enforcement Amendments of 1984 (CSEA).³⁹ By this act, Congress required the states to put teeth into their laws and strengthen their enforcement powers, even as to non-Title IV-D families. This act effectively broadened the scope of the FSA by requiring the states to: (1) require employers to withhold child support from paychecks of delinquent parents for one month; (2) provide for the imposition of liens against the property of defaulting support obligors; and (3) deduct from federal and state income tax refunds unpaid support obligations. States receiving AFDC funds also had to offer full parent-locator and child support services to *all* custodial parents, regardless of whether they were receiving

³⁵ Anderson v. Edwards, 514 U.S. 143 (1995).

³⁶ Social Security Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (codified as amended at 42 U.S.C. §§ 651-665 (1994)).

³⁷ Staff of the Senate Committee on Finance, 94th Cong., 1st Sess., Child Support Data and Materials 3 (Comm. Print 1975).

³⁸ HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVES 308-309 (1981).

³⁹ Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305, amending 42 U.S.C. §§ 657-662 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C. (1984)).

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AFDC payments. Thus, more than one-half of the total support collections were going to children who were not on the welfare rolls.⁴⁰

Up to this point, Congressional action regarding child support had been limited to collection efforts. Congress came to realize, however, that it could never completely shift the cost of raising children from the federal government back to parents unless child support awards were adequate to meet the costs of raising children. The 1984 legislation, thus, required the Office of Child Support Enforcement to establish a national advisory panel on child support guidelines, and required the states to establish advisory numeric guidelines to determine appropriate amounts of child support, and that these guidelines be made available to judicial and administrative officials charged with setting child support.⁴¹ The 1984 amendments, thus, injected federal initiative and authority more deeply than ever before into matters that previously had been viewed as reserved to the states: the *amount*, as opposed to simply the *enforcement*, of child support was now a matter of federal concern.

In 1987, the advisory panel of the Office of Child Support Enforcement prepared its recommendations for the development of child support guidelines to be used nationally.⁴² As a result of this study, Congress enacted the Family Support Act of 1988,⁴³ mandating that by 1994, states implement mandatory presumptive, rather than advisory, guidelines:

There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is

⁴⁰ Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 Fam. L.Q. 1, 7 (1990). See also Diane Dodson & Nancy Hurowitz, *Child Support Enforcement Amendments of 1984: New Tools for Enforcement*, 10 Fam. L. Rep. (BNA) 3051 (1984).

⁴¹ 45 C.F.R. § 302.56(c) (1994) requires that the guidelines be based on specific descriptive and numeric criteria that results in a mathematical computation of the support award.

⁴² ROBERT G. WILLIAMS, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS: ADVISORY PANEL RECOMMENDATIONS AND FINAL REPORT (U.S. Dep't of Health and Human Services, Office of Child Support Enforcement, 1987).

⁴³ Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C. (1988)).

the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.⁴⁴

Federal law also requires that each state: (1) establish criteria under which application of the guidelines might be unjust or inappropriate, and require that when the decision-maker deviates from the guidelines, the decision-maker must make written findings as to why the guideline amount is unjust or inappropriate; (2) require that the guidelines be used not only to establish initial support awards, but for any subsequent modification of the award as well.⁴⁵

The federal mandate that states enact child support guidelines came under constitutional attack in *Children's and Parents Rights Association of Ohio v. Sullivan*.⁴⁶ In that case, the federal district court considered an argument that the federal statutes and regulations governing child support, i.e., the requirement that all states enact child support guidelines, are unconstitutional. The plaintiffs asserted, inter alia, that the federal government was overly involved in child support determinations, a matter that should be left to the states. The court easily disposed of this argument, stating that relevant authority⁴⁷ holds that the federal government may, in the exercise of its spending power,⁴⁸ require that states adhere to certain rules as a condition to receiving federal funds. The spending power is limited only by the requirement that it be in pursuit of the general welfare. The child support regulations enacted by the Department of Health and Human Services, the court concluded, passed constitutional muster on all points, because child support was *not a matter of local concern anymore*: "The general welfare requirement has been

⁴⁴ 42 U.S.C. § 667(b)(2) (1994).

⁴⁵ 42 U.S.C. § 667(a).

⁴⁶ 787 F. Supp. 724 (N.D. Ohio 1991).

⁴⁷ *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding federal statute that requires states to prohibit the sale of alcoholic beverages to individuals under the age of 21 as a condition to receipt of federal funding for highways).

⁴⁸ Article I, Section 8 of the Constitution provides Congress with the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and General Welfare of the United States."

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interpreted as foreclosing Congressional exercise of the spending power for purely local concerns.”⁴⁹ Rather, child support was *now a matter of the general welfare*:

[C]hild support regulations are within the “pursuit of the general welfare.” Over the course of several decades, Congress has come to conclude that significant legislation is necessary to alleviate some of the effects of divorce upon children. The legislative history is replete with statistics showing that lack of adequate child support has become a serious problem. It affects almost one-quarter of all American children; more than three million of whose fathers do not live in the home and do not provide financial support for their upbringing.⁵⁰

The court concluded with a simple analogy. Just as Congress had the authority to require states to raise the drinking age to eighteen under its power to appropriate funds for highways, although not everyone drinks and drives, so, too, does Congress have the authority to require that states enact child support guidelines under its power to appropriate funds for AFDC, although not all parents fail to support their children. “Whether individuals are recipients of welfare, they benefit from child support policies.”⁵¹ In essence, the spending clause allows federal legislation on child support because child support is matter of *general welfare*.⁵²

⁴⁹ 787 F. Supp. at 735.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Specific state guidelines have withstood constitutional attack on a variety of grounds as well. In *Schenek v. Schenek*, 780 P.2d 413 (Ariz. Ct. App. 1989), the father argued that the child support guidelines violated due process because the state guidelines contain provisions not required by the federal legislation. The court held that the guidelines passed constitutional muster, because the court has the authority to deviate in the appropriate circumstances. Thus, as long as the guidelines are equitably applied and provide for discretion to suit the particular circumstances of each case, they are not constitutionally infirm. *Accord* *P.O.P.S. v. Gardner*, 998 F.2d 764 (9th Cir. 1993) (discussing Washington state guidelines, court held that guidelines do not violate procedural due process rights of divorcing parents, even if schedule does not enable parents to show that individualized costs of care for their children differed from assumptions underlying table); *Coghill v. Coghill*, 836 P.2d 921 (Alaska 1992) (upholding Alaska guidelines on due process challenge); *A.S. v. District of Columbia ex rel. B.R.*, 593 A.2d 646 (D.C. 1991) (upholding guidelines against due process attack); *Boris v. Blaisdell*, 142 Ill. App. 1034, 492 N.E.2d 622 (Ill. App. Ct. 1986) (same); *In re Marriage of Cook*, 497 N.E.2d 1029 (Ill. App. Ct. 1986) (same); *In re Marriage of Soden*, 834 P.2d 358 (Kan. 1992) (same); *Esber v. Esber*, 519

The latest pronouncement from the federal courts, therefore, is that the amount of child support awarded is not a matter of local concern, but a matter that may be addressed by Congress as part of the general welfare.⁵³

B. *Enforcement of Child Support*

The 1988 Family Support Act also created the U.S. Commission on Interstate Child Support. The Commission issued its Fi-

N.E.2d 222 (Ohio Ct. App. 1989) (guidelines do not violate due process rights of noncustodial father's new wife by considering her income in determining income available to father); *Hur v. Virginia Department of Social Services, Division of Child Support Enforcement ex rel. Klopp*, 409 S.E.2d 454 (Va. Ct. App. 1991) (guidelines do not violate due process rights).

Still other litigants have challenged state guidelines on equal protection grounds. These challenges have generally failed as well. *P.O.P.S. v. Gardner*, 998 F.2d 764 (9th Cir. 1993) (rejecting challenge to Washington State guidelines as violative of the equal protection rights of children living in the noncustodial parent's household struck down); *Coghill v. Coghill*, 836 P.2d 921 (Alaska 1992) (rejecting claim that Alaska's Percentage of Income model, which considers only the income of the noncustodial parent, violates equal protections); *Stewart v. Winfrey*, 824 S.W.2d 373 (Ark. 1991) (child support guidelines do not violate equal protection of other children of parents by according preference for prior born children, as guidelines consider other children as deviation factor); *In re Marriage of Cook*, 497 N.E.2d 1029 (Ill. App. Ct. 1986) (rejecting equal protection claim); *Reeves v. Reeves*, 584 N.E.2d 589 (Ind. Ct. App. 1992) (same); *In re Marriage of Rudish*, 472 N.W.2d 277 (Iowa 1991); *Wheaton-Dunberger v. Dunberger*, 629 A.2d 812 (N.H. 1993) (father claimed that the guidelines violated the equal protection clause because the court designated him as the "obligor" parent, even though both the mother and father had joint physical custody; court disposed of this argument, holding that the father was designated the obligor because he had vastly superior financial resources; if the mother had greater resources, she'd be the obligor); *Martinez v. Martinez*, 660 A.2d 13 (N.J. Super. Ch. Div. 1995) (finding child of first marriage was not denied equal protection by consideration of father's children of second marriage under guidelines); *Eklund v. Eklund*, 538 N.W.2d 182 (N.D. 1995); *Cole v. Cole*, 590 N.E.2d 862 (Ohio Ct. App. 1990) (child support guidelines do not violate equal protection of incarcerated parent by not suspending payment of child support while parent is in jail); *Feltman v. Feltman*, 434 N.W.2d 590 (S.D. 1989) (deciding child support guideline statute does not violate equal protection rights of children of second marriage by giving child support priority to children of first marriage); *Hur v. Virginia Department of Social Services, Division of Child Support Enforcement ex rel. Klopp*, 409 S.E.2d 454 (Va. Ct. App. 1991).

⁵³ This federal concern, however, does not endow individuals with a private right of action to enforce the provisions of Title IV-D. *Blessing v. Freestone*, 520 U.S. 329 (1997).

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nal Report in August, 1992.⁵⁴ Following the Commission's recommendations, Congress enacted the Child Support Recovery Act of 1992, which criminalizes the willful failure to pay child support owed to a child in another state.⁵⁵ In that same bill, Congress established a Commission on Child and Family Welfare. This Commission's Final Report⁵⁶ resulted in the passage of the Full Faith and Credit for Child Support Orders Act.⁵⁷

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), also known as the Welfare Reform Act.⁵⁸ Many fine articles have been written recently⁵⁹ about the child support enforcement provisions of PRWORA, and the major provisions of this Act will be summarized only with an eye toward further demonstrating the federal interest in child support as a matter of the general welfare.

PRWORA, in the words of President Clinton, effectively "ended welfare as we know it."⁶⁰ PRWORA ended the federal entitlement to Aid to Families with Dependent Children

⁵⁴ *Official Recommendations of the United States Commission on Interstate Child Support*, 27 Fam. L.Q. 83 (1993).

⁵⁵ Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (codified at 18 U.S.C. § 228). See discussion *infra* Part III in text at notes 73-78.

⁵⁶ U.S. COMMISSION ON CHILD AND FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION (1996).

⁵⁷ Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, 108 Stat. 4064 (codified at 28 U.S.C. § 1738B (1994)).

⁵⁸ Welfare Reform Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

⁵⁹ *E.g.*, Samuel V. Schoonmaker IV, *Consequences and Validity of Family Law Provisions in the "Welfare Reform Act,"* 14 J. Am. Acad. Matrim. Law. 1 (Summer 1997); Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 Fam. L.Q. 519 (1996); Paula Roberts, *The Family Law Implications of the 1996 Welfare Legislation*, 30 Clearinghouse Rev. (Jan./Feb. 1997).

⁶⁰ President William Jefferson Clinton, (Presidential Campaign Speech, Oct. 11, 1992). The first news story reporting President Clinton's use of the phrase "end welfare as we know it" appeared on October 12, 1992, during Clinton's campaign. After his election in November 1992, he used the phrase in a speech to the National Conference of State Governors. See, *New York Times*, Feb. 2, 1993, page A1, column 5. This speech was widely reported in the press, and the President again used the phrase in his first State of the Union Address in 1993. See also Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523 (1995).

(AFDC),⁶¹ and replaced it with block grants to the states. The major effect of PRWORA is that the federal government will no longer provide a guaranteed safety net of cash subsistence benefits. Instead, the major responsibility for helping poor families has shifted to state and local governments.⁶²

In order to qualify for a block grant, a state must operate a Title IV-D child support enforcement program⁶³ and provide assistance to each child who is either receiving or who formerly received IV-A assistance or Medicaid, or who uses Title IV-D services. PRWORA also requires the states, in order to qualify for a block grant, to undertake many new measures that will lead to increased child support collection.⁶⁴ The federal government

⁶¹ Title IV-A of the Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified at 42 U.S.C. §§ 601-617 (1935)).

⁶² This provision of PRWORA was summarized by the court in *Kansas v. United States*, 24 F. Supp. 2d 1192, 1193 (D. Kan. 1998):

PRWORA, popularly known as "welfare reform," made sweeping changes in the laws regulating the poor. It abolished Aid to Families with Dependent Children (AFDC) and created the Temporary Assistance for Needy Families (TANF) program. AFDC had provided cash payments to indigent families based upon national eligibility standards and a uniform federal definition which created an entitlement for recipients. TANF eliminated national eligibility standards and abolished the national entitlement to aid. Under the new TANF program, states are given federal block grant money with the authority to design their own public assistance programs.

At the time PRWORA was passed, Congress promised states a substantial block grant that would not be modified for five years. In 1999, however, Congress considered cutting the block grants by \$350 million to offset the cost of providing disaster relief aid to Central America. Wisconsin Governor Tommy G. Thompson, who had supported welfare reform, stated that the U.S. Senate had unilaterally betrayed a promise made to the governors. *The Washington Post*, Mar. 13, 1999, at A2, col. 1.

⁶³ See *supra* notes 36-37.

⁶⁴ The Utah Office of Recovery Services reported on March 30, 1999, as reported in the Salt Lake Tribune, that the New Hire Registry had resulted in an estimated \$5 million increase in collections of child support arrears, calling it "the most timely fraud detection tool we have ever used." (visited Mar. 30, 1999) <<http://www.sltrib.com:80/1999/mar/03301999/utah/94205.htm>> The United States Department of Health and Human Services also reported that for 1998, collections of child support increased from \$12 billion in 1996 to \$14.4 billion in 1998, a factor of twenty percent. *Washington Post*, Apr. 2, 1999, A27, col. 4; *Christian Science Monitor On-Line* (visited Mar. 25, 1999) <http://www.csmonitor.com/durable/1999/03/25/f-p2sw.shtml>.

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stated that sharpened tools of enforcement are extremely important, given certain demographic realities of the late 1990s.⁶⁵ These facts include: 14.5 million children under the age of eighteen lived in a female-headed family, almost triple the number in 1960; 65% of absent fathers contributed no child support or alimony; only 5.5% of absent fathers contributed as much as \$5,000 per year, while 91% of married fathers contribute earnings of at least \$5,000 to the total family income.⁶⁶

Title III of the PRWORA details a mandatory child support collection structure that must be established and operated if a state is to remain eligible for the full Temporary Assistance to Needy Families (TANF) grant. PRWORA requires states to enact legislation or regulations to: (1) expand the scope of existing in-hospital paternity establishment programs and to make them uniform; (2) streamline the process for the establishment of paternity; (3) provide authority to the child support enforcement agency to order genetic testing without the necessity of obtaining an order from any judicial or administrative tribunal; (4) create a state registry of all cases in which services for collection are provided by the state IV-D agency, which must include the amount of the obligation, a record of payments collected, the amount of arrears, if any, the distribution of collections, and identifying information on the parties and child[ren]; (5) coordinate the state registry with the Federal Case Registry, Federal Parent Locator Service, Medicaid agencies, and Interstate Information; (6) create a Directory of New Hires that will report to the Federal Parent Locator Service for matching; (7) match new hires against Federal Case Registry of Child Support Orders; (8) require employers to send withholdings to the state disbursement unit within seven days after payday; (9) require the Social Security number of any applicant for a commercial driver's license, occupational license, professional license, or marriage license, and in any paternity or child support action; (10) adopt the Uniform Interstate Family Support Act (UIFSA) by January 1, 1998; (11) use standard forms for interstate enforcement of child support by October 1, 1996; (12) create expedited procedures without court

⁶⁵ See *Child Support Enforcement & Welfare Reform: Hearings Before the Subcomm. On Human Resources, House Comm. On Ways and Means*, 104th Cong., 1st Sess (1995).

⁶⁶ Legler, *supra* note 59, at 520-21.

order for obtaining financial records by subpoena, imposing penalties for failure to respond to subpoena requests, requiring responses to other state requests for information, providing access to public records, ordering income withholding, and securing assets by intercept from workers' compensation benefits, judgments, settlements, and lotteries; (13) adopt the Uniform Fraudulent Conveyance Act of 1981, or other similar act that creates a prima facie case of fraud for transfers of property to avoid support payment where a support obligation is owed; (14) establish liens against real estate and personal property as a matter of law for overdue support owed by a parent who resides or owns property in the state, and give full faith and credit to liens arising in sister states where such liens are properly recorded or served in accordance with state law; (14) withhold, suspend, or restrict drivers' licenses, professional and occupational licenses, and recreational licenses of individuals who owe child support.

Like the Family Support Act of 1988, PRWORA came under attack as an unconstitutional intrusion by the federal government into a purely local concern: child support. *Kansas v. United States*⁶⁷ considered this argument, and found it wanting. First, the court concluded, following *South Dakota v. Dole*,⁶⁸ that Congress may condition federal funds upon a state's enactment of laws or regulations, so long as it is in pursuit of the general welfare. "There can be little dispute," the federal district court in Kansas stated, that collection of child support is for the general welfare:

The overall goal of PRWORA was to protect children and facilitate the self-sufficiency of welfare recipients. The requirements of Title III of PRWORA were designed with the intent of "establishing uniform State tracking procedures; taking strong measures to establish paternity and funding, and ensuring tough child support enforcement." H.R.Rep. No. 104-651 at 1324. Accordingly, we have little trouble in determining that the challenged provisions are *intended to serve the general welfare*.⁶⁹

The conclusion that must be drawn is that the federal power over child support establishment and collection is now estab-

⁶⁷ 24 F. Supp. 2d 1192 (D. Kan. 1998).

⁶⁸ 483 U.S. 203 (1987).

⁶⁹ 24 F. Supp. 2d at 1197 (emphasis added).

lished under the Spending Power as a matter of the general welfare.⁷⁰

III. Child Support: The Domain of the Federal Government Under the Commerce Clause

The federal government's foray into what was heretofore a matter of local concern, child support, is not limited to Social Security legislation requiring the states to adopt certain laws or regulations as a condition of receipt of federal funds under the Spending Power.⁷¹ The intrusion extends to federal legislation promulgated under the Commerce Clause as well.⁷²

The Child Support Recovery Act of 1992⁷³ (CSRA) makes it a federal crime for a support obligor, who has the ability to pay, to willfully fail to pay a child support obligation which has remained unpaid longer than one year of an amount greater than \$5,000. In every federal circuit that has considered the issue, the court has determined that the CSRA is a valid exercise of Congressional power under the Commerce Clause.⁷⁴

⁷⁰ Indeed, even in *Ankenbrandt v. Richards*, the Supreme Court stated that *enforcement* of family law judgments is not beyond the purview of the federal courts. 504 U.S. at 701-02. See *supra* discussion in text at notes 15-18.

⁷¹ Such an intrusion might be considered de minimus, since, as both *Children's and Parents Rights Association of Ohio v. Sullivan*, 787 F. Supp. 724, 727 (N.D. Ohio 1991), and *Kansas v. United States*, 24 F. Supp. 2d 1192, 1997 (D. Kan. 1998) pointed out, the states are free to decline Title IV-D and TANF funds and retain their own supremacy over the field.

⁷² Where a statute is a valid exercise of Congressional authority under the Commerce Clause, it does not violate the Tenth Amendment. *United States v. Sage*, 92 F.3d 101, 105 (2d Cir. 1996) (citing *Cheffer v. Reno*, 55 F.3d 1517, 1519 (11th Cir.1995)).

⁷³ 18 U.S.C. § 228 (1994).

⁷⁴ *United States v. Black*, 125 F.3d 454 (7th Cir. 1997); *United States v. Williams*, 121 F.3d 615 (11th Cir. 1997); *United States v. Crawford*, 115 F.3d 1397 (8th Cir. 1997); *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997); *United States v. Johnson*, 114 F.3d 476 (4th Cir. 1996); *United States v. Parker*, 108 F.3d 28 (3d Cir. 1997); *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997); *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996); *United States v. Musari*, 95 F.3d 787 (9th Cir. 1996); *United States v. Wall*, 92 F.3d 1444 (6th Cir. 1997); *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996).

In *United States v. Sage*,⁷⁵ the first circuit court to uphold the CSRA, the court had little trouble overcoming a challenge under the Commerce Clause:

To sustain the Act does not require a court to espouse reasoning that would enable Congress to regulate any activities that might lead to crime “regardless of how tenuously they relate to interstate commerce,” [*United States v. Lopez*,] 115 S. Ct. at 1632, or any activities Congress found to be related to the “economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.” *Id.* As already stated, by its terms the Act provides a multi-state jurisdictional element. *Cf. id.* at 1631. Because it presupposes an order of a State court imposing an obligation to pay money, the Act concerns transactions related to economic activity. *Cf. id.*

Moreover, nothing about the Act threatens the existence or significance of the States or interferes with the exercise of their powers. *Cf. id.* at 1634. On the contrary the Act aims to help the States in their efforts, often unsuccessful, to enforce their child support decrees.⁷⁶

Each successive opinion by the various circuits reached the same conclusion: enforcement of child support obligations, obligations that move through interstate commerce via the mails, telephone, and telegraph, can be regulated by Congress.⁷⁷

The opinion of Judge Noonan in *United States v. Mussari* elaborated on this same reasoning:

The obligation of a parent in one state to provide support for a child in a different state is an obligation to be met by a payment that will normally move in interstate commerce - by mail, by wire, or by the electronic transfer of funds. That obligation is, therefore, a thing in interstate commerce and falls within the power of Congress to regulate.⁷⁸

The willingness of all federal circuit courts to uphold the validity of CSRA may be contrasted with the recent decision of the Fourth Circuit Court of Appeals in *Brzonkala v. Virginia Poly-*

⁷⁵ 92 F.3d 101 (2d Cir. 1996).

⁷⁶ *Id.* at 107.

⁷⁷ The most impassioned opposition to this Congressional authority came in *United States v. Bailey*, 115 F.2d 1222, 1233-1240 (Smith, J., dissenting), where Judge Smith argued that *Lopez* specifically warned against federal intrusion into family law and its consequent subversion of the federal system.

⁷⁸ 95 F.3d at 795.

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technic Institute,⁷⁹ which held the Violence Against Women Act⁸⁰ to be an unconstitutional exercise of Congressional power.⁸¹

In *Brzonkala*, the court found the VAWA to be unconstitutional precisely because it regulated a matter included within the rubric of “family law”: domestic violence. Indeed, the court appeared to hold the VAWA unconstitutional because it *might* be used to regulate domestic violence, as there is often a common nucleus of fact in divorce cases and domestic violence cases:

[I]t is undisputed that a primary focus of section 13981 is domestic violence, a type of violence that, perhaps more than any other, has traditionally been regulated not by Congress, but by the several States. . . . Though such violence is not itself an object of family law — an area of law that clearly rests at the heart of the traditional authority of the States, *see Lopez*, 514 U.S. at 564 — issues of domestic violence frequently arise from the same facts that give rise to issues such as divorce and child custody, which lie at the very core of family law.⁸²

The court further noted that even though the VAWA explicitly precludes the federal courts from exercising the jurisdiction over family matters, the fact that Congress found it necessary to include such a jurisdictional disclaimer merely confirmed that the VAWA was too close to the regulation of family law, and thus an unconstitutional exercise of power.

The court also had trouble with the fact that a husband might be able to sue a wife under the act, thus possibly abrogating husband-wife tort immunity, ignoring that in many other contexts spouses have the right to sue one another for violation of a

⁷⁹ 169 F. 3d 820 (4th Cir. 1999) *cert. granted* *Brzonkala v. Morrison*, 68 U.S.L.W. 3177 (Sept.28,1999) *aff'd sub nom* *United States v. Morrison*, 120 S. Ct. 1740 (2000).

⁸⁰ Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 8, 18, and 42 U.S.C. (1994)).

⁸¹ Every other case that had considered the issue found VAWA to be constitutional under the Commerce Clause. *Liu v. Striuli*, 36 F. Supp.2d. 452 (D.R.I. 1999); *Ziegler v. Ziegler*, 28 F. Supp.2d. 601 (E.D. Wash. 1998); *Timm v. DeLong*, No. 8:98CV43 (D. Neb. June 22, 1998); *Mattison v. Glick Corp. of America, Inc.*, Civ. A. No. 97-CV-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998); *Crisonino v. New York City Housing Auth.*, 985 F. Supp. 385 (S.D.N.Y. 1997); *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997); *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997); *Doe v. Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996).

⁸² 169 F. 3d at 842.

federal right.⁸³ What bothered this court was the fact that under the VAWA, the right being exercised was one based in the context of a family as a family:

By entering into this most traditional area of state concern, Congress has not only substantially reduced the States' ability to calibrate the extent of judicial supervision of intrafamily violence, *see Lopez*, 514 U.S. at 581 (Kennedy, J., concurring), but has also substantially obscured the boundaries of political responsibility, freeing those States that would deny a remedy in such circumstances from accountability for the policy choices they have made, *see id.* at 576-77.⁸⁴

The court's absolute refusal to allow Congress to regulate a matter of family law lay at the heart of the opinion in *Brzonkala*, even though the case concerned a young woman who was raped in a college dormitory.⁸⁵

The ease with which the circuit courts affirmed Congressional authority over child support, as opposed to the adamance with which the Fourth Circuit disdained such authority, must necessarily lead to the conclusion that child support *qua* child support is now considered a matter *outside* of family law: it is a matter of interstate commerce.⁸⁶

⁸³ The court also ignored that the Restatement (Second) of Torts § 895F(i) abrogated the doctrine of interspousal tort immunity, and a majority of states have followed the Restatement position. *See generally* Leonard Karp and Cheryl L. Karp, DOMESTIC TORTS § 2.13 (1989).

⁸⁴ 169 F.3d at 843.

⁸⁵ It is also possible that the Fourth Circuit was, as were all federal circuits, feeling the combined heat of two reports: On February 16, 1999, the ABA Task Force on the Federalization of Criminal Law issued its report, calling on Congress to resist political impulse to enact new federal crimes; on December 28, 1998, Chief Justice Rehnquist issued his year-end report on the federal judiciary, which blamed Congress's federalization of criminal law as placing too great a burden on the federal courts. *See* Terry Carter, *Turning Back the Federal Tide*, 85 ABA J. 16 (Apr. 1999). "It may even be that the court perceived that child support enforcement is simply art of the criminal law, rather than family law, and saw this response as consistent with the need to reduce the federalization of crime. *Cf.* Barbara Glessner - Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D Child Support Enforcement Attorney*, 67 Fordham L. Rev. 2155, 2184 at N. 171 (1999) (Noting that the role of the iv-d child-support enforcement attorney has increasingly moved toward a "prosecutorial" model for "enforcement of public rights against those who commit the 'crime' of 'causing poverty'").

⁸⁶ Indeed, even in *Brzonkala*, the majority opinion defined "family law" as excluding child support, stating: "For that matter, they [the appellants] would

IV. Federally Mandated Child Support Guidelines?

The federal courts have upheld Congressional authority to require the states to enact legislation governing both child support establishment and child support enforcement under the Spending Power. The federal courts have also upheld direct federal legislation governing the enforcement of child support across state lines under the Commerce Clause. The federal interest in these measures is lessening the cost of welfare assistance which operates as a substitute for child support. These cases necessarily lead to the conclusion that if Congress so chose, it could mandate a national child support guideline.

Given that Congress *could* mandate a national child support guideline, the question presents itself: *Should* Congress mandate a national child support guideline? Given the federal interest in child support, i.e., in seeing to the general welfare, it is certainly possible to argue that the answer is "Yes." It is clear that Congressional mandates concerning enforcement can only go so far. So long as child support awards are inadequate, the federal government will always be left in the position of making up the shortfall in some manner. In order for the federal government to truly "enforce" child support in the sense that it enforces all parents' obligations to support their children at least at the poverty level, it will have to address the issue of a national child support guideline that ensures adequate awards.⁸⁷ Moreover, a national

justify federal regulation, and even occupation, of the entire field of family law, including divorce, alimony, child custody, and the equitable division of property." 169 F.3d at 843.

In oral arguments before the Supreme Court on January 11, 2000, Justice Sandra Day O'Connor stated to Solicitor General Seth P. Waxman, defender of VAWA, "Your approach would justify a federal remedy for alimony or child support," again drawing attention to the Supreme Court's disdain for a federal intrusion into family law, but ignoring the CSRA. See Joan Biskupic, "Sex-Assault Law Under Scrutiny," *Washington Post*, Jan. 12, 2000, A11, col. 4.

⁸⁷ This position has been advocated elsewhere. See, e.g., IRWIN GARFINKEL, ASSURING CHILD SUPPORT: AN EXTENSION OF SOCIAL SECURITY 18 (1992); Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. Ill. L. Rev. 695, 708 (1997); Robert G. Williams, *An Overview of Child Support Guidelines in the United States*, in UNITED STATES DEP'T OF HEALTH & HUMAN SERVICES, CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 1, 10 (Margaret Campbell Haynes, ed. 1994). See also

guideline would eliminate forum shopping by parents looking for the greater advantage. There is no question that the Full Faith and Credit of Child Support Orders Act⁸⁸ and the Uniform Interstate Family Support Act (UIFSA)⁸⁹ have already contributed to a uniformity of family law by preventing forum shopping, and a national uniform child support guideline would be merely the next logical step.⁹⁰

On the other hand, one cannot simply ignore the Supreme Court's elevation of the role of the states over child support, citing their "traditional authority" and "unparalleled familiarity with local economic factors affecting divorced parents and children."⁹¹ Local, that is, state, governments are more attuned to the particular financial stresses that come into play in a child support case.⁹²

Assuming that the federal government both could and should mandate a uniform guideline, a final question is raised: What should these guidelines provide? To answer this question, an excellent starting point is the report originally furnished to the federal government by the advisory panel of the Office of Child Support Enforcement in 1987.⁹³ In this report, the panel recom-

Allen M. Parkman, *The Government's Role in the Support of Children*, 11 B.Y.U. J. Pub. L. 55 (1997); Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 Va. L. Rev. 2523 (1995). Moreover, the Conference Committee on PRWORA considered the establishment of a National Child Support Guidelines Commission, but deleted consideration of a national guideline from the final report. It is surely just a matter of time before the matter is taken up again by Congress.

⁸⁸ Full Faith and Credit of Child Support Orders Act, Pub. L. No. 103-383, § 3, 108 Stat. 4064 (codified at 28 U.S.C. § 1738B (1994)).

⁸⁹ Uniform Interstate Family Support Act, 9B U.L.A. 121 (Supp. 1998).

⁹⁰ See ANDREA H. BELLER & JOHN W. GRAHAM, *SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT* 251 (1993).

⁹¹ *Rose*, 481 U.S. at 627.

⁹² Indeed, it may be argued convincingly that child support guidelines should be enacted on a county wide, rather than state wide, basis, given wide variations in standard of living, unemployment rates, and job availability. See Anne C. Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787 (1995) (arguing that states are better situated than the national government to develop and sustain normative political discourse on family life).

⁹³ ROBERT G. WILLIAMS, *DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS: ADVISORY PANEL RECOMMENDATIONS AND FINAL REPORT* (United States Dep't of Health and Human Services, Office of Child Support Enforcement, 1987).

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mended that every state follow certain principles when drafting its guidelines. These principles are:

- (1) Both parents should share legal responsibility for support of their children, with the economic responsibility divided between the parents in proportion to their income;
- (2) The subsistence needs of each parent should be taken into consideration in setting child support, but in virtually no event should the child support obligation be set at zero;
- (3) Child support must cover a child's basic needs as a first priority, but, to the extent either parent enjoys a higher than subsistence level standard of living, the child is entitled to share in the benefit of that improved standard;
- (4) Each child of a given parent has an equal right to share in that parent's income, subject to factors such as age of the child, income of the parent, income of a current spouse, and the presence of other dependents.
- (5) Each child is entitled to determination of support without respect to the marital status of the parents at the time of the child's birth. Consequently, the guidelines should be used equally in cases of paternity, separation, and divorce.
- (6) Application of the guidelines should be sexually nondiscriminatory.
- (7) The guidelines should not create extraneous negative effects on the major life decisions of either parent. In particular, the guidelines should avoid creating economic disincentives for remarriage or labor force participation.
- (8) The guidelines should encourage the involvement of both parents in the child's upbringing. The guidelines should take into consideration the financial support provided by parents in shared physical custody and extended visitation arrangements.

To these founding principles, certain other principles should be added to meet the goal of adequate support:

- (1) The most current and accurate economic data on family expenditures should be used, with family expenditures on children based on USDA figures.⁹⁴

⁹⁴ See Laura W. Morgan & Mark C. Lino, *A Comparison of Child Support Awards Calculated Under States' Child Support Guidelines With Expenditures on Children Calculated by the United States Department of Agriculture*, 33 *Fam. L.Q.* 191 (1999).

(2) The expenditures figures provided by the USDA should be modified to include estimates of asset-creating expenditures on children, such as home mortgages and college savings.⁹⁵

(3) The guidelines should require that a sufficient amount of support is transferred from the noncustodial parent to the custodial parent so that the custodial parent does not suffer a substantial decrease in living standard while the noncustodial parent enjoys a substantial increase in living standard.⁹⁶

(4) The guidelines should make explicit the value of child care and home-making by the custodial parent by not imputing income to a stay at home parent where the children are under age 10.⁹⁷

(5) The guidelines should address child care costs, health insurance costs, unreimbursed medical costs, primary and secondary educational costs, college costs, and visitation costs in addition to the basic award.⁹⁸

(6) The guidelines should define income in a sufficiently expansive manner that parents cannot shield funds otherwise available for support, but such a definition should not be a disincentive to earn extra income. Generally, income earned on an hourly basis should not include income in excess of 50 hours per week.

(7) The guidelines should contain an equitable formula dealing with shared custody, starting with the premise that when both parents have equal incomes and equal custody, then no support is owed from one parent to the other. In no event should the

⁹⁵ See Nancy Polikoff, *Looking for Policy Choices Within an Economic Methodology: A Critique of the Income Shares Model*, in ESSENTIALS OF CHILD SUPPORT GUIDELINE DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS (Women's Legal Defense Fund 1987) [hereafter ESSENTIAL OF CHILD SUPPORT GUIDELINE DEVELOPMENT].

⁹⁶ See James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 Fam. L.Q. 351 (1987).

⁹⁷ See James A. McKenna, *Housekeeping Ain't No Joke: How Maine's Child Support Guidelines Can Be Biased Against Mothers*, 49 Maine L. Rev. 281 (1997); Karl A.W. DeMarce, *Devaluing Caregiving in Child Support Calculations: Imputing Income to Custodial Parents Who Stay Home with Children*, 61 Mo. L. Rev. 429 (1996).

⁹⁸ See Linda Henry Elrod, *Adding to the Basic Support Obligation*, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 62 (Margaret Campbell Haynes, ed., 1994); Sally F. Goldfarb, *Child Support Guidelines and Child Care, Medical and Educational Expenses*, in ESSENTIALS OF CHILD SUPPORT GUIDELINE DEVELOPMENT, *supra* note 90.

guidelines be drafted to produce a “cliff effect” whereby one parent is given the incentive to bargain for extra visitation in an effort to significantly reduce the support obligation.⁹⁹

(8) The guidelines should adequately address both support for prior-born children and subsequently-born children in a manner that does not discriminate against either class.¹⁰⁰

(9) The guidelines should provide for special formulae in the case of extremely high-income parents, under the principles that children should share in the wealth of their parents.¹⁰¹

(10) The guidelines should specifically consider federal and state tax consequences.

(11) The guidelines should take into account cost-of-living adjustments for different areas in the United States by deviating from a national standard.

(12) The guidelines should provide for automatic review of each award every four years.

(13) The judge, in all cases, must retain the discretion to deviate from the presumptive award for good cause shown.

V. Conclusion

It is more than likely that at some point in the not too distant future, Congress will take up the issue of a national child support guideline. The power of Congress to require states to enact a national guideline cannot be gainsaid at this point.

Moreover, there is no question that the Full Faith and Credit of Child Support Orders Act and the Uniform Interstate Family Support Act (UIFSA) have contributed to a uniformity of family law by preventing forum shopping. A national uniform child

⁹⁹ See Marygold S. Melli & Patricia R. Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 *Houston L. Rev.* 542 (1994); Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 *Rutgers L.J.* 619 (1989); Karen A. Getman, *A Critique of the Effect of Non-Traditional Visitation and Custody Arrangements on Child Support Awards*, in *ESSENTIALS OF CHILD SUPPORT GUIDELINE DEVELOPMENT*, *supra* note 90.

¹⁰⁰ Marianne Takas, *Improving Child Support Guidelines*, 26 *Fam. L.Q.* 171 (Fall 1992).

¹⁰¹ See Laura W. Morgan, *Child Support and the Anomalous Cases of the High-Income and Low-Income Parent: The Need to Reconsider What Constitutes “Support” in the American and Canadian Child Support Guideline Models*, 13 *Can. J. Fam. L.* 161 (1996).

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support guideline would be merely the next logical step in creating uniformity and preventing forum shopping. The challenge, therefore, is to create the most equitable guideline possible.

