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Abortion as Commerce: The Impact of "United States v. Lopez" on the Freedom of Access to Clinic Entrances Act of 1994

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I. INTRODUCTION

American politics in the 1990s is preoccupied with the movement of power from a centralized federal authority to state and local governments. There is some measure of consensus that the federal government can no longer provide solutions to all of America's problems.[1] The resulting retreat from the twentieth century federal monolith has interesting implications for constitutional law. The federal government's power expanded largely under the authority of the Commerce Clause. Although the traditional broad interpretation of Congress's commerce power bears little resemblance to the actual text of the Constitution, courts have accepted the notion that Congress may regulate any activity that it reasonably believes could affect interstate commerce.[2] In 1995, however, the Supreme Court, in the landmark decision of *United States v. Lopez*,[3] held the Gun-Free School Zones Act unconstitutional as beyond the scope of the commerce power.[4]

This Note evaluates the significance of that decision to the Freedom of Access to Clinic Entrances Act ("FACE Act").[5] Developed in response to the violent and obstructionist tactics of some anti-abortion activists, the FACE Act prohibits the intimidation of patients seeking access to reproductive health care.[6] This Note analyzes the FACE Act's constitutionality under the Commerce Clause, concluding that while *Lopez* does not unequivocally call for overturning the act, it provides strong authority for such an argument. This Note contends that a challenge to the FACE Act should be sustained by the Supreme Court because the statute exceeds meaningful limits on the Commerce Clause and because state law is better able to address the problem of violent anti-abortion activity. Part II examines the legal background of the *Lopez* decision, providing a basis to discuss the impact of the decision. Part III focuses on the FACE Act, including its legislative history and a recent interpretation given by the Seventh Circuit. Part IV analyzes two views of how *Lopez* affects the FACE Act. Finally, Part V examines another possible constitutional source

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1. See, for example, Jonathan Alter, *Washington Washes Its Hands*, Newsweek 42, 42-44 (August 12, 1996) (describing landmark federal legislation handing responsibility for welfare over to the states).
2. See Part II.A.1.
3. 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).
4. Id. at 1634.
5. 18 U.S.C. § 248 (1994 ed.).
6. Id. See Part III.A.

of congressional power and offers two regulatory alternatives to the FACE Act that better conform to a post-*Lopez* Commerce Clause.

II. THE COMMERCE CLAUSE

The Constitution grants Congress the power to regulate commerce with other nations and among the states.[7] The federal government is a limited government with specifically enumerated powers.[8] Because Congress has no authority to act unless the action falls within one of the enumerated powers, the authority to regulate interstate commerce is significant. Furthermore, because the Commerce Clause often serves as the authority under which the federal government acts to regulate behavior otherwise outside its jurisdiction, the interpretation of the scope of the Commerce Clause profoundly affects the balance of power between the federal and state governments.[9]

During most of American history, the commerce power was interpreted literally as "commerce among the states."[10] By the mid-

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7. "Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const., Art. 1, § 8, cl. 3.

8. Congress's powers are listed in Article I, § 8 of the Constitution. Aside from the commerce power, the taxing power and the spending power are the most significant of Congress's powers. See generally Gerald Gunther, *Constitutional Law* 176-201 (Foundation Press, 12th ed. 1991) (describing the history of the Taxing and Spending Clauses).

9. See *Lopez*, 115 S. Ct. at 1639 (Kennedy, J., concurring) ("This clause has throughout the Court's history been the chief source of its adjudications regarding federalism . . . .") (quoting Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* 66-67 (U. of North Carolina, 1937)).

10. The starting point for commerce clause jurisprudence is *Gibbons v. Ogden*, 22 U.S. (9 Wheaton) 1 (1824), in which Chief Justice Marshall examined the congressional power over interstate commerce. Holding that a federal statute preempted a New York law granting a monopoly to operators of a ferry between New York City and New Jersey, id. at 221, the Court concluded that Congress's power over commerce "cannot stop at the external boundary line of each State, but may be introduced into the interior." Id. at 194. Furthermore, while *Gibbons* established the plenary power of Congress over interstate commerce, this power did not extend to the "completely internal commerce of a stato." Id. at 195.

Until the end of the nineteenth century, the Court's dealings with the Commerce Clause almost exclusively concerned analyzing whether state laws interfered with interstate commerce. See, for example, *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 Howard) 299, 315-16 (1851) (holding that a Pennsylvania statute regulating ships entering or leaving the port of Philadelphia did not unduly interfere with Congress's commerce power). With Congress's enactment of the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890, focus shifted from the negative, or dormant, aspect of the Commerce Clause to its affirmative grant of power. Examining an application of the latter in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), the Court formulated the direct/indirect distinction. It concluded that intrastate manufacture only indirectly affected commerce, id. at 12, and it therefore dismissed an antitrust action against a sugar refinery that controlled 98% of the nation's refining capacity. Id. at 17-18. The Court examined the Interstate Commerce Act in *Houston E. & W. Texas Railway Co. v. United States*, 234 U.S. 342 (1914) ("*The Shreveport Rate Case*"). In this case, the Court upheld federal regulation of intrastate rail rates which had a "close and

twentieth century, however, the power to regulate commerce had expanded to give Congress the power to regulate a wide range of activities, even when only remotely connected to commerce among the states.

A. *The Commerce Clause Historically: The Legal Background to* United States v. Lopez

During the late 1930s and early 1940s, the Supreme Court expanded its interpretation of the scope of the Commerce Clause to accommodate the economic and social reforms of the New Deal. Previously, litigants had successfully challenged congressional acts based on distinctions between manufacturing and commerce or between indirect and direct effects on commerce. Under the Court's analysis, manufacturing was a purely local activity that had only an indirect effect on commerce; thus Congress could not regulate it under the commerce power.[11] The Court gradually eliminated these formal restrictions on the commerce power, and in subsequent years, the Commerce Clause became nearly limitless in scope and application. In deference to Congress, the Court has consistently maintained an expansive reading of the Clause. While the litany of decisions illustrating the development of the commerce power is not unfamiliar,[12] a few cases merit brief discussion.

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substantial relation" to interstate commerce. Id. at 355. Texas had lowered rail fares from towns in East Texas to Dallas and Houston, making them much cheaper than the fare from Shreveport to these destinations, which the Interstate Commerce Commission ("ICC") regulated. Id. at 346-47. The Court found that the ICC's power over the instrumentalities of interstate commerce extended to intrastate commerce substantially affecting interstate commerce. See id. at 353.

11. For example, in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court struck down the Bituminous Coal Conservation Act of 1935, a New Deal program that included wage and hour regulations for the coal mining industry. Id. at 304. The Court found that the labor provisions of the act regulated purely local production and not commerce. Id. at 304. In analyzing whether Congress had authority to enact the statute, the Court asked whether the activity being regulated had a direct or an indirect effect on interstate commerce. Id. at 307. It concluded that the labor conditions had only an indirect effect. Id. at 308-09. For a discussion of the roots of the direct/indirect distinction, see note 10.

12. See, for example, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1443-54 (1987) (describing the "New Deal Transformation of the Commerce Clause"). See generally Gunther, *Constitutional Law* at 124-75 (cited in note 8).

1. *Darby* to *Garcia*

United States v. Darby[13] illustrates the transformation in commerce clause jurisprudence that occurred during the New Deal.[14] In *Darby*, the Supreme Court abandoned the formal distinction between manufacture and commerce,[15] concluding instead that Congress may regulate intrastate activities that have a "substantial effect" on interstate commerce.[16] The Court thus permitted the regulation of a class of activities that affected interstate commerce, even though a particular instance of that activity did not.[17] For that reason, the Court upheld the minimum wage and maximum hour requirements of the Fair Labor Standards Act ("FLSA").[18]

This expanded reading of the Commerce Clause continued in *Wickard v. Filburn*.[19] The *Wickard* Court examined the application of the Agricultural Adjustment Act's production quotas to a local dairy farmer who grew winter wheat.[20] The Court abandoned the direct/indirect distinction, ruling that even if homegrown wheat only indirectly causes a substantial economic effect on interstate commerce, Congress may regulate its production.[21] Despite the trivial

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13. 312 U.S. 100 (1941).

14. The first case of this transformation was *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which upheld the constitutionality of the National Labor Relations Act. In this case, the Court allowed Congress to regulate intrastate activities that bore such a "close and substantial relation to intorstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." Id. at 37. In upholding the Act, the Court effectively overruled *Carter Coal*. See id. at 40-41. Because this decision signaled a more deferential approach to New Deal reforms, eliminating the need to pack the Court with friendlier justices, it has been called "the switch in time that saved nine." Daniel A. Farber, William N. Eskridge, Jr., and Philip P. Frickey, *Constitutional Law: Themes for the Constitution's Third Century* 20 (West, 1993).

15. See note 10.

16. 312 U.S. at 119. The Court framed the issue as "whether the employment . . . of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it." Id. at 117. The Court found that the Tenth Amendment did not limit the commerce power but merely stated "a truism that all is retained which has not been surrendered." Id. at 124.

17. See id. at 117, 121-22. See also *Perez v. United States*, 402 U.S. 146, 152 (1971) (describing the origins of the "class of activities" test).

18. The FLSA prohibited the shipment in interstate commerce of goods made by employees who worked more than a certain maximum number of hours, were paid less than a certain minimum wage per hour, or both. *Darby*, 312 U.S. at 108-09.

19. 317 U.S. 111 (1942).

20. Id. at 114-15.

21. Id. at 125. The Court considered a portion of the Agricultural Adjustment Act that imposed a penalty on farmers raising more wheat than a prescribed maximum. The quotas applied not only to wheat that would be sold in commerce but also to wheat grown for personal use. Id. at 119.

Justifying the Court's position, Justice Jackson wrote: "At tbe beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded." Id. at 120

impact on interstate commerce of private consumption of homegrown wheat, the Court sustained the Agricultural Adjustment Act because collectively the class of activity could have a substantial effect on interstate commerce.[22]

The Court continued the class of activities analysis when it considered the constitutionality of Title II of the Civil Rights Act of 1964 in *Heart of Atlanta Motel v. United States*[23] and *Katzenbach v. McClung*.[24] *Heart of Atlanta Motel* concerned the application of the Civil Rights Act to hotels, while *McClung* dealt with the Act in the context of a restaurant. In the latter, the Court concluded that Congress may regulate local establishments that receive goods in interstate commerce.[25] Specifically, it held that Congress had a rational basis for concluding that racial discrimination by a private restaurant that received food from out-of-state suppliers had a substantial effect on interstate commerce.[26] Following *Wickard*, the Court reasoned that although such activity by one local restaurant might have very little impact on interstate commerce, the aggregation of that restaurant and others similarly situated could have a substantial effect on interstate commerce.[27]

The broad reading of the Commerce Clause continued in *Perez v. United States*.[28] In *Perez*, the Court upheld a federal criminal statute prohibiting "loan sharking," an activity that Congress found to be largely controlled by organized crime.[29] The Court deferred to Congress's determination that purely intrastate extortionate credit transactions affect interstate commerce.[30] Because the class of activities regulated affected interstate commerce, the Court upheld this federal regulation of a local criminal act.[31]

(citing *Gibbons*, 22 U.S. at 194-95). To this conclusion Professor Epstein responds, "No way." Epstein, 73 Va. L. Rev. at 1408 (cited in note 12). He contends that *Gibbons* "stands in sharp opposition to the very assertion of federal power that characterizes such cases as *United States v. Darby* and *Wickard v. Filburn*." Id. at 1407 (citations omitted).

22. *Wickard*, 317 U.S. at 127-28. The Court believed that farmers' consumption of homegrown wheat instead of market wheat could, in the aggregate, have a substantial effect on the national wheat market. Id.

23. 379 U.S. 241 (1964).

24. 379 U.S. 294 (1964). This case is more commonly known by the name of the local restaurant involved in the litigation, Ollie's Barbecue.

25. Id. at 304-05.

26. Id. at 304. Its reasoning centered on the fact that Ollie's Barbecue purchased 46% of its meat from out-of-state sources. Id. at 296.

27. Id. at 300-01.

28. 402 U.S. 146 (1971).

29. Id. at 147. "Loan sharking" involves the extension of credit with the understanding that the creditor may use violence or other criminal means to enforce repayment. Id. at 147.

30. Id. at 154.

31. Id.

While *Darby*, *Wickard*, *McClung*, and *Perez* demonstrate the vast scope of the commerce power, the Court had to consider whether other sections of the Constitution limit this power. In *National League of Cities v. Usery*,[32] the Court, while not limiting its earlier holdings regarding the extent of Congress's power to regulate interstate commerce, concluded that the Tenth Amendment[33] did place a substantive restriction on the commerce power.[34] In doing so, the Court employed a notion of state sovereignty to strike down federal regulations passed under the commerce power. It found unconstitutional provisions of the Fair Labor Standards Act that pertained to states as employers, determining that such provisions would interfere with the core functions of the state and local governments.[35] Because the regulations impaired the states' authority to govern in matters of traditional state concern, the Court held that they were outside the scope of the commerce power.[36]

Ten years later, however, the Court eliminated this substantive restriction on the Commerce Clause by overruling *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.[37] Examining a similar issue to that in *National League of*

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32. 426 U.S. 833 (1976).

33. The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X.

34. *National League of Cities*, 426 U.S. at 841-45.

35. Id. at 851.

36. Id. at 852.

37. 469 U.S. 528 (1985). In *Garcia*, the Court held that a local transit authority must adhere to the minimum wage and overtime requirements of the Fair Labor Standards Act as congressional authority under the Commerce Clause was not exceeded. Id. at 555-56.

Prior to *Garcia*, the Court had distinguished *National League of Cities* in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982). There the Court upheld the Public Utility Regulatory Policies Act of 1978 ("PURPA"), portions of which were challenged under the Commerce Clause and the Tenth Amendment. Id. at 758, 765-66. In response to a national energy crisis, Congress had enacted PURPA, which was designed to increase the efficiency of electricity utilities and lessen American dependence on foreign oil. Id. at 746. The state of Mississippi challenged Titles I and III of the Act, which directed the states to "consider" implementing federal regulatory measures, and § 210 of Title II, which required the states to adopt certain Federal Energy Regulatory Commission rules concerning non-traditional electricity generation facilities. Id. at 746-52. The Court readily determined that those provisions regulating private parties were within the scope of the commerce power, finding that Congress could rationally conclude that a national energy crisis substantially impacted commerce. Id. at 755-58. On the issue of whether the Tenth Amendment restricted Congress from using the states to advance federal goals, however, the Court gave pause before sustaining the provisions. Despite the fact that § 210 required the states to implement federal provisions, the Court concluded that these could be implemented without compromising state sovereignty: "In essence, then, the statute and the implementing regulations simply require the Mississippi authorities to adjudicate disputes arising under the statute. Dispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission." Id. at 760 (citations omitted).

Cities, the Court turned away from any substantive notions of state sovereignty as limiting federal power under the Commerce Clause.[38] Rather, it found that the states' involvement in federal decisionmaking gave them a remedy through the political process.[39] *Garcia* implied, then, that if a statute contains the requisite connection to interstate commerce, it is constitutional despite any encroachment on areas of traditional state authority.

More recently, however, the Court's decision in *New York v. United States*[40] has cast doubt on the continued authority of *Garcia*. In striking down provisions of a federal statute that required states to treat hazardous waste in a certain way,[41] the Court held that these provisions either exceeded Congress's authority under the commerce and spending powers or infringed upon the sovereignty of the states protected by the Tenth Amendment.[42] While the Court declined to reconsider its holding in *Garcia*,[43] it nonetheless spoke of the Tenth Amendment as a restriction on the federal government's enumerated powers.[44]

2. Schools of Thought

Before turning to the Court's decision in *Lopez*, two dominant legal interpretations of the Court's jurisprudence in this area bear

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38. *Garcia*, 469 U.S. at 547-50.

39. Id. at 552-54.

40. 505 U.S. 144 (1992).

41. Part of the Low-Level Radioactive Waste Policy Act, 42 U.S.C. § 2021e(d)(2)(C) (1994 ed.), offered states the "choice" of regulating pursuant to congressional standards or "taking title" to radioactive waste generated within their borders. *New York*, 505 U.S. at 174-75.

42. Id. at 177 ("Whether one views the take title provision as lying outside Congress's enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.").

43. Id. at 160 ("This case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties.").

44. Id. at 156-57.

> [U]nder the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

Id. For a discussion of *New York* and an application of its holding, see Amy Marie Pepke, Note, *The Brady Bill: Surviving the Tenth Amendment*, 48 Vand. L. Rev. 1803, 1817-21, 1828-31 (1995).

mentioning: the "political process" theory and the "specifically delegated" theory. The former view holds that the judiciary should not decide controversies over the structure of federalism; instead, the representation of the states in the political process will protect their interests. Herbert Wechsler made this argument in the 1950s in an attempt to explain the abrupt change in the New Deal Court,[45] and more recently Jesse Choper has forcefully articulated this view.[46] The Court explicitly adopted the political process view in *Garcia*,[47] influenced in part by these two scholars.[48] The underlying theory of the "political process" doctrine is that courts have greater legitimacy when deciding questions of individual rights than when determining the boundaries of power between federal and state governments.[49] Courts should therefore devote their limited institutional capital[50] to overruling the will of the political majority only when it conflicts with an *individual's* protected right, rather than interfering when it conflicts with the power of another political body. From a practical perspective, this view also points out the failures of earlier judicial attempts to police the federal/state boundary.[51] These failures show the futility of protecting state sovereignty in a nation where state boundaries have little economic meaning.[52] In fact, even the term

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45. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 558-60 (1954).

46. Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconstruction of the Role of the Supreme Court* (U. of Chicago, 1980). Professor Choper's thesis is as follows:

> The federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates "states' rights" should be treated as nonjusticiable, final resolution being relegated to the political hranches—i.e., Congress and the President.

Id. at 175.

47. *Garcia*, 469 U.S. at 556. This view was implied by the New Deal cases, since there was a clear legislative mandate for congressional action to combat the Depression. See Part II.A.1.

48. See *Garcia*, 469 U.S. at 551 n.11 (citing Professors Choper and Wechsler).

49. Choper, *Judicial Review* at 201-03 (cited in note 46). "If the states concededly may do to the individual what it is claimed that the federal government may not do, the issue of concern is primarily one for the states and . . . may be entrusted to the states' representatives in the national political branches to decide." Id. at 196. If, however, it is claimed that neither government may act, the judicial branch must protect the individual's rights. Id.

50. See id. at 139-40.

51. Noting the Court's "dismal record of judicial intervention," Andrzej Rapaczynski has commented that "[t]he most common explanation, seemingly adopted by the *Garcia* Court, is that federalism is essentially a political arrangement and that the policing of it is, for one reason or another, unsuited to the *modus operandi* of the judicial operation." *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 S. Ct. Rev. 341, 343.

52. Id. at 355.

"state sovereignty" has no accepted definition and merely confuses the issue in the federalism debate.[53] Under the process theory, the task of the courts is to ensure the integrity of the political process, but otherwise not to protect any notions of the sovereignty of states.[54]

Adherents to the specifically delegated powers viewpoint disagree with the process approach because it ignores the principle of limited government embodied in the Constitution.[55] This view emphasizes that the states delegated certain powers to the federal government, while retaining for themselves extensive power over state and local matters.[56] This federal structure, our nation's unique contribution to political thought, was designed to promote and protect individual liberty.[57] Transforming the Commerce Clause into a gen-

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Within the American federal system, state boundaries have long lost most of their economic significance, and as early as the distinction between commerce and production appeared, the Court was forced to modify it by the introduction of the concept of the "current" or "flow" of commerce and to draw another, economically irrelevant, distinction between "direct" and "indirect" effects of the regulated activity on interstate commerce.

Id. (citations omitted).

53. Id. at 346.

When speaking of the states, therefore, the task is to articulate some independent grounds for saying that some of their decisions are immune from federal interference, and not to call the states "sovereign" in order to deduce anything from that. At the very least, then, the idea of state sovereignty is of no help in elaborating a theory of federalism.

Id. at 358-59.

54. Id. at 364.

55. See Epstein, 73 Va. L. Rev. at 1443 (cited in note 12). Professor Epstein writes:

The original theory of the Constitution was based on the belief that government was not an unrequited good, but was at best a necessary evil. The system of enumerated powers allowed state governments to compete among themselves, thus limiting the risks of governmental abuse even absent explicit, substantive limitations on the laws that states could pass. The various limitations upon the federal power helped achieve this end. The New Deal conception, on the other hand, saw no virtue in competition, whether between states or between firms. The old barriers were stripped away; in their place bas emerged the vast and unwarranted concentration of power in Congress that remains the hallmark of the modern regulatory state.

Id.

56. See U.S. Const., Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

57. Federalist No. 51 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 320, 323 (Mentor, 1961). See Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 Mich. L. Rev. 752 (1995). Professor Calabresi argues that federalism is "*more* important to the liberty and well being of the American people than any other structural feature of our Constitution, including the separation of powers, the Bill of Rights, and judicial review." Id. at 756. But see Choper, *Judicial Review* at 244 (cited in note 46) ("[T]he assertion that federalism was meant to protect, or does in fact protect, individual constitutional freedoms akin to those conventionally so defined has no solid historical or logical basis.").

eral police power undermines federalism by increasing the jurisdiction of the national government.[58]

While process jurisprudence designates the political process to police the boundaries between state and federal power, the specifically delegated theory contends that it is precisely the role of the federal courts to impose meaningful limits on Congress's commerce power.[59] The Supreme Court's institutional competence to decide cases impacting the national/state balance of power can be seen in dormant commerce clause cases, in *Erie*,[60] and most recently in *New York v. United States*.[61] Returning to this role in the context of the Commerce Clause is crucial to federalism and thereby to individual liberty.

B. The Commerce Clause Today: United States v. Lopez

In *United States v. Lopez*,[62] the Supreme Court struck down a statute solely on the grounds that it exceeded Congress's authority under the Commerce Clause—the first time it had taken such a stance in sixty years.[63] The facts of *Lopez* are relatively straightforward. A twelfth grade student in San Antonio, Texas, was arrested and charged under state law with possession of a firearm on school premises.[64] On the following day, the state dropped its charges when federal agents charged Lopez with violation of the Gun-Free School Zones Act.[65] The Act prohibited possession of a firearm within 1,000 feet of a school.[66] The Court found that the Act "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce,"[67] and struck down the Act as beyond the scope of Congress's power under the Commerce Clause.[68] An understanding of the Supreme Court's opinion in this case is essential in assessing the future direction of commerce clause jurisprudence.

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58. Epstein, 73 Va. L. Rev. at 1395-96 (cited in note 12).
59. See Calabresi, 94 Mich. L. Rev. at 800-01 (cited in note 57).
60. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).
61. Calabresi, 94 Mich. L. Rev. at 801 (cited in note 57).
62. 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).
63. The last case to invalidate a congressional statuto under the Commerce Clause was *Carter Coal* in 1936. See note 11.
64. *Lopez*, 115 S. Ct. at 1626.
65. Id. See 18 U.S.C. § 922(q)(1)(A) (1994 ed.).
66. 18 U.S.C. § 922(q)(2)(A).
67. *Lopez*, 115 S. Ct. at 1626.
68. Id. at 1634.

1. The Majority

The Court began its analysis by recounting the history of congressional power under the Commerce Clause.[69] From this survey, the Court deduced three categories of activity that Congress may regulate: (1) "the use of the channels of interstate commerce;"[70] (2) "the instrumentalities of interstate commerce;"[71] and (3) "those activities having a substantial relation to interstate commerce."[72] After concluding that the act did not fall under the first two categories of regulation,[73] the Court turned to the final category.

The Court offered two types of regulation that would substantially affect interstate commerce: (1) regulation of an economic activity substantially affecting interstate commerce;[74] and (2) regulation including a jurisdictional element requiring that the particular activity be connected to interstate commerce.[75] The Court first concluded that the activity regulated by the act was not an economic activity.[76] The Court distinguished the expansive holding of *Wickard* on the grounds that the growing of wheat involved an economic activity, whereas possession of a firearm within a school zone is neither a commercial activity nor any kind of economic enterprise.[77] Also, unlike the regulation at issue in *Wickard*, the Gun-Free School Zones Act did not regulate an intrastate activity as a part of a larger interstate economic regulation.[78] Considering the second permissible type of regulation, the Court noted that the Act did not contain a jurisdictional requirement making the connection between firearm possession

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69. First, though, Chief Justice Rehnquist extolled the importance of enumerated powers within the federal structure. He noted:

> This constitutionally mandated division of authority "was adopted by the Framers to ensure [the] protection of our fundamental liberties." "Just as the separation and independence of the coordinate branches of the Federal Government serve[s] to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Id. at 1626 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

70. Id. at 1629. Examples include regulation of navigation, see *Gibbons*, 22 U.S. at 189-90, and regulation of the shipment of stolen goods, 18 U.S.C. §§ 2312-15 (1994 ed.).

71. *Lopez*, 115 S. Ct. at 1629. The Court cited examples such as the regulation of railways, *The Shreveport Rate Case*, 234 U.S. at 351 (discussed in note 10), and aircraft, 18 U.S.C. § 32. *Lopez*, 115 S. Ct. at 1629.

72. *Lopez*, 115 S. Ct. at 1629-30.

73. Id. at 1630.

74. Id. The Court cited *Perez*, *McClung*, *Heart of Atlanta Motel*, and *Wickard* approvingly under this category. Id.

75. Id. at 1631.

76. Id. at 1630-31.

77. Id. at 1630.

78. Id. at 1631.

and interstate commerce an essential element of the crime.[79] Without such a nexus requirement, the statute merely prohibited intrastate possession of a firearm and thus did not impact interstate commerce.

Having seemingly disposed of both categories under which the regulated activity could have substantially affected interstate commerce, the Court proceeded to consider the government's arguments that this noneconomic activity substantially affected interstate commerce.[80] The government argued that gun possession in a school zone could result in violence, and that such violence could impact the national economy in two ways. First, the substantial costs of violent crimes are spread throughout the nation through insurance, and violent crimes may discourage travel to afflicted areas.[81] Second, the presence of guns in schools could substantially threaten the learning environment, resulting in less educated citizens.[82] This would in turn adversely affect the national economy through decreased worker productivity.[83]

Recognizing that this logic implied that no perceptible limits existed on the commerce power, the Court rejected the government's arguments.[84] First, the Court noted that the government's position would convert the Commerce Clause into a grant of general federal police power.[85] This conflicted with the Court's understanding that criminal law enforcement and education have historically been areas over which the states have exercised sovereignty.[86] Both the *local* nature and the *noneconomic* nature of the activity persuaded the Court that this Act was beyond the scope of the Constitution.[87] The Court acknowledged that Congress's power under the Commerce Clause was broad, but nevertheless insisted that that power did not

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79. Id. A jurisdictional element "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Id.

80. "The Government's essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce." Id. at 1632.

While the Court noted that the statute contained no congressional findings linking the possession of a firearm within a school zone to interstate commerce, it found no requirement of express findings. Id. at 1631.

81. Id. at 1632 (citing *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991); *Heart of Atlanta Motel*, 379 U.S. at 253).

82. Id.

83. Id.

84. Id. "[I]f we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." Id.

85. Id. at 1634.

86. Id. at 1632.

87. Id. at 1634. "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." Id.

include the authority to regulate the possession of firearms in local schools.

2. Justice Kennedy's Concurrence

Justice Kennedy, joining the Court's "necessary though limited holding,"[88] emphasized the protection of the system of federalism. He first noted that the Court's role in determining the limits of the commerce power was essential to preserving the delicate balance of federalism.[89] He then echoed Chief Justice Rehnquist's majority opinion, finding that the statute did not regulate an economic activity.[90] He noted that neither the act of carrying a firearm within 1,000 feet of a school nor the design of the statute itself has any commercial character.[91] Given this unprecedented stretch of the Commerce Clause to govern non-economic activity, Justice Kennedy then framed the necessary inquiry as whether the federal power intruded upon a matter of "traditional state concern."[92] He concluded that education was within the realm of traditional state authority, and that federal legislation in this area prevented the states from exercising that authority according to their own judgment of local needs.[93]

3. Justice Breyer's Dissent

Justice Breyer's dissent[94] argued that the act was within the scope of the Commerce Clause as defined by the Court over the past fifty years.[95] Justice Breyer began by identifying three touchstones of commerce clause jurisprudence. First, Congress may regulate local activities that "significantly affect interstate commerce."[96] Second, as

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88. Id. at 1634 (Kennedy, J., concurring).

89. Id. at 1639-40 (Kennedy, J., concurring). "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." Id. at 1639 (Kennedy, J., concurring). Justice Kennedy, joined by Justice O'Connor, thus rejected process jurisprudence. See Part II.A.2.

90. *Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring).

91. Id. (Kennedy, J., concurring).

92. Id. (Kennedy, J., concurring).

93. Id. at 1641 (Kennedy, J., concurring). Justice Thomas also provided a concurring opinion in which he urged the Court to bring commerce clause jurisprudence back to accordance with the original understanding of the Constitution. Id. at 1642 (Thomas, J., concurring).

94. Joining Justice Breyer were Justices Stevens, Souter, and Ginsburg. Id. at 1657. Justices Stevens and Souter also filed separate dissents. Id. at 1651.

95. Id. at 1657 (Breyer, J., dissenting).

96. Id. (Breyer, J., dissenting). Justice Breyer used "significant" to underscore the fact that the commerce power is not as limited as the requirement of a substantial effect might

Wickard demands, a court must consider not the impact of an individual act but rather the aggregate effect of all similar acts.[97] Third, a court must not evaluate the connection between the activity and commerce directly but at "one remove."[98] That is, it must decide only whether Congress had a rational basis[99] for concluding that the activity affected interstate commerce.[100]

Justice Breyer concluded that Congress could rationally have found that violence in schools substantially affects interstate commerce. First, he reasoned that Congress could have decided that the national problem of violence in schools threatens the quality of education in our school systems.[101] Second, he noted the relationship between quality education and commerce: particularly in today's global marketplace, good schools are essential in producing a competent workforce.[102] Accordingly, he reasoned, poor educational systems threaten the commercial life of the nation. Justice Breyer concluded that, given the severity of the problem of violence in schools and its corresponding impact on the quality of education, along with the commercial effects which result from lower quality schools, Congress could reasonably have found that violent crime in school zones substantially affects interstate commerce.[103]

Justice Breyer criticized the majority opinion on several points. He first contended that the decision deviated from fifty years of commerce clause jurisprudence.[104] He argued that the connection to interstate commerce was more substantial here than in several previous cases.[105] Second, Justice Breyer charged the majority with mischaracterizing the analysis of past cases by introducing a formalistic commercial/noncommercial distinction in determining whether federal authority may intrude into local realms.[106] He contended that these cases did not require that the regulated activity be economic in nature; rather, they required only that the activity affect interstate

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suggest. Nevertheless, he observed that this semantic difference would not have changed the outcome of this case. Id. at 1657-58 (Breyer, J., dissenting).

97. Id. at 1658 (Breyer, J., dissenting).

98. Id. (Breyer, J., dissenting).

99. Some commentators have termed the majority's test a heightened rational basis standard. See Deborah Jones Merritt, *Commerce!*, 94 Mich. L. Rev. 674, 682-84 (1995).

100. *Lopez*, 115 S. Ct. at 1658 (Breyer, J., dissenting).

101. Id. at 1659 (Breyer, J., dissenting).

102. Id. at 1659-60 (Breyer, J., dissenting).

103. Id. at 1661 (Breyer, J., dissenting).

104. Id. at 1657 (Breyer, J., dissenting).

105. Id. at 1662 (Breyer, J., dissenting). Justice Breyer argued that the congressional actions at issue in *Perez*, *McClung*, and *Wickard* had a more tenuous connection to interstate commerce than did the statute in the case at bar. Id. at 1662-63 (Breyer, J., dissenting).

106. Id. at 1663 (Breyer, J., dissenting).

commerce.[107] Finally, he asserted that the majority's decision would generate legal uncertainty in this area of jurisprudence.[108]

III. THE FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1994

Congress enacted the Freedom of Access to Clinic Entrances Act[109] on May 26, 1994, in response to increasingly violent anti-abortion protests at reproductive health centers throughout the country.[110] The FACE Act, like the Gun-Free School Zones Act in *Lopez*, is a federal criminal statute passed under the commerce power.[111] The statute applies to persons ranging from nonviolent demonstrators who obstruct clinic entrances to violent protesters, some of whom have murdered reproductive health employees.[112] The FACE Act is inherently suspect because it contains no jurisdictional element linking the regulated activity to interstate commerce.

A. The Statute and Its Background

1. The Text

Subsection (a) of the statute describes the prohibited activity. To fall within the statute a person must intentionally use force, the threat of force, or physical obstruction to injure, intimidate, or interfere with a person to prevent that person from obtaining reproductive health services.[113] Additionally, a person who intentionally damages

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107. Id. (Breyer, J., dissenting).

108. Id. at 1664 (Breyer, J., dissenting).

109. Pub. L. No. 103-259, 108 Stat. 694 (1994), codified at 18 U.S.C. § 248 (1994 ed.).

110. See Part III.A.2.a.

111. See Pub. L. No. 103-259, § 2, 108 Stat. 694 (1994) (stating that Congress has the "affirmative power . . . to enact this legislation under section 8 of article I of the Constitution, as well as under section 5 of the fourteenth amendment to the Constitution . . ."). Congress has often used the commerce power to pass criminal statutes. For example, federal statutes prohibit firearm possession, 18 U.S.C. § 922(g) (1994 ed.) (prohibiting a convicted felon to "possess in or affecting commerce, any firearm or ammunition"); arson, 18 U.S.C. § 844(i) (1994 ed.) ("Whoever maliciously damages or destroys, . . . by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned . . . ."); and carjacking, 18 U.S.C. § 2119 (1994 ed.) (prohibiting the taking of a "motor vehicle that has been transported, shipped, or received in interstate or foreign commerce . . . by force and violence or by intimidation").

112. See 18 U.S.C. § 248 (a)(1).

113. Subsection (a), in relevant part, reads as follows:

the property of a reproductive health provider may be prosecuted under the statute.[114] Noticeably absent from subsection (a) is a jurisdictional element requiring a link between the regulated activity and interstate commerce. Subsection (b) outlines the penalties for violations of the statute. A first-time offender may be fined, imprisoned for up to one year, or both.[115] For each subsequent conviction, an offender may be fined or imprisoned up to three years.[116] The fines for nonviolent offenders are specifically listed—up to $10,000 and six months imprisonment for the first violation, and up to $25,000 and eighteen months imprisonment for each subsequent violation.[117] Section (c) provides a right of civil action for aggrieved persons, for the U.S. Attorney General, and for state attorneys general.[118] Civil remedies for individuals include compensatory damages, punitive damages, injunctive relief, reasonable costs, and attorney's fees.[119] In addition, an individual may elect to receive a $5,000 statutory penalty

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Whoever—

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with or attempts to injure, intimidate or interfere with any person hecause that person is or has been, or in order to intimidato such person or any other person or any class of persons from, obtaining or providing reproductive health services . . .
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> . . .

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

Id.

The act defines reproductive health services as "services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." Id. § 248(e)(5).

114. Id. § 248(a)(3) (applying the penalties to whoever "intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services").

115. Id. § 248(b)(1) (providing that those who violate this provision shall, "in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both").

116. Id. § 248(b)(2) (providing that "in the case of a second or subsequent offense after a prior conviction under this section, [the offender shall] be fined in accordance with this title, or imprisoned not more than 3 years, or both").

117. Section 248(b) adds the following exceptions for nonviolent offenses:

> [E]xcept that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall . . . be not more than $25,000 and the length of imprisonment sball be not more than 18 months, or both, for a subsequent offense . . . .

Id. § 248(b). The statute further provides "that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life." Id.

118. Id. § 248(c).

119. Id.

instead of compensatory damages.[120] In an action by the United States Attorney General or a state attorney general, the court may award injunctive relief, compensatory damages, a civil penalty, or some combination of the three.[121]

2. Legislative History

The report of the Senate Committee on Labor and Human Resources provides a detailed account of the legislative history of the FACE Act.[122] Generally, Congress perceived that organized anti-abortion groups had restricted access to reproductive health clinics, frequently through intimidation and violence, and that this national problem required a federal remedy.[123]

a. Events Leading to the FACE Act

The Senate Report cited the increasing violence accompanying the anti-abortion movement as a major impetus for the enactment of the statute.[124] The Senate Report observed that between 1977 and April 1993, anti-abortion protesters committed over 1,000 acts of violence against abortion providers, including bombings, arsons, death threats, assaults, kidnappings, and murders.[125] The murder of Dr. David Gunn in Pensacola, Florida, on March 10, 1993, was a recent memory at the time the Committee voted to recommend the statute.[126] In addition, anti-abortion protesters had organized over 6,000 clinic entrance blockades since 1977.[127] The Senate Committee found that these blockades had disrupted health services, terrorized patients and staff, and imposed costs of millions of dollars on the criminal justice system, the clinics themselves, and society in general.[128]

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120. Id. § 248(c)(1)(B).

121. Id. § 248(c)(2)(B), (c)(3)(B).

122. Freedom of Access to Clinic Entrances Act of 1993, S. Rep. No. 103-117, 103d Cong., 1st Sess. (1993) ("Senate Report").

123. Id. at 3.

124. Id.

125. Id. ("These acts included at least 36 hombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder.") (citing a report from the National Abortion Federation).

126. See William Booth, *Doctor Killed During Abortion Protest: Alleged Gunman Calmly Surrenders to Police Outside Florida Clinic*, Wash. Post A1 (March 11, 1993). The Committee approved the FACE Act on June 23, 1993. Senate Report at 33-35 (cited in note 122).

127. Senate Report at 7 (cited in note 122) (citing a report from the National Abortion Federation).

128. Id. (citing a report from the National Abortion Federation).

b. The Need for the FACE Act

The Senate Committee found that the anti-abortion groups expressly intended to use threatening activity to eliminate access to abortion clinics.[129] The groups hoped that mass disregard of the law would overwhelm the judicial system, rendering efforts to enjoin such activities futile.[130] The Senate Committee noted Attorney General Janet Reno's testimony that the problem was national in scope, and that the activities were frequently organized and conducted across state borders.[131] It was not uncommon, testimony showed, for anti-abortion leaders[132] in one state to order the blockade of a particular clinic in another. The Senate concluded that such national activity is impossible for states to enjoin, as their jurisdiction ends at the state line.[133]

In addition, the Senate Committee found existing federal, state, and local law to be inadequate to meet the challenge posed by the anti-abortion activities.[134] The Supreme Court in *Bray v. Alexandria Women's Health Clinic*[135] denied the possibility of injunctive relief under 42 U.S.C. section 1985(3), which prohibits conspiracies intended to deprive a person or class of persons of their civil rights.[136] In *Bray*, the Court found protesters' opposition to abortion not to constitute a discriminatory motive comparable to racial discrimination.[137] The Court also held the provision inapplicable because the protesters had not infringed upon a right that was protected against private action.[138] It rejected arguments asserting a constitutional right to be free from individual interference with access to abortions.[139]

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129. Id. at 11.
130. Id.
131. Id. at 12-13.
132. The Senate Report mentions Operation Rescue, among other organizations. Id. at 13-14.
133. Id. at 13.
134. Id. at 10.
135. 506 U.S. 263 (1993).
136. Id. at 267-68.
137. Id. at 268-69.
138. Id. at 274. The Court also found that the purpose of the protesters' conspiracy was not to infringe women's right of interstate travel; at most this was incidental to their efforts. Id. at 275-76. The Court was also troubled by the fact that to hold that anti-abortion demonstrations violated the right of interstate travel would transform all state-law torts into civil rights actions if committed against interstate travelers. Id. at 276-77.
139. Id. at 277-78. Section 1985(3) does not give individuals a cause of action to sue other private individuals for intrusions on a right protected only against state action. Id.

The Senate Committee found state and local laws proscribing trespass, vandalism, and assault to be insufficient to deal with national problems. First, it concluded that some local officials had refused to apply the law to anti-abortion demonstrators because of sympathy to their political viewpoint.[140] Second, it noted that when officials had attempted to enforce the law, the national scope of the protesters' organizations often hampered their efforts.[141] Third, local officials had frequently been overwhelmed by the number of protesters. They did not have sufficient law enforcement personnel to arrest hundreds of demonstrators.[142] Finally, the Committee noted the penalties available under the state and local laws at issue here were too small to offer adequate deterrence for repeated violations.[143]

c. Constitutional Authority for the FACE Act

Congress enacted the FACE Act under the authority of the Commerce Clause and section five of the Fourteenth Amendment.[144] The Senate Committee made detailed findings regarding the effect of the activity regulated by the FACE Act on interstate commerce, including the opinions of Attorney General Janet Reno and Professor Laurence Tribe that Congress possessed authority to implement the Act.[145]

The Senate Committee made several findings concerning interstate commerce. First, it found abortion clinics to be engaged in interstate commerce. The Committee reasoned that the clinics were directly involved in interstate commerce because they purchased medical supplies from other states, and indirectly involved because they employed workers, paid rent, and in general operated as a business—they were "within the stream of interstate commerce."[146] Second, it found that both patients and clinic employees frequently

140. Senate Report at 19 (cited in note 122) (citing the testimony of a Texas sheriff before a House subcommittee).

141. Id. at 19-20. "Mr. Lasso, City Manager of Falls Church, VA, explained, for example, that because the blockades against clinics in his jurisdiction were planned outside of Virginia, the perpetrators were to a large degree beyond the reach of Virginia law and Virginia State court injunctions." Id. at 20.

142. Id. at 20 (citing testimony that it took all thirty of Falls Church's police officers several hours to make over two hundred arrests in response to a 1988 blockade).

143. Id. After being charged fines similar to those imposed for speeding violations, protesters frequently returned to the blockaded clinics. Even repeat offenders were not jailed. Id. at 20-21.

144. Id. at 30-33. For a discussion of the authority for the act under the Fourteenth Amendment, see Part V.

145. Senate Report at 30 (cited in note 122).

146. Id. at 31.

traveled interstate to the clinics.[147] Finally, the Senate Committee reported that the activities regulated by the FACE Act had a negative impact on interstate commerce; such intimidation discouraged the movement of people and goods in interstate commerce.[148]

B. Legal Challenges to the Statute

Legal challenges to the FACE Act have focused primarily on freedom of speech concerns,[149] but each of the cases has also raised a commerce clause challenge to the statute.[150] One district court ruled the FACE Act unconstitutional under the theory that Congress exceeded its authority under the Commerce Clause and the Fourteenth Amendment.[151] On appeal to the Seventh Circuit, however, a divided panel overturned this decision.[152] The Seventh Circuit opinion provides a useful device for exploring the arguments for and against congressional authority under the Commerce Clause in the context of the FACE Act.

The facts of *United States v. Wilson*[153] were not contested. There, under the FACE Act, local officials prosecuted six Wisconsin residents[154] for blockading the front and rear entrances of an abortion clinic in Milwaukee, Wisconsin.[155] The defendants wedged automobiles into the entrances and welded themselves into the vehicles using steel restraining devices.[156] It took local firefighters over four hours to

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147. Id. The Committee noted that the Supreme Court in *Bray* had accepted the finding that "substantial numbers of women travel interstate to seek abortion services." Id. (citing *Bray*, 506 U.S. at 275).

148. Id. at 31-32. The Committee compared the effect to that caused by racial discrimination in hotels and restaurants. Id. (citing *Heart of Atlanta Motel*, 379 U.S. at 241).

149. See, for example, *American Life League, Inc. v. Reno*, 47 F.3d 642, 648-54 (4th Cir. 1995) (holding the FACE Act not to violate the First Amendment's Free Speech Clause), cert. denied, 116 S. Ct. 55, 133 L. Ed. 2d 19 (1995); *Cheffer v. Reno*, 55 F.3d 1517, 1521-22. (11th Cir. 1995) (same); *United States v. Dinwiddie*, 76 F.3d 913, 921-24 (8th Cir. 1996) (same).

150. See, for example, *American Life League*, 47 F.3d at 647; *Cheffer*, 55 F.3d at 1519-21; *Dinwiddie*, 76 F.3d at 919-21.

151. *United States v. Wilson*, 880 F. Supp. 621, 623 (E.D. Wis. 1995), rev'd, 73 F.3d 675 (7th Cir. 1995), cert. denied, *Skott v. United States*, 1996 U.S. LEXIS 4624 (1996). One year after *Wilson* was decided at the trial level, another district court agreed that the FACE Act exceeded Congress's power to regulate under the Commerce Clause. *Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996). Oddly, the court made no mention of its own circuit's contrary authority. See 923 F. Supp. at 814 (disagreeing with the Eleventh Circuit in *Cheffer* and the Seventh Circuit in *Wilson*, but failing to acknowledge *American Life League*).

152. *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995), cert. denied, *Skott v. United States*, 1996 U.S. LEXIS 4624.

153. 880 F. Supp. 621, 623 (E.D. Wis. 1995), rev'd, 73 F.3d 675 (7th Cir. 1995), cert. denied, *Skott v. United States*, 1996 U.S. LEXIS 4624.

154. *Wilson*, 73 F.3d at 690 (Coffey, J., dissenting).

155. Id. at 677.

156. Id.

remove the defendants and the obstructing automobiles, during which time neither staff members of the clinic nor patients could enter the building.[157] Defendants were charged with violations of the FACE Act. The district court dismissed the charges, holding that the statute was unconstitutional under the Commerce Clause.[158]

To begin its lengthy analysis of the commerce clause challenge, the district court first addressed the rational basis test. It concluded that the test must not allow congressional regulation of each and every activity that Congress could plausibly find affected interstate commerce.[159] Rather, the test must take into account the limits of the commerce power.[160] The court then considered whether the regulated activity affected interstate commerce. It derived three guiding principles from Supreme Court precedent: (1) When a general regulatory scheme has a substantial effect on interstate commerce, Congress may regulate "trivial" conduct falling under the scheme;[161] (2) Congress may regulate commercial establishments receiving goods in interstate commerce;[162] and (3) Congress may regulate "activities that employ violent means to achieve an economic purpose."[163]

The court concluded that the activity regulated under the FACE Act did not fall into any of the three categories. First, the Act did not establish a national commercial regulatory scheme, and particular acts of protest do not in the aggregate undermine such a commercial scheme.[164] Second, unlike Title II of the 1964 Civil Rights Act, which regulates commercial establishments, the FACE Act regulates

157. Id.

158. *Wilson*, 880 F. Supp. at 634. The court specifically held unconstitutional "that portion of 18 U.S.C. § 248(a)(1) which applies to non-violent physical obstruction of reproductive health services clinics." Id. The court also concluded that section five of the Fourteenth Amendment did not give Congress authority for the FACE Act. Id. at 634-36. The district court issued its opinion the month before the Supreme Court announced its decision in *Lopez*.

159. Id. at 625-26. The court noted that Congress could plausibly find any activity to affect interstate commerce: "[I]n a logical sense, *all* activity 'affects' commerce because 'there is no private activity, no matter how local and insignificant, the ripple [e]ffect from which is not in some theoretical measure ultimately felt beyond the borders of the state in which it took place.' " Id. at 625 (quoting *Lopez*, 2 F.3d 1342, 1362 (5th Cir. 1993), aff'd, 115 S. Ct. at 1624).

160. Id. at 626. The court found two limits on the commerce power: First, Congress cannot violate a provision of the Constitution such as the First Amendment; second, it "cannot interpret and exercise any one of its enumerated powers so expansively that it effectively subsumes other enumeratod powers or those powers reserved to the States, or extends to *all* spheres of human activity." Id.

161. Id. at 627. Examples of this category include the regulations sustained in *Wickard* and *Perez*. Id.

162. Id. at 628. Title II of the Civil Rights Act of 1964, which was upheld by *Heart of Atlanta Motel* and *McClung*, illustrates this category. Id.

163. Id. at 629. The regulation of organized crime is an example of this catogory. Id.

164. Id. at 628.

private activities.[165] Also, the obstruction of access to reproductive health services did not infringe upon the right to interstate travel.[166] Finally, the particular activity regulated in *Wilson* did not employ violent means to achieve an economic purpose; indeed, it employed nonviolent means to further a noneconomic purpose.[167]

1. Majority View

The Seventh Circuit followed the lead of the Fourth[168] and Eleventh[169] Circuits in overturning the district court's opinion and sustaining the FACE Act.[170] The court concluded that the activities

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165. Id.

166. Id. at 628-29.

167. Id. at 629. In addition, the court specifically addressed the congressional findings supporting the FACE Act. It dismissed the finding that abortion clinics operate within the stream of commerce because under such logic, no activity could escape regulation under the commerce power. Id. at 630. Next, it concluded that if Congress could regulate abortion clinics because some providers and patients travel across state lines to reach the clinic, Congress could also regulate golfing, camping, and shopping. Id. at 630-31. Furthermore, it lambasted the contention that Congress could regulate "any human activity which arguably decreases the sale or purchase of specific goods or services," id. at 631, offering the examples of shoplifting and breastfeeding as potential targets, id. at 631 n.17. Last, the court found irrelevant Congress's conclusion that the problem was national in scope. That alone was not enough unless the activity affected interstate commerce. Id. at 631. Even if anti-abortion activity affected interstate commerce, the court doubted it was a problem the states could not control, as no findings indicated that states utilized 42 U.S.C. § 10501's provision for federal assistance in such circumstances. Id. at 631-32.

168. In *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995), cert. denied, 116 S. Ct. 55, 133 L. Ed. 2d 19 (1995), an action filed on the same day the FACE Act became law, the Fourth Circuit held that the statute was within Congress's commerce power, that it did not violate the First Amendment's Free Speech Clause, and that it did not violate the First Amendment's Free Exercise Clause. Id. at 645. In briefly considering the commerce clause challenge to the act, the court found that Congress rationally concluded that violence, threats, and physical obstructions of reproductive health services affected interstate commerce. Id. at 647. It concluded that the regulatory means chosen were "reasonably adapted to permissible ends." Id. The court then considered at length the first amendment challenges to the Act. Id. at 648-56. Because the Fourth Circuit decided *American Life League* two months before the Supreme Court's *Lopez* decision, *American Life League*'s analysis of the commerce clause issue is not especially helpful.

169. In an opinion issued less than two months after *Lopez*, the Eleventh Circuit upheld the FACE Act against several challenges in *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995). In answer to a tenth amendment challenge, the court held that the act was permissible under the commerce power and thus did not violate the Tenth Amendment. Id. at 1521. The court distinguished *Lopez* on the grounds that, unlike the Gun-Free School Zones Act, the FACE Act did regulate commercial activity, "the provision of reproductive health services." Id. at 1520. Also, the court was persuaded by extensive congressional findings that the regulated activity had a substantial effect on interstate commerce. Id. at 1520-21. The court proceeded to hold that the Act survived first amendment challenges under the Free Speech Clause, id. at 1521-22, and the Free Exercise Clause, id. at 1522, and that the eighth amendment challenge was not ripe for review, id. at 1523-24.

170. *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995). After the Seventh Circuit decided *Wilson*, the Eighth Circuit upheld the FACE Act as well. *Dinwiddie*, 76 F.3d at 913.

regulated under the statute substantially affected interstate commerce and that the statute was therefore within Congress's commerce power.[171] The court considered congressional findings that reproductive health facilities substantially relate to interstate commerce, and ruled that a rational basis existed for such findings. First, it accepted Congress's finding that these health clinics operate within the stream of commerce, rebuking the district court for converting the rational basis test to a less deferential standard.[172] Second, the court found that Congress could rationally have concluded that the interstate travel of individuals seeking reproductive health services was substantial, and thus that the obstruction of these individuals substantially affected interstate commerce.[173] The court cited evidence that the decreasing number of reproductive health clinics had resulted in greater percentages of patients traveling across state lines to obtain abortions.[174] Third, the court approved Congress's finding that the diminished opportunity to access abortion clinics posed a substantial threat to interstate commerce.[175]

The Seventh Circuit distinguished *Lopez* on several grounds. First, the court found that, unlike the statute in *Lopez*, the FACE Act's regulation of reproductive health services governed a commercial enterprise.[176] Second, it noted that while congressional findings regarding links to interstate commerce are not determinative, the extensive findings in the FACE Act stood in contrast to the absence of such findings in the Gun-Free School Zones Act of *Lopez*.[177] The court rejected the argument that the FACE Act regulated noncommercial activity. Instead, it ruled that Congress may regulate any private activity that substantially affects interstate commerce.[178] In short, the court interpreted *Lopez* as a continuation of existing commerce clause cases, reaffirming the expansive jurisprudence of the past sixty years.

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171. *Wilson*, 73 F.3d at 679-80.
172. Id. at 680-81.
173. Id. at 681.
174. Id.
175. Id. at 682. While these reasons were sufficient to establish congressional authority, the court rejected as irrelevant findings that the problem was national in scope. Id. at 683. Instead, the court determined that whether an activity is national or local, if it substantially affects interstate commerce it may be regulated under the Commerce Clause. Id. at 682-83.
176. Id. at 683-84 (citing *Cheffer*, 55 F.3d at 1520-21).
177. Id. at 684.
178. Id.

2. Minority View

The dissent in *Wilson*, on the other hand, viewed *Lopez* as a fundamental shift in commerce clause jurisprudence, calling for a limitation of the substantial effects analysis to two situations: when a federal criminal statute contains a jurisdictional element requiring that the prohibited conduct substantially affect interstate commerce and when the regulation of economic activity substantially affects interstate commerce.[179] Judge Coffey concluded that since the FACE Act was drafted without the requisite jurisdictional element and did not regulate economic activity substantially affecting interstate commerce, the statute was unconstitutional.[180]

The dissent rejected the majority's conclusion that Congress's authority under the Commerce Clause is not limited to the regulation of commercial entities.[181] Judge Coffey instead pointed out that all of the cases *Lopez* cited as illustrative of activity substantially affecting interstate commerce regulated some kind of economic activity.[182] For instance, the Civil Rights Act of 1964 regulated hotels and restaurants—economic actors engaged in racial discrimination.[183] In contrast, the FACE Act regulated private individuals engaged in protest. While the majority's language focused on the commercial nature of the reproductive health clinics, the dissent argued that the statute focused on the protesters, not the clinics.[184] The result was a federal statute regulating noneconomic abortion protests.

The dissent argued that due to the absence of a jurisdictional element in the FACE Act linking the protest to interstate commerce, the statute allowed the conviction of Wisconsin residents for actions in Wisconsin.[185] The dissent concluded that the statute thus allowed the federalization of a local trespass.[186] Such power under the Commerce Clause disrupts the delicate balance between federal and state governments.[187]

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179. Id. at 691 (Coffey, J., dissenting) (citing *Lopez*, 115 S. Ct. at 1630, 1631).
180. Id. at 690 (Coffey, J., dissenting).
181. Id. at 693 (Coffey, J., dissenting).
182. Id. (Coffey, J., dissenting).
183. Id. at 692 (Coffey, J., dissenting).
184. Id. (Coffey, J., dissenting).
185. Id. at 690 (Coffey, J., dissenting). The dissent also noted that the record did not show whether any of the clinic staff members traveled in interstate commerce or whether any of their supplies were obtained in interstate commerce. Id. (Coffey, J., dissenting).
186. Id. at 699 (Coffey, J., dissenting).
187. Id. (Coffey, J., dissenting).

IV. THE FACE ACT UNDER *LOPEZ*

The difference between the majority opinion and the dissent in *Wilson* illustrates the ambiguity of the Supreme Court's position in *Lopez*. If *Lopez* limits the substantial effects category to (1) regulation of those *commercial* activities which substantially affect interstate commerce, and (2) regulation of noncommercial activities that are shown, through case-by-case application of a jurisdictional element, substantially to affect interstate commerce,[188] then the FACE Act should be overturned. If, however, *Lopez* also allows the use of the second type of regulation without a jurisdictional element,[189] then the Act could be upheld.

A. Evaluating the Majority Approach

The majority's argument that the FACE Act regulates a commercial activity is plausible. Though the statute refers only to the conduct of protesters, in essence it is regulating access to commercial reproductive health facilities. Congress made extensive findings that these facilities operate within the stream of interstate commerce, and a court could rationally conclude that ensuring access to these commercial entities is within Congress's commerce power.[190] Still, the minority's argument that the statute regulates the conduct of noncommercial private protesters seems more true to the wording of the FACE Act.[191]

Lopez requires that the statute either regulate a commercial activity that substantially affects interstate commerce or contain a jurisdictional element providing a nexus between the regulated activity and interstate commerce.[192] The FACE Act, like the Gun-Free School Zones Act, does not contain a jurisdictional element making the connection of the regulated activity to interstate commerce an element of the crime.

The majority's strongest argument is that even if the FACE Act regulates the noncommercial protesters instead of the commercial health care facilities, these protest activities nonetheless have a substantial effect on interstate commerce. The majority has authority for this position because the *Lopez* Court addressed the argument that

188. See *Lopez*, 116 S. Ct. at 1630-31.
189. See id. at 1632-33.
190. See Part III.A.2.c.
191. See discussion at Part IV.B.
192. See notes 74-75 and accompanying text.

noneconomic gun possession affected interstate commerce before ultimately rejecting it as too remote.[193] Here, the protesters' actions arguably burden commercial enterprises that receive supplies, workers, and even patients from across state lines.[194] Thus, even local protests substantially affect the interstate commerce in which the reproductive clinics are engaged.

FACE Act advocates could cite *Wickard*, *McClung*, and *Perez* as support for such an argument. *Wickard* upheld the regulation of local wheat production because in the aggregate local production had a substantial effect on interstate commerce.[195] *McClung* sustained the regulation of racial discrimination in local restaurants because that discrimination had an adverse effect on interstate commerce.[196] *Perez* continued this notion that Congress may regulate a class of activities if the total impact of the collective acts affects interstate commerce,[197] holding that even local loan-sharking activities may affect interstate commerce.[198] *Wickard* and *McClung* explicitly state that the regulated act need not be commercial to affect interstate commerce,[199] and the *Lopez* Court did not question these decisions.[200] Therefore, the majority approach has strong authority for the proposition that local noncommercial abortion protests may have a substantial effect on interstate commerce.

As a practical matter, the majority view's argument to limit *Lopez* to its facts has some merit. The statute in *Lopez* regulated a noncommercial activity, did not require a nexus to interstate commerce as an element to the crime, lacked specific congressional findings, and regulated education, which is traditionally a state concern.[201] The FACE Act, in turn, is similar to the Gun-Free School Zones Act only in its lack of a nexus requirement as an element of the crime. It differs in several ways. The FACE Act arguably regulates

193. See Part II.B.3.
194. See Part III.A.2.
195. 317 U.S. at 128-29.
196. 379 U.S. at 304.
197. 402 U.S. at 154.
198. Id.
199. *McClung*, 379 U.S. at 383 ("[B]ut 'even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . .' ") (quoting *Wickard*, 317 U.S. at 125).
200. See *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring) ("[*Wickard, Heart of Atlanta Motel, McClung, Perez,*] and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today.").
201. See Merritt, 94 Mich. L. Rev. at 693-700 (cited in note 99) (discussing factors limiting the future application of *Lopez*).

commercial reproductive health facilities.[202] The Act also contains extensive congressional findings linking the effects of anti-abortion protests to interstate commerce.[203] Furthermore, the regulation of reproductive health facilities does not raise quite the level of concern of federal intrusion on state power as does the regulation of local schools, an area at the heart of state and local concern.[204] Thus, advocates may argue that facts unique to *Lopez* compelled the Court to overturn the Gun-Free School Zones Act.

B. Evaluating the Minority Approach

Despite the strength of the majority's arguments and its widespread acceptance, the minority view provides the more realistic approach. The minority approach forcefully contends that the FACE Act is unconstitutional under *Lopez* because the statute neither regulates commercial activity nor contains a jurisdictional element.[205] Upholding the FACE Act would require an extension of existing commerce clause jurisprudence that the *Lopez* Court was unwilling to approve.[206]

The minority's argument that the FACE Act regulates noncommercial protesters instead of commercial reproductive health care facilities more accurately describes the wording of the statute than the majority's approach. A comparison to the regulation in *Lopez* is appropriate. There, the Court held that the Gun-Free School Zones Act, which prohibited gun possession in school zones, was neither an economic regulation nor an essential part of the regulation of economic activity.[207] Under this analysis, the FACE Act, which prohibits the physical obstruction, intimidation, or injury of those seeking to access or provide reproductive services,[208] is not an economic regulation. Instead, it criminalizes specified acts by protesters.

Case law provides no precedent for regulating noncommercial activity without requiring a nexus to interstate commerce on a case-

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202. See notes 171-72 and accompanying text.

203. See Part III.A.2.

204. See *Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring) (asserting that, in the circumstances surrounding the Gun-Free School Zones Act, the Court has "a particular duty to insure that the federal-state balance is not destroyed").

205. See Part III.B.2.

206. See *Lopez*, 115 S. Ct. at 1634 ("The broad language in [prior commerce clause cases] has suggested the possibility of additional expansion, but we decline here to proceed any further.").

207. *Lopez*, 115 S. Ct. at 1630-31.

208. See Part III.A.1.

by-case basis.[209] Despite the majority's attempt to characterize the post-New Deal commerce clause cases as providing authority for the regulation of noncommercial activity substantially affecting interstate commerce, close examination of these cases proves otherwise. *Wickard* upheld a national economic regulation that controlled wheat prices.[210] Even if one concedes that *Wickard* did not involve a commercial farmer, the regulation at issue was a commercial one.[211] Similarly, the regulation in *Perez* criminalized an extortionate commercial transaction.[212] The FACE Act, on the other hand, regulates noncommercial acts of obstruction or intimidation. The difference is perhaps best seen by comparing the FACE Act to the statute at issue in *McClung* and *Heart of Atlanta Motel*. The Civil Rights Act of 1964 prohibited hotels and restaurants—commercial establishments—from discriminating.[213] These cases would only provide authority for the constitutionality of the FACE Act if they upheld legislation prohibiting civil rights demonstrators from obstructing the entrances to these commercial establishments. Sustaining the FACE Act, then, requires extending commerce clause jurisprudence one step further to allow the regulation of noneconomic activity that affects interstate commerce.

Under *Lopez*, such regulation of noneconomic activity affecting interstate commerce is only permissible if the statute contains a jurisdictional element linking the noneconomic activity to interstate commerce on a case-by-case inquiry.[214] The absence of a nexus requirement in the FACE Act could potentially allow local, noncommercial protesters to be convicted of a federal crimes without any showing of a connection to interstate commerce.[215]

Even if *Lopez* did allow the regulation of noncommercial activity substantially affecting interstate commerce without a jurisdictional element, the minority view that the FACE Act is unconstitutional would still be superior. The majority approach faces a threshold barrier in the substantiality requirement: protest activities must

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209. *Wilson*, 73 F.3d at 693 (Coffey, J., dissenting) ("Where Congress is not regulating economic activity, insisting on jurisdictional language in a federal criminal statute is essential because, 'under our federal system, the "States possess primary authority for defining and enforcing the criminal law." ' ") (citing *Lopez*, 115 S. Ct. at 1631 n.3).

210. See notes 19-22 and accompanying text.

211. See notes 76-78 and accompanying text.

212. See note 29 and accompanying text.

213. See notes 23-25 and accompanying text.

214. See *Wilson*, 73 F.3d at 692-94 (Coffey, J., dissenting).

215. Id. (Coffey, J., dissenting).

place a *substantial* burden on interstate commerce.[216] Abortion protestes' impact on interstate commerce does not seem to rise to the level of that caused by denying food and lodging to African-American travelers[217] or providing income for organized crime.[218] The Court could find that the FACE Act fails the *substantial* effects test. Such a finding, however, would be open to criticism on grounds that the Court employed a heightened scrutiny rather than the deferential rational basis inquiry.[219]

A more convincing argument is that the majority's approach calls for a nearly limitless commerce power. Very few noncommercial activities are not in some way connected to the stream of interstate commerce. *Lopez* rejected the government's argument precisely because its logic would have created a general federal police power, leaving nothing beyond the reach of the federal government's authority.[220] Allowing the federal government to regulate acts of trespass and assault committed by some anti-abortion protesters simply because the reproductive health facilities they target purchase supplies from out-of-state or because some people travel across state lines to obtain reproductive health services broadens the commerce power beyond recognition.[221] *Lopez* may be a limited holding, but it resurrected after sixty years the notion that limits to the Commerce Clause exist. The FACE Act exceeds any meaningful limits.

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216. See id. at 681 (discussing how persons traveling interstate to obtain reproductive health services have a substantial impact on interstate commerce while those traveling to shop or play golf do not).

217. See *McClung*, 379 U.S. at 300 (describing congressional testimony that "discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negros. . . . This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating").

218. *Perez*, 402 U.S. at 155 (describing congressional testimony tbat loan sbarking was "the second largest source of revenue for organized crime").

219. See *Wilson*, 73 F.3d at 698 (Coffey, J., dissenting) (evaluating congressional findings that abortion protests affect interstate commerce carefully despite criticism that this elevates the rational basis inquiry to one of strict scrutiny).

220. 116 S. Ct. at 1632 ("[I]f we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate."). See also Merritt, 94 Mich. L. Rev. at 688 (cited in note 99) ("Although pressed repeatedly during oral arguments, the Solicitor General could not offer a single example of conduct falling outside Congress's commerce power.") (citing Transcript of Oral Argument on Behalf of the Petitioner at 10-11, 13, *United States v. Lopez*, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (available in Westlaw, SCT-ORALARG Directory)).

221. See *Wilson*, 880 F. Supp. at 630-33 (describing the implications of congressional justifications for the FACE Act).

V. POSSIBLE SOLUTIONS

If *Lopez* proved fatal to the FACE Act's commerce clause authority, a court would be required to analyze the Act under the other independent constitutional basis Congress offered—section five of the Fourteenth Amendment.[222] If this authority failed, Congress could pass a new FACE Act with a jurisdictional element linking the crime to interstate commerce. Alternatively, Congress could allow state law to handle the problem.

A. An Alternate Source of Power

Section five of the Fourteenth Amendment gives Congress the power to enforce section one of the Fourteenth Amendment.[223] Section one prohibits the states from depriving "any person of life, liberty, or property, without due process of law" and from denying any person the "equal protection of the laws."[224] Therefore, section five only gives Congress the authority to regulate state action.

Whether one adopts the view that the FACE Act regulates private protesters or private abortion clinics, the act does not regulate state action. Nevertheless, the Court has indicated that private activity may constitute state action for fourteenth amendment purposes in limited circumstances when the activity is intertwined with state authority.[225] The Court has found state action in four such situations:[226] (1) "when there is a symbiotic relationship between the private actor and the state";[227] (2) when private discrimination is

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222. See note 111. In *Wilson*, although the district court held the FACE Act unconstitutional under the Fourteenth Amendment, 880 F. Supp. at 636, the dissent in the Seventh Circuit opinion did not analyze the statute under the Fourteenth Amendment. See *Wilson*, 73 F.3d at 679 n.4. In *Hoffman*, the court briefly considered the fourteenth amendment question before concluding that the activities of private protesters did not satisfy the state action requirement of the Fourteenth Amendment. 923 F. Supp. at 819-20.

223. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., Amend. XIV, § 5.

224. Id. § 1.

225. "Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

226. *Sherman v. Community Consol. School Dist. 21 of Wheeling Township*, 8 F.3d 1160, 1168-69 (7th Cir. 1993) (outlining the four categories).

227. Id. at 1168. See, for example, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722-24 (1961) (holding that a private restaurant that leased from a state agency was a state actor for purposes of the Fourteenth Amendment because of the mutual benefits each derived from the relationship).

"aggravated" by a governmental authority;[228] (3) "when the state has commanded or encouraged the private discriminat[ion]";[229] and (4) when the private actor performs a "traditional state function."[230]

None of these four scenarios is present in the context of the FACE Act. No symbolic relationship exists between the protesters and the state. Also, the state has neither enforced a judgment giving effect to discrimination, nor been responsible for encouraging discrimination. Finally, private abortion protesters do not perform a traditional state function. Accordingly, no plausible argument exists that these private protests are intertwined with state authority.

Advocates of the FACE Act might nonetheless argue that Congress has authority under section five to regulate activity that Congress has determined violates section one. In *Katzenbach v. Morgan*,[231] the Court stated that Congress itself may determine that a state law violates section one and thus implement legislation correcting the discrimination under section five.[232] Even under *Morgan*'s expansive rationale, the FACE Act should not survive because it does not correct discrimination caused by state law. *Morgan*, however, does not appear to authorize Congress to determine that purely private action could violate section one despite the express state action language in section one. In addition, the authority of *Morgan* is questionable because the Court has not followed it in subsequent cases.

Finally, FACE Act supporters may argue that by refusing to prosecute offenders, government actors deprived women of their fourteenth amendment right to be free from state interference in obtaining an abortion.[233] Such a charge would be difficult to substantiate. While the Senate Report on the FACE bill cited testimony by a Texas sheriff who refused to enforce the law against pro-life demon-

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228. *Sherman*, 8 F.3d at 1168. See, for example, *Shelly v. Kraemer*, 334 U.S. 1, 19-20 (1948) (finding state action when a court enforced racially discriminatory restrictive covenants).

229. *Sherman*, 8 F.3d at 1168. See, for example, *Blum v. Yaretsky*, 457 U.S. 991 (1982). In *Blum*, the Court found that private nursing homes receiving Medicaid reimbursements were not state actors. Id. at 105. The state was not responsible for the nursing homes' decisions to transfer certain patients to less expensive facilities and thus lower their Medicaid benefits. Id. at 1007-09. The Court observed that a stato could only be held responsible for these decisions if it "has exercised coercive power or has provided . . . significant encouragement" in the decision. Id. at 1004.

230. *Sherman*, 8 F.3d at 1169. See, for example, *Terry v. Adams*, 345 U.S. 461, 469-70 (1953) (holding preprimary elections to be a state function).

231. 384 U.S. 641 (1966).

232. Id. at 656 ("[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's [requirement] . . . constituted an invidious discrimination in violation of the Equal Protection Clause.").

233. See *Wilson*, 73 F.3d at 683 n.8 (discussing hypothetically the government's claim under the Fourteenth Amendment).

strators,[234] no other evidence was shown. The dissenting views of the House Report pointed to the sheriff's testimony that his fellow law enforcement officers were not reluctant to enforce the law.[235] Furthermore, testimony showed that state and local officials in many areas of the country had prosecuted the protesters effectively.[236] Even so, no case law exists for the proposition that failure to enforce state law constitutes a violation of section one's substantive due process requirements. If the Court found such activity to be a violation, section five appears only to give Congress the authority to prevent the state from violating section one—that is, to prevent the state from refusing to enforce the state law, not to implement its own regulations directed at the protesters.

B. A Stronger Nexus

If the FACE Act failed under the Commerce Clause and the Fourteenth Amendment, Congress could remedy the law by drafting a new act with a nexus requirement linking the regulated activity, through case-by-case inquiry, to interstate commerce.[237] For instance, Congress could prohibit crossing or conspiring across state lines with intent to obstruct access to a reproductive health facility.[238] Such a clause would address the real concern of the legislation—that of hundreds of "professional" protesters descending upon a local clinic, overwhelming the local justice system. At the same time, however, such a statute would allow local authorities to govern local protests.

C. Surrender to the States

The final alternative would be for Congress to abandon the FACE Act altogether and allow the states to handle the regulation of this matter. State and local laws of trespass, assault, murder, and arson are adequate to deal with the problems addressed by the FACE Act. Some states have enacted their own statutes similar to the

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234. Senate Report at 19 (cited in note 122).

235. Freedom of Access to Clinic Entrances Act of 1993, H.R. Rep. No. 103-306, 103d Cong., 1st Sess. 22-23, reprinted in 1994 U.S.C.C.A.N. 699, 717-18 ("House Report").

236. Id. Police in Wichita, Kansas, arrested 2,700 people at a demonstration; officials in Buffalo, New York, arrested 500. Id.

237. See *Lopez*, 115 S. Ct. at 1631 (acknowledging the efficacy of such a case-by-case jurisdictional requirement).

238. See Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life after* Lopez, 46 Case W. Res. L. Rev. 801, 812 (1996) (suggesting that Congress could have "prohibited crossing state lines with intent to possess a firearm in a school zone" to cure the Gun-Free School Zones Act).

FACE Act, specifically proscribing obstructing access to health care facilities.[239] Other states address these concerns through criminal trespass laws[240] or by finding civil contempt for violating injunctions or restraining orders.[241] If state and local law enforcement officers are overwhelmed by demonstrators, they have independent statutory authority to request federal reinforcements.[242]

This discussion raises larger normative questions of whether the criminal law should be primarily a state or federal concern. Historically, criminal law has been considered to be almost exclusively within the states' domain.[243] More recently, the increased mobility of criminals, accompanied by the expansion of the Commerce Clause, has led to a great growth in the scope of federal criminal

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239. See, for example, Cal. Penal Code § 602.11 (West, 1996 Supp.); Kan. Stat. Ann. § 21-3721(2) (1995); Mass. Gen. Laws Ann. ch. 266, § 120E (West, 1996 Supp.); N.C. Gen. Stat. § 14-277.4 (Michie, 1995); Wis. Stat. § 943.145 (West, 1996).

The Massachusetts statute provides:

> Whoever knowingly obstructs entry to or departure from any medical facility or who enters or remains in any medical facility so as to impede the provision of medical services, after notice to refrain from such obstruction or interference, shall be punished for the first offense by a fine of not more than one thousand dollars or not more than six months in jail . . . , and for each subsequent violation of this section by a fine of not less than five hundred dollars and not more than five thousand dollars or not more than two and one-half years in jail . . . .

Mass. Gen. Laws Ann. ch. 266, § 120E.

240. For example, Connecticut makes "obstructing free passage" a class C misdemeanor, Conn. Gen. Stat. Ann. § 53a-182a (West, 1994), punishable by imprisonment not to exceed three months, id. § 53a-36, and a fine not te exceed $500, id. § 53a-4z. Similarly, Connecticut defines criminal trespass in the third degree as a class C misdemeanor: "A person is guilty of criminal trespass in the third degree when, knowing that he is not licensed or privileged to do so: (1) He enters or remains in premises which are posted in a manner prescribed by law or reasonably likely to come to the attention of intruders . . . ." Id. § 53a-109(a).

241. See, for example, Ohio Rev. Code Ann. § 2727.11 (West, 1994) (granting a court the authority to enforce an injunction or restraining order under the court's contempt powers); id. § 2727.12 (imposing a fine of not more than $200 and restitution to the injured party for the breach of an injunction).

242. Justice Kennedy summarized this possible source of federal reinforcement in his *Bray* concurrence:

> Should state officials deem it necessary, law enforcement assistance is authorized upon request by the State to the Attorney General of the United States, pursuant to 42 U.S.C. § 10501. In the event of a law enforcement emergency as to which "State and local resources are inadequate to protect the lives and property of citizens or to enforce the criminal law," § 10502(3), the Attorney General is empowered to put the full range of federal law enforcement resources at the disposal of the State, including the resources of the United States Marshals Service . . . .

506 U.S. at 287-88 (Kennedy, J., concurring).

243. See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L. J. 1135, 1139 (1995) (describing how "[n]arrowly drawn federal crimes were tailored to provide protections in matters of direct federal interest or matters that the states were powerless to address—theft from a federal bank by a bank employee, arson on a federal vessel outside of any state's jurisdiction, immigration and customs offenses, tax fraud, and smuggling") (citations omitted).

law.[244] Today, federal criminal law prohibits carjacking,[245] drive-by shootings,[246] and domestic violence.[247] Congress is now well practiced at federalizing state law crimes, usually making the penalties more severe. This urge to "get tough on crime" has overwhelmed congressional federalism concerns.[248] Chief Justice Rehnquist himself has warned that the federalization of crime threatens to overwhelm the federal court system.[249]

Stronger penalties for federal crimes give prosecutors the choice of whether to choose a less severe or more severe punishment for the same act.[250] The harsher state regulations punish trespassers by imprisonment of up to one year and a fine of up to $1,000.[251] Such penalties do not begin to approach the FACE Act penalties for nonviolent obstructors: up to six months in prison and a $10,000 fine for the first offense and up to eighteen months and $25,000 for subsequent offenses.[252] This consequence of federalization raises problems of arbitrary punishments because a government official may prosecute under a more severe federal statute or a less severe state statute without explanation.[253] It also results in a loss of democratic accountability. State and local officials are not held accountable for main-

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244. Id. at 1141-45 (describing the development of federal criminal jurisdiction).

245. 18 U.S.C. § 2119 (1994 ed.).

246. Drive-By Shooting Prevention Act of 1994, 18 U.S.C. § 36 (1994 ed.).

247. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40221, 108 Stat. 1926-27, codified in 18 U.S.C. § 2261 (1994 ed.).

248. See Lawrence M. Friedman, *Crime and Punishment in American History* 274 (BasicBooks, 1993).

249. *Chief Justice's 1993 Year-End Report Highlights Cost-saving Measures*, Third Branch 1, 3 (Jan. 1994). Federal district court judges have brought similar concerns:

> At every meeting of federal judges that I attend there is the complaint that the Congress is broadening federal jurisdiction to the point where we are unable to do our jobs. The historically unique and discrete jurisdiction of the Federal Courts is being distorted. The constant lament is that the constitutional concept of Federalism is being eviscerated by the Congress.

United States v. Cortner, 834 F. Supp. 242, 244 (M.D. Tenn. 1993), rev'd, *United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994). Judge Wiseman said federal jurisdiction has expanded "only because we in the judicial branch are willing to interpret the Commerce Clause of the Constitution so broadly." Id. at 244.

250. It is the practice of the Southern District of New York to designate one day per week as "federal day" for drug crimes. Brickey, 46 Hastings L. J. at 1159 (cited in note 243).

251. See, for example, Fla. Stat. Ann. § 810.09 (West, 1994) (providing that trespass on property "other than a structure or conveyance" is a misdemeanor of the first degree, punishable by up to one year in prison, Fla. Stat. Ann. § 775.082(4)(a) (West, 1994), and a $1,000 fine, id. § 775.084(1)(d)).

252. 18 U.S.C. § 248(b)(2).

253. See Brickey, 46 Hastings L. J. at 1159-60 (cited in note 243) (discussing the implications of this choice in the area of drug crimes).

taining appropriate sentencing because Congress steps in to improve the law.[254]

Transforming state crimes to federal offenses through the use of the Commerce Clause has a detrimental effect on the balance of power between federal and state governments. While the *Lopez* Court has shown no sign of retreating from this basic element for federal crimes, Congress should reexamine its philosophy of making crime a federal concern. The concerns of the FACE Act are better addressed by state criminal law.

VI. CONCLUSION

Lopez calls for a return to some restrictions on the Commerce Clause. While the *Lopez* Court did not completely abandon the post-New Deal expansive Commerce Clause, it did resist the notion that the Commerce Clause may be used to regulate any and all activities having an effect on interstate commerce. Under *Lopez*, the FACE Act should be struck down because it implies an unlimited federal commerce power. The fact that it has been almost universally upheld reflects the reluctance of the judiciary to question the linchpin upon which so much federal legislation hangs. The courts are also reluctant to overturn a law that furthers an important policy objective—eliminating obstruction and violence at abortion clinics. Indeed, the success of the law in achieving a reduction in the number of violent incidents at these clinics[255] would convince many of the need to affirm its constitutionality. Nevertheless, such an approach ignores the importance of our federal structure. Federalism concededly sacrifices some efficiency in order to protect individual liberty, but like the Gun-Free School Zones Act, the FACE Act regulates activity that can be adequately addressed by state law.

Lopez reminds us that the courts play an important institutional role in policing the federal/state boundary. It is precisely the function of the courts to determine whether the federal government

254. Brickey, 46 Case W. Res. L. Rev. at 841-42 (cited in note 238) (noting that the National Association of Attorneys General and other state organizations have "expressed serious concerns about the rampant centralization of power, particularly police power, in the federal government").

255. A recent study by the National Abortion Federation shows that "violent protests at abortion clinics have decreased sharply in the 28 months since Congress" passed the FACE Act. Robert Pear, *After New Law, Abortion-Clinic Protests Fall*, N.Y. Times D25 (Sept. 24, 1996) (reporting that "there had been fewer than 400 incidents of violence and disruption this year, down from 1,815 in all of 1995, 1,987 in 1994 and 3,429 in 1993").

has the authority to enact a given statute. Upholding commerce clause legislation with only remote links to interstate commerce lends judicial endorsement to the expansion of the federal government's jurisdiction.

Whether or not courts follow *Lopez*'s call for realistic limits to the commerce power, Congress should assume a more responsible role in protecting federalism. Congress should examine more carefully whether a problem can be handled by the states or whether it requires a national solution. The reflexive use of case-specific jurisdictional requirements may be a particularly tempting way to federalize criminal law under *Lopez*'s interpretation of the Commerce Clause. By nationalizing criminal regulations that can be adequately handled by state and local authorities, Congress has enlarged federal power at too great an expense to federalism.

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