Beautiful Winds of Change: Do Bush's Recent Supreme Court Appointees Mean the End of Face?

Mattei Radu
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On May 26, 1994, President Clinton signed into law the Freedom of Access to Clinic Entranceways Act (“FACE” or “Act”).1 FACE made it a federal crime to prevent persons from going into an abortion facility.2 As a result, there was a substantial decrease in pro-life direct action, particularly rescue.

During the confirmation of Chief Justice Roberts and Justice Alito, both sides of the abortion controversy focused on whether either would vote to overturn the Supreme Court’s decisions in Roe v. Wade and Planned Parenthood v. Casey.3 In sharp contrast, pro-life and pro-abortion forces seem largely to have failed to notice the effect the two new jurists might have on the ability of pro-life citizens to vigorously and effectively protest abortion.4 Nevertheless, there is evidence that both Roberts and Alito share a narrow Commerce Clause philosophy, which is at odds with FACE.5

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4. At one point before his confirmation, NARAL Pro-Choice America ran an advertising campaign, which they were eventually forced to drop, “that tried to portray Mr. Roberts as ‘supporting violent fringe groups’ and excusing ‘violence against other Americans’ because he once defended the legal right of a convicted bomber to protest outside an abortion clinic.” David D. Kirkpatrick, Abortion Rights Group Revamps Anti-Roberts Ad, N.Y. TIMES, August 27, 2005, at A11. However, NARAL’s justification for running the ad apparently had nothing to do with the danger Roberts might pose towards FACE if he was confirmed.
Taking into account the track records of certain long-standing members of the Supreme Court, as well as the recent changes in the composition of the Court, the pro-life community’s hope that FACE will be invalidated might actually be realized.

This article begins by looking at the basic underlying principles of the Commerce Clause, which are essential to understanding how and why the Roberts Court might find FACE unconstitutional. Next it looks at the Act, both as it is written and as it has been interpreted by the lower federal courts. This section also covers the various constitutional challenges that have been mounted against FACE, with particular emphasis on the debate surrounding the question of whether the Act was validly enacted under Congress’s Commerce Clause power. Finally, this article considers whether the addition of Chief Justice Roberts and Justice Alito to the Supreme Court will result in the invalidation of FACE.

I. THE COMMERCE CLAUSE

The Constitution provides that Congress has the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” While this power is generally viewed as broad, the Supreme Court has laid out certain relevant parameters. According to NLRB v. Jones & Laughlin Steel Corp., the activities which are regulated must have a substantial effect upon interstate commerce—though the effect need not be direct—and the Congressional legislation can touch nominally intrastate activities. As the Court stated, “[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”

In Wickard v. Filburn, the Court clarified that while an individual’s actions may only minimally affect interstate commerce, he is not exempt from federal regulation where “his contribution, taken together with that of many others similarly situated, is far from trivial.” This legal theory is known as the aggregation principle or the cumulative impact doctrine, “under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce.”

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7. 301 U.S. 1 (1937).
8. Id. at 37.
10. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 191 F.3d 845, 850 (7th Cir. 1999).
In the 1990s the Rehnquist Court placed further restrictions on Congress’s Commerce Clause power. According to U.S. v. Lopez, in addition to the substantial effects requirement, the activity being regulated must be economic in nature for the law to pass constitutional muster. In finding the statute in question unconstitutional, Chief Justice Rehnquist noted that “[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.” The Lopez decision signaled the Court’s willingness to inquire into congressional purpose. Additionally, the Court seemed to be concerned about the implication of the government’s rationale:

The Government admits, under its “costs of crime” reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government’s “national productivity” reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of [the statute], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if 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.

In summarizing why the statute at issue in Lopez exceeded Congress’ Commerce power, the Court stressed that the Gun-Free School Zones Act: [i]s a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms . . . [the statute] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

The Court’s willingness to enforce its Commerce Clause standards continued in U.S. v. Morrison. The Morrison Court held that the Violence

13. Id. at 551.
14. See id. at 562 (“Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce . . . the Government concedes that ‘[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.’”).
15. Id. at 564.
16. Id. at 561.
Against Women Act—a statute granting federal relief for those subjected to violence because of their sex—was unconstitutional. 18 The Court reasoned that “a fair reading of Lopez shows that the noneconomic [sic], criminal nature of the conduct at issue was central to our decision in that case” 19 and that “our decision in Lopez rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated.” 20 In striking down the law, the Court stated:

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic [sic] activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. 21 The Court stressed,

[we] accordingly reject the argument that Congress may regulate noneconomic [sic], violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce . . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. 22

Chief Justice Rehnquist pointed out, “[l]ike the Gun-Free School Zones Act at issue in Lopez, [the statute in Morrison] contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce.” 23 The Court also noted that congressional findings, by themselves, do not make a regulation constitutionally licit under the Commerce Clause. 24

II. FREEDOM OF ACCESS TO CLINIC ENTRANCEWAYS ACT

FACE provides considerable challenges to pro-life rescues, both in its statutory language and how it has been interpreted by courts. Enacted in 1994, FACE punishes anyone who:

[b]y 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 because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . . 25

18. Id.
19. Id. at 610.
20. Id. at 612.
21. Id. at 613.
22. Id. at 617-18.
23. Id. at 613.
24. Id. at 614.
25. 18 U.S.C.A. § 248(a) (1).
If a rescuer is charged criminally for violating the Act, he faces up to a $10,000 fine or as much as six months in jail, or both—penalties are harsher for subsequent violations. Courts are divided as to whether defendants are entitled to a trial by jury in a criminal FACE case. Courts have shown both mercy and harshness in applying FACE. Additionally, if a rescuer faces a civil judgment under FACE, he could be liable for $5,000. The civil suit avenue is also available to the United States Attorney General, who may collect $10,000 in money damages for an initial rescue and $15,000 for any subsequent rescues. Federal courts seem to be in agreement that the defendants are liable for the statutory damages in aggregate. To that effect, if a group of pro-life rescuers was sued by a private party for violating the Act, they would collectively have to pay a $5,000 penalty for each rescue they carried out, plus additional costs.

III. FACE AND THE COMMERCE CLAUSE

There have been a number of unsuccessful challenges to the constitutionality of FACE. Its challengers have alleged that the Act violates several provisions of the Constitution, including the Commerce Clause. However, the Fourth, Sixth, Seventh, and Eighth Circuits,

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26. See 18 U.S.C.A. § 248(b) ("[a]nd the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense.").
27. See U.S. v. Unterburger, 97 F.3d 1413, 1416 (11th Cir. 1996) (holding that two rescuers were not constitutionally entitled to trial by jury). But see U.S. v. Lucero, 895 F. Supp. 1419, (D. Kan. 1995) ("Nevertheless, the court believes the Tenth Circuit Court of Appeals would hold that the defendants in this case are entitled to a trial by jury, and this court agrees that it is better to err on the side of preserving the right to a jury trial.").
28. In U.S. v. Lynch, two rescuers faced a criminal contempt conviction for breaking the provisions of the Act. However, the court responded to such a possibility in the following way: The Court finds both Lynch and Moscinski to be not guilty of criminal contempt. Not only does their sincere religious belief render their conduct lacking in the willfulness which criminal contempt requires, but also, the nature of that conduct, which is purely passive as the videotape shows, and which is at the outermost limits of expressive conduct that is not constitutionally protected, is so minimally obstructive as to justify the exercise of the prerogative of leniency. The charge is therefore dismissed, 952 F. Supp. 167, 172 (S.D.N.Y. 1997). Conversely, in U.S. v. Mahoney, the court found sufficient evidence of a FACE violation. 247 F.3d 279 (D.C. Cir. 2001). In that case, the direct action activity consisted of the following: one pro-lifer obstructing an emergency exit that was not customarily used by abortion staff or customers by kneeling and praying three feet from the door, others "[kneeling] or [sitting] within five feet of the south door, the main entrance to the [abortion facility]," and one final pro-life advocate "[pacing] just behind them." Id. at 283.
34. See, e.g., Planned Parenthood Ass’n of Southeastern Pa., Inc. v. Walton, 949 F. Supp.
among others, have ruled that Congress has acted within its Commerce Clause powers in enacting FACE. Nevertheless, the contention that the Act is an illicit application of Congress's Commerce Clause authority is perhaps the most likely to be accepted by the Supreme Court given its current configuration. This article will now review the main arguments for and against the validity of the Act under the Commerce Clause.

In Norton v. Ashcroft, the Sixth Circuit set forth the following argument:

Initially, we find that the Act regulates activity that has a direct economic effect. Express congressional findings underlying the Act plainly demonstrate that violent and obstructive acts directed at reproductive health facilities resulted in millions of dollars in damage, forced reproductive health clinics to close, delayed medical services, and intimidated numerous physicians from offering abortion services. While the activity prohibited by the Act might be motivated by non-commercial sentiment—namely, staunch moral opposition to abortion—the effect of this activity is unambiguously and directly economic. Thus, in our view, such conduct is properly considered commercial activity. Congress can properly counter such conduct with legislation pursuant to the Commerce Clause. In light of the extensive congressional findings regarding the economically disruptive effects of clinic blockades and anti-abortion violence, we find that a formal jurisdictional element is unnecessary because the proscribed

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290, 292 (E.D. Pa. 1996) ("it is defendants' contention that the Act violates the First, Eighth, Tenth, and Fourteenth Amendments and the Religious Freedom Restoration Act of 1993, and that Congress lacked the authority under the Commerce Clause to pass it.").

36. See Norton v. Ashcroft, 298 F.3d 547 (6th Cir. 2002).
37. See U.S. v. Soderna, 82 F.3d 1370 (7th Cir. 1996).
38. See U.S. v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996).
activity targets "reproductive health clinics that are, by definition, directly engaged in the business of providing reproductive health services." . . . Both the Senate Judiciary Committee and the House Committee on Labor and Human Resources submitted extensive reports detailing that clinic blockades and violent anti-abortion protests burdened interstate commerce . . . . Thus, in evaluating the constitutionality of the Act we are mindful of the informed judgment of our congressional counterparts . . . . Given the detailed congressional record, we are satisfied that Congress had a rational basis to conclude that the activities prohibited by the Act disrupted the national market for abortion-related services and decreased the availability of such services.41

Other courts have used the Commerce Clause to justify FACE. Finding that Congress had not overstepped its Commerce Clause boundaries, the court in Hoffman v. Hunt alleged that direct action activities had a substantial effect upon the interstate abortion market.42 In U.S. v. Soderna, the Seventh Circuit focused on the fact that the Act sought to remove serious hindrances to the free movement of goods and citizens across state borders.43 Additionally, in U.S. v. Hill, the court found that "there is a rational basis for Congress's determination that the activity the Act regulates affects interstate commerce . . . . [and] the Act is a reasonable means of addressing the problems identified by Congress."44

Furthermore, in U.S. v. Gregg, the Third Circuit decided that FACE meets the substantial effects requirement for valid Commerce Clause legislation.45 The court specifically distinguished FACE from the statute at issue in Morrison: "[I]n contrast to gender-motivated crime, the activity regulated by FACE . . . is activity with an effect that is economic in nature. Reproductive health clinics are income-generating businesses that employ physicians and other staff to provide services and goods to their patients."46 The Gregg court submitted that the main aim of pro-lifers violating FACE was to disrupt the operations of abortion facilities and prevent potential customers from buying their services.47 The Gregg court supported its conclusion by citing congressional studies finding rescuers' activities had resulted in substantial monetary damage, abortion facility closings, delayed abortions, and the refusal of abortionists to commit abortions.48 The court concluded:

41. 298 F.3d at 556-59 (citations omitted).
42. 126 F.3d at 582-89. In holding that FACE was a licit exercise of Congress’s Commerce Clause power, it seems as if Riely v. Reno even alluded to the antiquated “stream of commerce” theory. 860 F. Supp. 693, 707 (D. Ariz. 1994).
43. See 82 F.3d at 1373-74. According to the court, “The fact that the motive for the Freedom of Access to Clinic Entrances Act was not to increase the gross national product by removing a barrier to free trade, but rather to protect personal safety and property rights, is irrelevant.” Id at 1374.
44. 893 F. Supp. 1034, 1037 (N.D. Fla. 1994).
45. 226 F.3d 253, (3d Cir. 2000).
46. Id. at 262.
47. Id.
48. Id.
The effect of the conduct proscribed by FACE is to deter, and in some cases to stop completely, the commercial activity of providing reproductive health services. We thus hold that although the connection to economic or commercial activity plays a central role in whether a law is valid under the Commerce Clause, we hold that economic activity can be understood in broad terms. Pursuant to this principle, unlike the activity prohibited by VAWA, the misconduct regulated by FACE, although not motivated by commercial concerns, has an effect which is, at its essence, economic.

In an Eighth Circuit case, *U.S. v. Dinwiddie*, the court asserted, "if Planned Parenthood of Greater Kansas City, its staff, or its patients are 'in interstate commerce,' FACE's protection of them from Mrs. Dinwiddie's disruptive activities is a valid exercise of the commerce power." The court submitted that this condition was satisfied, and that therefore the Act was licit under the Commerce Clause. "Planned Parenthood has a number of patients and staff who do not reside in Missouri and who, therefore, engage in interstate commerce when they obtain or provide reproductive-health services." Additionally, the court noted a significant amount of women travel between states to procure abortions, pointing out that the abortion facility in question was situated in a metropolitan area spread out over more than one state. Finally, the court defended the constitutionality of the Act by contending, "[I]n addition to having the power to protect those of Planned Parenthood's staff and patients who are 'in interstate commerce,' Congress also has the power to protect Planned Parenthood." A recent federal district court case finding FACE unconstitutional is *United States v. Bird* (*Bird II*). *Bird II* 's rationale, as well as the dissent issued upon *Bird II* 's appellate reversal in *Bird III*, serve as examples for finding the Act violates the Commerce Clause. In *Bird II*, the district court held that, in enacting FACE, Congress had overstepped the bounds of its Commerce Clause authority. Specifically, it found that the Act focused on activity that was both non-economic and intrastate in nature, which *prima facie* is not allowed under the Commerce Clause. Additionally, the court held that the Act failed to satisfy the substantial effects test, which

49. *Id.*
50. 76 F.3d at 919.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. 279 F. Supp. 2d 827. The defendant in *Bird II* was Frank Lafayette Bird, who was charged with violating face when he allegedly used an automobile to damage a Planned Parenthood facility in Houston, Texas. This case is referred to as "*Bird I*" because the defendant, Frank Lafayette Bird had previously been found to have violated FACE in 1994, when he threw a bottle at an abortionist's car as he attempted to enter a Houston area abortion facility. *See United States v. Bird*, 124 F.3d 667 (5th Cir. 1997) (known as *Bird I*).
56. *Bird III*, 401 F.3d at 634 (DeMoss, dissenting).
legitimizes congressional action that might otherwise be considered the province of the states.\textsuperscript{58}

As a preliminary matter, the court pointed out that “while the abortion business is economic in nature, the conduct of Bird and the activities sought to be circumscribed are not.”\textsuperscript{59} It also noted that, ironically, pro-life activism had in fact helped interstate commerce. Normally, abortion is an intrastate activity, however, Congress found “that doctors and patients travel from state to state because of anti-abortion activities.”\textsuperscript{60} Thus, rescues helped create an interstate market for a service that would otherwise have remained intrastate; they decidedly did not obstruct interstate commerce.\textsuperscript{61} The district court concluded that “the aggregation analysis does not support a reverse impact on interstate commerce, which commerce is not illegal.”\textsuperscript{62}

Next, the district court dismissed the idea that an activity is interstate in nature merely because economic activity goes on inside an abortion facility, nor did pro-life activism become interstate because it occurred around such a facility.\textsuperscript{63} Instead, the court concluded that “[t]he fact that a person may travel across state lines to an abortion clinic for convenience, privacy or availability, does not alter the fact that the activity [i.e. a rescue] is intrastate and has, at most an insubstantial or attenuated affect on interstate commerce.”\textsuperscript{64} The court explicitly denied Congress the right to decide whether a specific activity passes the substantial effects test.

The district court was also persuaded by the fact that FACE did not contain “an express jurisdictional element,” which would have limited the application of the statute to those persons “whose activities would have an explicit connection with or effect on interstate commerce.”\textsuperscript{65} This factor figured in the Supreme Court’s reasoning in United States v. Lopez.\textsuperscript{66} Furthermore, the Act was not designed to regulate some bigger economic activity which is itself crucial to interstate commerce.\textsuperscript{67} Additionally, the court found salient that FACE’s goal was “at most a general regulatory

\textsuperscript{58} Bird II, 279 F. Supp. 2d at 836. The district court stressed that “Even if the activities prohibited by [FACE] are considered under the aggregation theory, it does not strengthen the relationship between the statute’s prohibitions and the Commerce Clause . . . . Here, as in Lopez and Morrison, the analysis consists of too many inferences and leaps in constitutional logic to reach congressional authority to regulate this activity under the Commerce Clause.” Id at 831 n.7.
\textsuperscript{59} Id at 829 n.4.
\textsuperscript{60} Id at 835.
\textsuperscript{61} Id at 836 (“Specifically, there is no interstate economic market for abortion clinic services except that identified as created by anti-abortionist [sic]; and congressional findings do not support a different conclusion.”).
\textsuperscript{62} Id at 835.
\textsuperscript{63} Id at 836.
\textsuperscript{64} Id. Hoyt made the further point that “there is no defined interstate criminal activity. All of the activity occurs within state lines.” Id.
\textsuperscript{65} Id.
\textsuperscript{66} 514 U.S. 549.
\textsuperscript{67} Bird II, 279 F. Supp. 2d at 837.
purpose that fails to establish any substantial relationship to a commercial activity." The district court summarized:

The regulated activity is noneconomic criminal conduct that is allegedly perpetuated at a local level. While doctors and abortion clinics engage in commerce at some level, that commerce was not the object of Congress’ regulatory purpose. As observed earlier, enforcement of the Act has the effect of reducing interstate commerce activity. Certainly, Congress has passed legislation before that might arguably have as its purpose the reduction of interstate commerce activity. However, such as it was, the legislation was generally designed to prevent interference in or with Congress’ regulation of a larger economic activity. Here, there is no larger regulated economic activity. In fact, there is no evidence in Congress’ findings that the Houston clinic ever served anyone outside the boundaries of the city of Houston. Moreover, the government conceded in [Bird’s first FACE case] that there was no rational basis for finding that anti-abortion activities substantially affected interstate commerce, except by aggregation.

Finding FACE unconstitutional, the district court ordered the government's indictment against Bird be dismissed with prejudice.

In the wake of Bird II, the government appealed the decision to the Fifth Circuit. In 2005 the Fifth Circuit vacated the district court’s decision only insofar as it struck down the Act. In a brief opinion, written by Judge Garza, the court ruled that “[w]e do not find that the Supreme Court’s decision in Morrison materially affects our holding in Bird I. Our decision in that case is therefore binding.” The court pointed out that, after Morrison, both the Third Circuit in Gregg and the Sixth Circuit in Norton, had also concluded that FACE was a valid exercise of Congress’s Commerce Clause power. No circuits have sided with the view that the Morrison ruling invalidated the Act. The appellate court found it immaterial that Bird I and Bird III dealt with different subsections of

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68. Id.
69. Id.
70. Bird III, 401 F.3d at 634.
71. This fact is perhaps especially surprising considering that Judge Garza has been mentioned as a possible “pro-life” candidate for the Supreme Court. See Steven Ertelt, President Bush Looking Into Possible Supreme Court Picks, LifeNews.com (May 30, 2005), http://www.lifenews.com/natl1352.html (May 30, 2005) (last visited Jul. 22, 2005). Garza has criticized the Supreme Court’s approach to abortion in previous cases. See Sojourner T v. Edwards, 974 F.2d 27 (5th Cir. 1992) (Garza, concurring); Causeway Medical Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997) (Garza, concurring). If he is indeed “pro-life,” it makes Bird III all the more frustrating for pro-life direct action participants, considering that the case was decided 2-1 and a pro-life result could have certainly been derived through plausible legal analysis.
72. Bird III, 401 F.3d at 634.
73. Id. at 634 n.1. This fact was not convincing to the dissent: “While the Government may be correct in its argument that each circuit court to have addressed this issue has upheld FACE as a constitutional exercise of Congress’s powers under the Commerce Clause, it is critical to point out that only two circuits have engaged in such an analysis post-Morrison.” Id. at 634 n.1 (DeMoss, dissenting).
FACE. The court vacated and remanded *Bird II* so it could be decided according to the principles laid down by *Bird III*.

Judge Harold R. DeMoss, Jr., who had refused to join in *Bird I*’s ruling that the Act is constitutional, again issued a strong dissent in *Bird III*. He stressed that the activity criminalized by the Act is intrastate, noneconomic, and non-commercial in nature. He also noted that Congress admitted that there are state criminal laws that effectively cover FACE-type activity. Judge DeMoss charged that “[b]ecause Congress does not have a general police power; it surely cannot have the authority to define as criminal conduct under federal law private acts that are intended to interfere with another person’s exercise of some constitutional right . . .”

The dissent next responded to the claim that “criminal, intrastate activity [that] is neither commercial nor economic in nature . . . can be aggregated in order to create a substantial effect on interstate commerce.” Judge DeMoss viewed this argument as the crux of *Bird I*. He argued that *Bird I* was in fact invalidated by *Morrison*, since, in that case, the Supreme Court ruled that “aggregation of noncommercial, criminal” intrastate conduct is not allowed as a valid Commerce Clause contention. The dissent also believed that *Morrison* rendered FACE unconstitutional. Judge DeMoss’ dissent closed with a searching critique of the majority’s position:

In sum, FACE, as interpreted now in light of *Morrison*, represents another effort by Congress to dismantle the federalist foundation upon which this country was designed to function. The regulation of purely intrastate, noneconomic, noncommercial criminal activity that is not essential to a broader regulatory scheme surely cannot be within Congress’s purview. To uphold the constitutionality of this statute in the face of the teachings provided by *Lopez* and *Morrison* not only ignores the precedents established by both of these decisions, but also essentially grants to Congress the unfettered authority to govern in areas the Framers contemplated would be regulated only by the states. Because I believe the Constitution and the Supreme Court disallow the result reached by the majority’s holding, I respectfully dissent.

In his dissent to the Third Circuit’s decision in *Gregg*, Judge Weis addressed the fact that the lower federal courts have overwhelming found
FACE constitutional and indicated the significance of *Morrison* to this factual pattern: “Although the Courts of Appeals opinions considered *Lopez*, they essentially treated it as a narrow holding that did not affect measures such as FACE. Doubts that *Lopez* had application beyond its unique factual setting, however, were dissipated by the expansive holding in *Morrison*.85 He also made the point that, while an abortion facility is indubitably involved in commerce, as demonstrated by the money transactions that take place within its walls, the actors targeted by the Act are by the very terms of the regulation external to the facility’s operations.86 “Although blockades may reduce a clinic’s revenue, the prohibited conduct is fundamentally criminal in nature and does not fit easily within the category of commercial activity. The fact that criminal conduct may also have financial effects does not transform that activity into one commercial in nature.”87 Citing *Morrison*, Judge Weis reminded his fellow judges that the nature of the regulated conduct is ascertained by an analysis of the conduct itself, not by outside factors such as economic effect, which are a degree removed from the legislation’s focus.88

The dissent also criticized the congressional findings associated with FACE as a source of the constitutionality of the Act:

As the basis for concluding that blockades have a substantial effect upon interstate commerce, Congress reasoned that obstructions that deter patients from going to a clinic caused diminished business for the enterprise. In some cases, when clinics closed, women were required to travel, perhaps interstate, to obtain the services of another establishment. This is the very same “but-for causal chain” of logic that the Court explicitly rejected in *Morrison*. If every attenuated effect upon interstate commerce stemming from an occurrence of violent crime satisfied the substantial effects test, then Congress could “regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.” . . . The opinions of the Courts of Appeals that have upheld FACE all rely heavily on the legislative history for concluding that a substantial effect on interstate commerce existed . . . But these decisions are undercut by *Morrison*. With the asserted justifications constitutionally infirm, the legislative history does little to demonstrate a reasonable congressional judgment that the prohibited activity substantially affects interstate commerce.89

85. *Gregg*, 226 F.3d at 268 (Weis, dissenting).
86. *Id.* at 269-70 (Weis, dissenting).
87. *Id.* at 270 (Weis, dissenting) (“Murder and robbery have monetary consequences, but that does not transform criminal codes into commercial regulation.”).
88. *Id.* (Weis, dissenting).
89. *Id.* at 271-72 (Weis, dissenting). Others have contended that certain parts of the congressional findings were factually incorrect. “Congress claimed FACE was needed because there was a nationwide conspiracy to commit violence against abortion providers . . . . However, the federal government itself found no evidence of such a conspiracy.” *PLF Brief, supra* note 42, at 17.
IV. OTHER CONSTITUTIONAL MATTERS RELATING TO FACE

In addition to the Commerce Clause challenges to FACE, the Act has also been confronted on other constitutional grounds. The court in *U.S. v. McMillan* concluded that Section 5 of the Fourteenth Amendment provided the necessary authorization for Congress’s passage of the Act.\(^9\) Federal courts have held FACE valid, despite claims that it violates the Equal Protection Clause of the Fourteenth Amendment,\(^9\) the Eight Amendment’s proscription of cruel and unusual punishment\(^9\) and excessive fines,\(^9\) and the Free Exercise Clause of the First Amendment.\(^4\) In *U.S. v. Unterburger*, the Eleventh Circuit ruled that the Act did not run into Tenth Amendment trouble.\(^9\) In *Hoffman*, the Fourth Circuit Court of Appeals rejected an argument that FACE violated the First Amendment free speech rights of pro-life activists.\(^9\) In *U.S. v. Weslin*, the court reached the same conclusion: “Many courts have noted that the Act furthers several important or substantial governmental interests. . . . FACE is also unrelated to the suppression of free expression. . . . I also find that the incidental restrictions imposed by FACE on First Amendment freedoms are sufficiently narrow.”\(^9\)

Furthermore, the Seventh Circuit found that FACE was not unconstitutionally vague,\(^9\) while the D.C. Circuit Court dismissed a charge

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\(^{91}\) See *U.S. v. Brock*, 863 F.Supp. 851, 861 n.19 (E.D. Wis. 1994), aff’d, 82 F.3d 1370 (7th Cir. 1996) (“[O]n its face, the statute applies equally to activities directed at the patients and staff of abortion clinics and the patients and staff of centers that counsel women against abortion and in favor of its alternatives.”). In *Riely*, the court stated that “Moreover, even if *Mosley* was applicable in this case and a heightened standard of scrutiny was to be applied, the Court finds that FACE is narrowly tailored and that, in light of its legislative history, its objectives are legitimate. Consequently, Plaintiffs’ Fifth Amendment claim must fail.” 860 F. Supp. at 706.

\(^92\) See *Riely*, 860 F. Supp. at 706. In *Riely*, the court submitted the following:

The Court finds that the harshness of the penalties provided is commensurate with the gravity of the proscribed conduct. The Court also notes that the federal criminal code contains numerous comparable penalty provisions for crimes involving threats of violence and the infliction of bodily injury. Finally, the Court finds it important that FACE affords a sentencing court much discretion in determining the actual sentence imposed.

*Id.*

\(^93\) See *Walton*, 949 F. Supp. at 294.

\(^{95}\) 97 F.3d at 1415 (citing *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995)).
\(^{96}\) 126 F.3d at 588-89.
\(^{97}\) 964 F. Supp. at 86.

\(^{98}\) See *U.S. v. Balint*, 201 F.3d 928, 935 (7th Cir. 2000) (dismissing idea that Act does not provide adequate warning that Act’s proscription applies to rescues that commence both before and after abortion facility opens); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422, 1429 (S.D. Cal. 1994) (“[N]ot only does FACE include specific definitions for such key terms as ‘intimidate,’ ‘interfere,’ and ‘physical obstruction,’ most of the operative words come from other statutes which the U.S. Supreme Court and other courts have construed and found not unconstitutionally vague.”). In *U.S. v. Scott*, the court found that FACE spoke “‘in clear, common words,’ [and] defin[ed] many of its terms so as to ‘inform those opposed to abortion that they will
that the Act was overbroad. In *U.S. v. Wilson*, the Seventh Circuit ruled that First Amendment protected speech was not illicitly targeted by FACE. In *U.S. v. Lucero*, in response to the contention that the "defendant engaged in expressive conduct, intended to communicate his view that legal abortion denies justice to the unborn," the court stated that "criminal conduct is not rendered protected speech in a given case merely because the actor intended to send a message, political or otherwise." *U.S. v. Dinwiddie* concluded that the Act was not "an impermissible content-based restriction on speech." Finally, in *Cook v. Reno*, the court did not find any merit in the contention that FACE was passed "to eliminate, or at least chill," pro-life direct action events. The Supreme Court has refused to hear any case concerning the constitutionality of the Act.

not offend this law by peaceful, non-obstructive [protest]." 958 F. Supp 761, 779 (D. Conn. 1997) (citing *American Life League, Inc. v. Reno*, 47 F.3d 642, 653 (4th Cir. 1995)).

99. *See Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996). In *Terry*, the court discarded the overbreadth argument that FACE "criminalizes 'threats' that the person who is uttering the 'threat' will harm himself if another person obtains or provides an abortion" and that its "definition of 'intimidation' would also include the 'harm' of increased medical risk—a harm abortion advocates claim is inherent in any delay or denial of abortion . . . ." Id. at 1421 (emphasis in original).

100. 154 F.3d 658, 662-63 (7th Cir. 1998).


102. *Dinwiddie*, 76 F.3d at 921; *see U.S. v. Brock*, 863 F. Supp. 851, 866 (E.D. Wis. 1994) ("In short, FACE is a content-neutral statute that (1) is narrowly tailored and (2) leaves anti-abortion protesters with ample alternative means of communicating their message . . . . it does not violate the First Amendment."). *Riely* asserted that:

The Court disagrees that FACE regulates protected speech or protected, expressive conduct. FACE merely regulates pure conduct (i.e., force or acts of physical obstruction that injure, intimidate or interfere with another's freedom of movement) and unprotected speech (i.e., threats). Plaintiffs have failed to cite, and this Court's own research has failed to find, any authority for the proposition that the First Amendment doctrine proscribing content- and viewpoint-based regulation applies to the regulation of such unexpressive conduct and unprotected speech.

860 F. Supp. at 700-01. In *Brock*, the court considered, and rejected, the following argument:

The defendants also object to FACE's reference to the reactions of listeners. In FACE, "'intimidation' is defined as that conduct which 'place[s] a person in reasonable apprehension of bodily harm to him- or herself or another." 18 U.S.C. § 248(e)(3). The defendants argue that, because this passage makes application of the statute depend on the impact of the communication on its audience, FACE is inherently content-based. I disagree. The "reasonable apprehension" language in FACE appears to be a reasonable attempt to limit application of the statute to "true threats."

863 F. Supp. at 857 n.7.

103. 859 F. Supp. 1008, 1010 (W.D. La. 1994); *see Soderna*, 82 F.3d at 1374-77 (rejecting argument that "the Act's real aim and likely effect are to deter the expression of a particular point of view, namely opposition to abortion"); *see also Walton*, 949 F. Supp. at 293 ("Given this, I am confident that Congress' purpose was not to discriminate against a particular idea, but to prohibit particular conduct.").

FACE has been subjected to a variety of policy-based criticisms. It is not the purpose of this paper to substantially review them. However, a basic understanding of these criticisms is instructive because it shows that the Act has been attacked even by those who do not fully support the idea of the pro-life rescue. This is demonstrated by the remarks of Michael W. McConnell, now a Judge for the Tenth Circuit, about *U.S. v. Lynch*, a criminal contempt FACE case:

It is utterly incredible that Lynch and Moscinski might be sent to prison for six months for praying in a driveway. If they had been in that driveway for some other reason (a labor dispute, for example), or if they had committed the same sort of protest at another kind of business (a fur store, for example, or a CIA recruiting office), they would have gotten off with a slap on the wrist, had they been punished at all. The Federal Access to Clinic Entrances Act singles out a particular kind of protest for penalties unheard-of in the history of American political protest movements. Lynch and Moscinski were not tried for the actual harm they caused. As Judge Sprizzo noted, the “obstructive” effect of their quiet protest was “minimal.” The prosecutor who sought to imprison Lynch and Moscinski was not asking for impartial justice, but for repression of political dissent. Lynch and Moscinski should have been punished for the acts they committed. They should not have been spared because their cause was just. But they also should not be punished more severely because their cause is unpopular. They should have been charged with trespassing on private property, and given the same punishment that is meted out to others who commit that offense in that jurisdiction with comparable damage. I’d guess a fifty-dollar fine would be about right.

V. WILL THE ROBERTS COURT INVALIDATE FACE?

In order to answer this important question, it is necessary to briefly review the relevant Supreme Court decisions affecting abortion protest. In 1988, the Court in *Frisby v. Schultz* considered the constitutionality of a Wisconsin town ordinance making it “unlawful for any person to engage in

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105. See e.g., Note, Safety Valve Closed: The Removal of Nonviolent Outlets for Dissent and the Onset of Anti-Abortion Violence, 113 HARV. L. REV. 1210 (2000) (suggesting a link between passage of FACE and killings of abortionists); Lynn D. Wardle, The Quandary of Pro-life Free Speech: a Lesson From the Abolitionists, 62 ALB. L. REV. 853, 885 (1999) (contending that the Act “has the potential to severely chill legitimate pro-life free speech”); DELAPENNA, supra note 35, at 804 (“In sum, proponents of abortion sought [through FACE and other means] to imprison or to ruin financially all with the temerity to oppose abortion through any means that might have some actual effect on the provision of the services.”).


picketing before or about the residence or dwelling of any individual.für The local municipal body enacted the law in response to the picketing of an abortionist's home by pro-life protestors. The pro-life protestors, after threats by the town of arrest and prosecution, challenged the ordinance on First Amendment grounds. Rejecting this challenge, Justice O'Connor summarized the Court's reasoning as follows:

Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample alternative channels of communication and is content neutral. Thus, largely because of its narrow scope, the facial challenge to the ordinance must fail.

In a 1993 case, *Bray v. Alexandria Women's Health Clinic*, the Supreme Court addressed the use of the Ku Klux Klan (KKK) Act by pro-abortionists against rescue groups. The issue addressed by the Court was "whether the first clause of Rev. Stat. § 1980, 42 U.S.C. § 1985(3)—the surviving version of § 2 of the Civil Rights Act of 1871—provides a federal cause of action against persons obstructing access to abortion clinics." The KKK Act specifically "provides, in pertinent part, that '[i]f two or more persons . . . conspire or go in disguise on the highway or . . . premises of another, for the purpose of depriving . . . any person or class of persons of . . . equal protection . . . or . . . privileges and immunities,' the injured party may recover ‘against any one or more of the conspirators.'" In an opinion written by Justice Scalia, the Court gave a clear answer:

Trespassing upon private property is unlawful in all States, as is, in many States and localities, intentionally obstructing the entrance to private premises. These offenses may be prosecuted criminally under state law, and may also be the basis for state civil damages. They do not, however, give rise to a federal cause of action simply because their objective is to prevent the performance of abortions, any more than they do so (as we have held) when their objective is to stifle free speech.

The Court's ruling deprived pro-abortion forces of one of the main weapons in the struggle against pro-life activists. While *Bray* significantly undercut pro-abortion efforts to secure access to federal courts, rescue cases decided under state law may give rise to federal jurisdiction under the legal

109. *Id.* at 476-77.
110. *Id.* at 477.
111. *Id.* at 488.
113. *Id.* at 266.
115. *Id.* at 286.
doctrine of pendent jurisdiction. Furthermore, federal courts disagree as to the proper interpretation of Bray. Some have outright dismissed KKK Act claims against rescuers, while others allow pro-abortion forces the chance to prove their case in light of what the Court stated in Bray. Thus, while the situation is not entirely clear, one can confidently say that it is now considerably more difficult, if not impossible, for pro-abortionists to bring a KKK Act cause of action pursuant to a rescue.

In the 1994 case, National Organization for Women, Inc. v. Scheidler (Scheidler I), the Court ruled that a RICO claim did not require an economic motive as to “either the racketeering enterprise or the predicate acts of racketeering . . . .” This decision allowed the National Organization for Women’s (NOW) suit to proceed against Scheidler and his

116. See, e.g., Women’s Health Care Serv., P.A. v. Operation Rescue, 24 F.3d 107, 110 (10th Cir. 1994). Pendent jurisdiction is “A court’s jurisdiction to hear and determine a claim over which it would not otherwise have jurisdiction, because the claim arises from the same transaction or occurrence as another claim that is properly before the court.” BLACK’S LAW DICTIONARY 856 (7th Ed. Bryan A. Garner ed., 1999).


The Supreme Court holding in Bray, supra, that section 1985(3) does not create a cause of action against persons blocking access to abortion clinics invalidates the section 1985(3) ground for the Injunction. Defendants argue that the Bray decision ousts this Court’s jurisdiction over the entire case. However, the principle of pendent jurisdiction preserves the Court’s continued jurisdiction over the injunction against D.C. law violations and sustains the Court’s power and duty to enforce its orders.

Id. at 731. While parts of this decision were later overruled, the jurisdictional conclusion quoted above was left untouched. See Nat’l Org. for Women, Inc. v. Operation Rescue, 37 F.3d 646, 651 (D.C. Cir. 1994).

119. See, e.g., Town of West Hartford v. Operation Rescue, 991 F.2d 1039 (2nd Cir. 1993). The court stated in relevant part:

To the extent that appellants are contending that Bray forecloses all resort to § 1985(3) in all instances involving “persons obstructing access to abortion clinics,” we think appellants have over-read what the Court announced. To be sure, the Court in Bray held, with respect to the animus ingredient of § 1985(3), that (1) women seeking abortions do not constitute a class protected by § 1985(3), and (2), if women in general constitute a class protected by the statute—a question the Court found no need to answer—“the claim that petitioners’ opposition to abortion reflects an animus against women in general must be rejected.” . . . But we are of the view that the Court’s analysis of the animus aspect of Bray is tied to the facts there adduced—“[t]he record in this case,” . . . “given this record.” . . . Accordingly, we think that an assessment of the animus aspect of the case at bar requires a further review, in the light of the legal principles relating to animus announced in Bray, of the record evidence bearing on appellants’ motivation.

In similar fashion, a determination of whether appellants intended to and did inhibit a right protected by § 1985(3)—either the Fourteenth Amendment abortion right, protected against the state; or the citizenship right to travel without public or private impediment—calls for scrutiny of the instant record through the prism of the Bray Court’s pronouncement that “impairment [of the right] must be a conscious objective of the enterprise.”

Id. at 1048 (citations omitted).

fellow pro-lifers. However, in 2003, in Scheidler v. National Organization for Women, Inc. (Scheidler III), the Court held: “[B]ecause we find that petitioners did not obtain or attempt to obtain property from respondents, we conclude that there was no basis upon which to find that they committed extortion under the Hobbs Act.” The Court went on to state:

Because petitioners did not obtain or attempt to obtain respondents’ property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed. The 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion. Because all of the predicate acts supporting the jury’s finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated. We therefore need not address the second question presented—whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964. The 8-1 ruling was generally viewed as a victory for pro-life activists. However, the Seventh Circuit Court of Appeals remanded the case to the district court level to resolve the following dispute:

On remand to this court, the parties submitted Statements of Position pursuant to Circuit Rule 54. Plaintiffs argue that, although the Court in [Scheidler III] disposed of the 117 extortion-based predicate acts under RICO, the defendants did not petition for a writ of certiorari on the four predicate acts involving “acts or threats of physical violence to any person or property” and, accordingly, the Court did not decide whether these acts alone could support the district court’s injunction. In response, defendants contend that the Hobbs Act does not outlaw “physical violence” apart from extortion and robbery, and therefore the Supreme Court’s holding that the defendants did not commit extortion precludes a finding that the four acts or threats of violence might independently support the injunction.

In response to petitions for rehearing and rehearing en banc, the Seventh Circuit affirmed its February 2004 decision.

121. See Nat’l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 694 (7th Cir. 2001) (Scheidler II).
123. Id. at 410-11.
126. Scheidler V, 396 F.3d at 817.
In 2005, the Supreme Court agreed to definitively answer the \( \text{Scheidler} \) \( V \)’s lingering questions. In an unanimous 8-0 decision (Justice Alito did not participate), Court held unequivocally “that Congress did not intend to create a freestanding physical violence offense in the Hobbs Act . . . The judgment of the Court of Appeals is reversed, and the cases are remanded for entry of judgment for petitioners.” This case ended any possibility of using civil RICO against pro-life protestors.

Since the 1994 enactment of FACE, the Court has decided three other cases that bear directly on pro-life activism. In \( \text{Madsen v. Women’s Health Center, Inc.} \) and \( \text{Schenck v. Pro-Choice Network Of Western New York,} \) the Court considered two injunctions, one state and one federal, that had been issued against pro-life activists. In both cases, the majority upheld some provisions of the injunction in question, while striking down others. Specifically, in \( \text{Madsen,} \) the Court held the following:

In sum, we uphold the noise restrictions and the 36-foot buffer zone around the clinic entrances and driveway because they burden no more speech than necessary to eliminate the unlawful conduct targeted by the state court’s injunction. We strike down as unconstitutional the 36-foot buffer zone as applied to the private property to the north and west of the clinic, the “images observable” provision, the 300-foot no-approach zone around the clinic, and the 300-foot buffer zone around the residences, because these provisions sweep more broadly than necessary to accomplish the permissible goals of the injunction.

In \( \text{Schenck,} \) the Court stated: “We uphold the provisions imposing ‘fixed bubble’ or ‘fixed buffer zone’ limitations . . . but hold that the provisions imposing ‘floating bubble’ or ‘floating buffer zone’ limitations violate the First Amendment.” However, in 2000, pro-life direct action participants suffered an unqualified loss in \( \text{Hill v. Colorado,} \) where the Court upheld a state statute making it a crime to:

knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the

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127. \( \text{Scheidler v. Nat’l Org. for Women, Inc.,} \) 545 U.S. 1151 (2005) (Scheidler VI); see \( \text{Operation Rescue v. Nat’l Org. for Women, Inc.,} \) 545 U.S. 1151 (2005). Of particular importance to the Rescue Movement, NOW’s appellate brief made it clear that the “4 acts or threats of physical violence” at issue do not refer to “sit-ins and demonstrations.” Respondents’ Brief in Opposition at 5, 6, \( \text{Scheidler v. Nat’l Org. for Women, Inc.,} \) 545 U.S. 1151 (2005) (No. 04-1244). Thus, even before the decision was handed down, it appeared to informed observers that peaceful rescues could no longer be grounds for RICO liability.


129. \( \text{512 U.S. 753 (1994).} \)

130. \( \text{519 U.S. 357 (1997).} \)

131. \( \text{Madsen, 512 U.S. at 776; Schenck, 519 U.S. at 361.} \)

132. \( \text{Madsen, 512 U.S. at 776.} \)

133. \( \text{Schenck, 519 U.S. at 361.} \)
public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.\textsuperscript{134}

The case law discussed in this article raises speculation about the outcome of a case challenging the constitutionality of FACE that reaches the Supreme Court. Both \textit{Lopez} and \textit{Morrison} were decided 5-4.\textsuperscript{135} If the Court agreed to hear such a matter, assuming that there are no other changes in Court personnel in the wake of Justice O'Connor's retirement and Chief Justice Rehnquist's death,\textsuperscript{136} three members of the \textit{Lopez} and \textit{Morrison} majorities would still be on the bench: Justices Scalia, Thomas, and Kennedy. Scalia and Kennedy both joined the majority in \textit{Frisby},\textsuperscript{137} while Scalia, Kennedy, and Thomas joined in Chief Justice Rehnquist's unanimous opinion in \textit{Scheidler I}.\textsuperscript{138} However, Scalia wrote the majority opinion in \textit{Bray} (in which Thomas, Rehnquist and Kennedy joined),\textsuperscript{139} and Kennedy noted in his concurrence that "even if, after proceedings on remand, the ultimate result is dismissal of the action, local authorities retain the right and the ability to request federal assistance, should they deem it warranted."\textsuperscript{140}

Furthermore, Scalia, Thomas, and Kennedy voted in accordance with pro-life direct action interests in \textit{Madsen}\textsuperscript{141} and \textit{Schenck},\textsuperscript{142} dissented in \textit{Hill},\textsuperscript{143} and sided with the pro-life activists in \textit{Scheidler III} and \textit{Scheidler VII}.\textsuperscript{144} These justices have shown concern for direct action pro-life participants in other cases as well. For example, in 1997, the Supreme Court denied certiorari to a California abortion protest case.\textsuperscript{145} Justice Scalia dissented to this decision and was joined by Justices Thomas and Kennedy.\textsuperscript{146} According to Justice Scalia, the case involved activities "so devoid of threatening physical confrontation it would make an old-fashioned union organizer blush. Yet the trial court entered—and the Supreme Court of California approved—an injunction severely curtailing

\begin{footnotesize}
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\item \textsuperscript{134} 530 U.S. 703, 707 n.1 (2000). Clearly, this statute makes it considerably more difficult to sidewalk counsel.
\item \textsuperscript{135} See \textit{Lopez}, 514 U.S. at 550; \textit{Morrison}, 529 U.S. at 600.
\item \textsuperscript{137} See 487 U.S. at 475.
\item \textsuperscript{138} See 510 U.S. at 250. In that case, Justice Kennedy also joined in Justice Souter's concurring opinion, which stated "I join the Court's opinion and write separately to explain why the First Amendment does not require reading an economic-motive requirement into the Racketeer Influenced and Corrupt Organizations Act...and to stress that the Court's opinion does not bar First Amendment challenges to RICO's application in particular cases." Id. at 263 (Souter, J., concurring).
\item \textsuperscript{139} See 506 U.S. at 265.
\item \textsuperscript{140} Id. at 288 (Kennedy, J., concurring).
\item \textsuperscript{141} See 512 U.S. at 756.
\item \textsuperscript{142} See 519 U.S. at 360.
\item \textsuperscript{143} See 530 U.S. at 705.
\item \textsuperscript{144} See 537 U.S. at 395; 547 U.S. at 12.
\item \textsuperscript{145} See \textit{Williams v. Planned Parenthood Shasta-Diablo, Inc.}, 520 U.S. 1133 (1997).
\item \textsuperscript{146} Id. at 1133-39 (Scalia, J., dissenting).
\end{itemize}
\end{footnotesize}
the speech rights of clinic protesters in a public forum.”

Moreover, in the dissent’s view, the lower court in the case had purposefully disregarded the relevant Supreme Court precedents.

Justice Scalia advocated for “grant[ing] the petition for certiorari, summarily revers[ing] the judgment of the Supreme Court of California, and remand[ing] for further proceedings.”

Justice Scalia and Thomas also dissented to the denial of certiorari in another abortion protest case in 2000.

Considering the sum of the evidence, one can cautiously predict that those three justices would invalidate FACE. However, while Scalia, Thomas, and Kennedy supported restrictions on the Commerce Clause in *Lopez* and *Morrison*, those same justices split over a Commerce Clause question in *Gonzales v. Raich*.

Some commentators have interpreted the latter case as a substantial defeat for federalism. In *Raich*, the Court, per Justice Stevens, ruled that the Controlled Substances Act (“CSA”) was valid, even though it banned the intrastate production and ownership of marijuana that was used for medical reasons under state law.

Justice Scalia, who authored the dissent, explained his rationale as follows:

Although in my judgment the scope of the injunction is unconstitutionally broad insofar as it prohibits approaching any physician or any vehicle containing a physician, and prohibits any noise that can be heard inside the clinic during any of its business hours... there would be nothing about this case warranting our attention if the judgment were based upon, and the scope of the injunction determined by, unlawful acts committed by petitioners. The First Amendment is not a license for lawlessness, and when abortion protesters engage in such acts as trespassing upon private property and deliberately obstructing access to clinics, they are accountable to the law. What makes the present case remarkable, however, and establishes it as a terrifying deterrent to legitimate, peaceful First Amendment activity throughout South Carolina, is the fact that the South Carolina Supreme Court’s affirmance did not rest upon its determination that there was adequate evidence of unlawful activity.

*Id.* (Scalia, J., dissenting).

Most assessments of Chief Justice Rehnquist’s jurisprudential legacy have placed federalism firmly at its center. And yet, a full decade after the Court’s revival of limits on the commerce power in *United States v Lopez*, grave doubts remain about the Chief’s “Federalist Revival.”... The doubts upon which I wish to focus here, however, go to the seriousness of the Court’s enterprise. That seriousness might be doubted on two distinct grounds... Others have argued that the Court’s federalism jurisprudence is unsustainable, that is, either that the doctrinal formulations employed are incapable of rolling national power back any significant distance, or that the Court simply lacks the resolve to take its federalism very far. Last Term’s decision in *Gonzales v. Raich* severely undermined hopes that the Court might enforce meaningful constitutional limits on congressional power.”

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47. *Id.* at 1135 (Scalia, J., dissenting).

48. *See id.* at 1134 (Scalia, J., dissenting).

49. *Id.* (Scalia, J., dissenting).


151. *See Lopez*, 514 U.S. at 550; *Morrison*, 529 U.S. at 600.

152. 545 U.S. 1 (2005).

153. *See Ilya Somin, A False Dawn for Federalism: Clear Statement Rules After Gonzales v. Raich*, 2006 CATO SUP. CT. REV. 113, 113 (2005-2006) (“The Supreme Court’s 2005 decision in *Gonzales v. Raich* severely undermined hopes that the Court might enforce meaningful constitutional limits on congressional power.”). Ernest A. Young, the Judge Benjamin Harrison Powell Professor of Law at the University of Texas at Austin, has written:

154. 545 U.S. at 15-33.
joined the majority's opinion). Scalia concurred in the Court's judgment, though not with Justice Steven's opinion. Scalia explained his position as follows: "In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce 'extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it.'" Justice Thomas issued a strong dissent.

Though it is impossible to be certain, Raich probably does not substantially alter the above calculations about how Scalia, Thomas, and Kennedy would vote in a matter challenging the constitutionality of FACE. In Thomas's case, it adds further weight to the claim that he would vote to invalidate the Act. As for Scalia, his concurrence in Raich seems sufficiently qualified or, in the Justice's own words, "nuanced," to make an observer think there has been no fundamental change in his support of a narrowed Commerce Clause. Indeed, Scalia's support for the constitutionality of the CSA in Raich seems to be based upon Lopez's allowance that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." Taking this as settled law, Scalia believed the main question to be answered in Raich was whether the means chosen by Congress were "reasonably adapted" to the fulfillment of a valid goal under the Commerce Clause.

Should Kennedy throw his support behind others to uphold FACE, such a vote would run afoul of the great majority of his prior actions on the bench. Moreover, the majority opinion in Raich that he joined made it clear that, "[u]nlike those at issue in Lopez and Morrison, the activities regulated by the CSA are quintessentially economic . . . . Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in Morrison casts no doubt on its constitutionality." Since the Commerce Clause argument for the unconstitutionality of the Act hinges upon the fact that a rescue is non-economic activity, Kennedy's analysis in a FACE case would presumably not be affected by his vote in Raich.

While Justice Stevens dissented in Frisby and Justice Breyer wrote

155. Id. at 4.
156. Id. at 33.
157. Id. at 39-40 (Scalia, J., concurring) (citations omitted).
158. See id. at 57-58 (Thomas, J., dissenting).
159. Id. at 33 (Scalia, J., concurring).
160. Id. at 37 (Scalia, J., concurring).
161. Id. (Scalia, J., concurring).
162. See, e.g., Leslie Wepner, Comment, The Machine Gun Statute: Its Controversial Past and Possible Future, 75 FORDHAM L. REV. 2269, 2299 (2007) ("Justice Anthony Kennedy joined the majority in both Lopez and Raich, but similar to Justice Scalia, has often voted for state power over congressional power.").
164. 487 U.S. at 475.
the majority opinion in *Scheidler* VII,165 there is, on the whole, little evidence supporting the idea that they or Justices Ginsburg or Souter would find the Act unconstitutional. Therefore, whether the Roberts Court will invalidate FACE depends on the views of the new Chief Justice and Justice Alito.

Before their confirmations, a fair amount of attention was paid to both Roberts’s and Alito’s outlooks on the Commerce Clause.166 In the 2003 case *Rancho Viejo, LLC v. Norton*, then-Judge Roberts dissented in a decision by the D.C. Circuit denying a rehearing en banc in a case involving the Commerce Clause and the Endangered Species Act (ESA).167 Roberts criticized the majority as follows:

> [S]uch a facial [Commerce Clause] challenge can succeed only if there are no circumstances in which the Act at issue can be applied without violating the Commerce Clause. Under the panel’s approach in this case, however, if the defendant in *Lopez* possessed the firearm because he was part of an interstate ring and had brought it to the school to sell it, or the defendant in *Morrison* assaulted his victims to promote interstate extortion, then clearly the challenged regulations in those cases would have substantially affected interstate commerce, and the facial Commerce Clause challenges would have failed . . . .The panel’s approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating “Commerce . . . among the several States.”168

Roberts favored en banc review because, after the *Rancho Viejo* case, a split existed between the D.C. Circuit and the Fifth Circuit on the matter at issue in Roberts’s dissent.169 He added that “[s]uch review would also afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent.”170 Apart from his dissent in *Rancho Viejo*, Roberts’s short time on the D.C. Circuit does not seem to have substantially illuminated his views on the Commerce Clause.

During his confirmation hearings, Roberts answered a number of questions about the Commerce Clause.171 Most importantly, while

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165. 547 U.S. at 12.
166. See, e.g., “Battle under way over Bush pick for top court; Roberts campaigns to nail support; Specter foresees no filibuster,” MSNBC (May 20, 2005), http://msnbc.msn.com/id/8644618/ (last visited June 14, 2008); Stuart Taylor Jr. and Evan Thomas, *Keeping It Real; The left fears him. The right loves him. Why both sides don’t quite get Samuel Alito*, NEWSWEEK, November 14, 2005, at 22.
167. 334 F.3d at 1160 (Roberts, J., dissenting); see also Simon Lazarus, *Federalism R.I.P.?; Did the Roberts Hearings Junk the Rehnquist Court’s Federalism Revolution?*, 56 DePaul L. Rev. 1, 9 (2006).
169. Id. (Roberts, J., dissenting).
170. Id. (Roberts, J., dissenting).
discussing Raich, he made the following statement:

[...Lopez and Morrison were merely] two decisions in the more than 200-year sweep of decisions in which the Supreme Court has . . . recognized extremely broad authority on Congress’s part, going all the way back to Gibbons v. Ogden and Chief Justice John Marshall, when those Commerce Clause decisions were important in binding the Nation together as a single commercial unit.172

During the same hearings, Roberts opined that “Raich meant that Lopez and Morrison did not ‘junk all the cases that came before.’”173 He indicated that the sole constitutional problem with the statute at issue in Lopez was its “lack of ‘a requirement that the firearm be transported in interstate commerce.’”174 According to Roberts, such a flaw could be easily remedied in the substantial majority of firearm cases.175 However, in response to one question, he did reiterate the fact that Lopez and Morrison required, for a federal statute regulating strictly intrastate conduct to be valid under the Commerce Clause, “the effects of such activities can be ‘aggregate[d]’ only if they are ‘commercial in nature.’”176

Unlike Chief Justice Roberts, Justice Alito spent significant time on the federal bench before being nominated to the Supreme Court.177 In 1996, he issued a dissent in U.S. v. Rybar, a Third Circuit case involving a contention that federal regulations governing machine guns violated the Commerce Clause and the Second Amendment.178 Alito began his dissent by asking rhetorically “Was United States v. Lopez . . . a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power?”179 Opposing the majority, Alito urged that the statute be struck down:

In sum, we are left with no congressional findings and no appreciable empirical support for the proposition that the purely intrastate possession of machine guns, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce, and without such support I do not see how the statutory provision at issue here can be sustained—unless, contrary to the lesson that I take from Lopez, the “substantial effects” test is to be drained of all practical significance. As Lopez reminded us, the “constitutionally mandated division of authority [between the federal government and the states] ‘was adopted by the Framers to ensure protection of our fundamental liberties.’” . . . And even
today, the normative case for federalism remains strong . . . . Out of respect for this vital element, we should require at least some empirical support before we sustain a novel law that effects “a significant change in the sensitive relation between federal and state criminal jurisdiction.”

Alito’s dissent therefore indicates that he sees *Lopez* as anything but a “constitutional freak.”

Similar to Chief Justice Roberts, Alito faced questions regarding his views on the Commerce Clause during his confirmation hearings. Specifically, he stood by his dissent in *Rybar*. In responding to another question, he stated:

Well, *Lopez* is a precedent of the court [sic] and it’s been followed in *Morrison* and then it has to be considered in connection with the Supreme Court’s decision in *Raich*. And I think that all three of those have to be taken into account together. I don’t think there’s any question at this point in our history that Congress’ power under the commerce clause is quite broad, and I think that reflects a number of things, including the way in which our economy and our society has developed and all of the foreign and interstate activity that takes place. We do still have a federal system of government, and I think most people believe that is the system set up by our Constitution.

Since Roberts and Alito took their places on the Court, a number of federalism cases have been heard with mixed results. However, none of the cases involved an outright challenge to the constitutionality of a federal statute on Commerce Clause grounds. Thus far, the Roberts Court has not decided a *Lopez/Morrison/Raich*-type case. The only abortion protest decision issued by the new Court was *Scheidler VII*, where Roberts joined the majority and Alito did not take part. Furthermore, neither Roberts nor Alito decided any cases concerning abortion protest while they were federal judges. During the lead up to their confirmations, significant inquiries into both men’s views on abortion and the Court’s abortion jurisprudence occurred. However, very little information regarding their opinions on abortion protest was revealed. While the facts uncovered were, on the whole, positive from the pro-life perspective, it would nevertheless seem unwise to assume either Justice’s abortion-protesting stance is synonymous with that of Scalia or Thomas. Roberts was involved in the drafting of a brief for the federal government in *Bray*, urging that the Court rule for the
pro-life, direct action participants. However, opinions vary as to whether a person’s role in preparing an appellate brief has any predictive value regarding how that person might rule on a similar issue as a Justice on the Supreme Court.

Scholars are divided as to the significance of this Roberts-Alito evidence. Erwin Chemerinsky, Alston & Bird Professor of Law and Political Science at Duke University, writes confidently that “[o]ver the past decade, the Supreme Court has limited the scope of Congress’s powers and has greatly expanded the protection of state sovereign immunity. . . . with two Bush picks for the high Court, these doctrines almost certainly will remain and expand in the years to come.” Conversely, Ernest A. Young, Judge Benjamin Harrison Powell Professor of Law at the University of Texas at Austin, opines:

Many observers have predicted that appointments by President George W. Bush are likely to accelerate the Court’s efforts to limit national authority. My own view is that this is highly unlikely; if anything, the losses of Chief Justice Rehnquist and Justice O’Connor will yield a more nationalist court on federalism issues. Despite her moderate instincts and reputation as a swing Justice on many issues, Justice O’Connor was perhaps the Court’s most committed Justice on questions of state autonomy. And the Chief Justice, while perhaps more accepting of national power in some circumstances, deserves to be described as the programmatic architect of the Federalist Revival. From the states’ perspective, these Justices are virtually irreplaceable. Nor are there strong grounds to believe that Chief Justice Roberts and Justice Alito will share their predecessors’ commitment to limiting national power, even if these jurists turn out to be as “conservative” as many of their supporters no doubt hope.

A review of the salient data suggests Roberts and Alito would vote against the constitutionality of the Act, if such a matter were before the Court. Thus, based on the evidence presented in this article, there appears to be five anti-FACE Justices currently sitting on the Court: Scalia, Thomas, Kennedy, Roberts, and Alito. However, the question whether the Roberts Court will invalidate the Act is a different matter.

Despite the fact that FACE has been on the books for over ten years and its constitutionality challenged many times, the Court has yet to agree to hear a case concerning the validity of the Act. Indeed, the Court has denied certiorari to every post-Morrison FACE case. In part, this may

187. See, e.g., Toner, supra note 186, at A22.
189. Young, supra note 153, at 43.
stem from the fact that no federal appellate court has held FACE unconstitutional; the Court is more likely to grant a petition for certiorari when there is a dispute among the circuits.191 Another factor may be "the Supreme Court’s cert pool, the system of randomly assigning petitions for review to a single clerk for a recommendation regarding acceptance or denial of a case."192 However, there is disagreement as to the precise effect of the "cert pool" on the Court.193 While the Court is asked to review over 7,000 cases per year, it usually grants certiorari to approximately 150.194 Therefore, statistically speaking, a case appealed to the Supreme Court has a miniscule chance of being heard. According to the "Rule of Four," four or more justices must express an interest in looking at the matter for certiorari to be granted.195

It would appear then that the direct action segment of the pro-life movement is in an ironic position. The evidence suggests a sufficient number of anti-FACE Justices currently sit on the Supreme Court to find the Act violates the Commerce Clause. At the same time, however, pro-life advocates and others seem incapable of getting the Court to agree to hear a case challenging the constitutionality of the Act. Not only has the Court denied every petition for certiorari filed in cases concerning the validity of FACE, including one in 2007 with both Roberts and Alito on the bench,196 but it seems that no dissents have been filed to these denials of certiorari. This would seem to indicate that the Justices labeled here as "anti-FACE," may not be particularly concerned about overturning the Act, even though they would likely be inclined to find that it violates the Constitution if the matter was before the Court.

While the appointment of Roberts and Alito to the Court may well mean the end of FACE, whether or not the act will be overturned remains uncertain. In order to take advantage of this development, pro-life activists must work diligently to convince the Court to hear a FACE case. To accomplish this necessary intermediate step, advocates for the unborn should create new cases involving the Act in the lower courts. The vast majority of FACE cases were decided before Morrison. If federal courts are called upon to decide a substantial number of post-Morrison FACE

191. See, e.g., Scheidler I, 510 U.S. at 255 ("We granted certiorari...to resolve a conflict among the Courts of Appeals on the putative economic motive requirement of 18 U.S.C. §§ 1962(c) and (d)." (citations omitted)).
193. See id at 107 ("At best, evidence for the influence of the cert pool over the Court's agenda is quite limited."); David R. Stras, The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process, 85 TEX. L. REV. 947, 950 (2007) (book review) ("Based on this evidence, I conclude that earlier studies too quickly dismissed the potential impact of law clerks and the cert pool on the size of the Court's plenary docket.").
194. See The Online News Hour: Supreme Court Watch; Court History; Choosing & Hearing Cases, PBS (2003), http://www.pbs.org/newshour/indepth_coverage/law/supreme_court/history_cases.html (last visited June 15, 2008).
195. See id.
cases, it may be possible to produce a Circuit split and thereby greatly increase the chance the Supreme Court will grant certiorari. Moreover, in addition to facial challenges, pro-lifers should choose cases with sympathetic factual records, similar to a case involving an all-woman direct action rescue that occurred in Philadelphia in February 1990.\textsuperscript{197} If such actions are pursued vigorously, the winds of change may blow in the direction of the unborn and their defenders in an important area of the abortion struggle.

\footnote{197. \textit{See Martha Woodall, Women Picket Clinic, PHILA. INQUIRER, February 4, 1990, at B01.}}