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

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ABSTRACT

This article speculates on whether the appointment of Justices Roberts and Alito to the Supreme Court will mean the end of FACE (the Freedom of Access to Clinic Entranceways act).

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 physically certain persons from going into an abortion facility.[2] As a result of the Act and of several other factors, there was a substantial decrease in pro-life direct action activities, especially that of rescue. When they were being confirmed, much attention was focused by people on both sides of the abortion controversy on whether Chief Justice Roberts or Justice Alito would overturn the Supreme Court's key abortion decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania 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

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[1] See Gwen Ifill, "Clinton Signs Bill Banning Blockades and Violent Acts at Abortion Clinics," *The New York Times* (May 27, 1994), at p. A18.

[2] 18 U.S.C.A. § 248 (West 2007).

[3] See "How Conservative is Judge Roberts?" *The New York Times* (Sept. 15, 2005), at p. A30; David D. Kirkpatrick, "A Year of Work to Sell Roberts to Conservatives," *The New York Times* (July 22, 2005), at p. A14; Robin Toner and David D. Kirkpatrick, "Liberals and Conservatives Remain Worlds Apart on Roberts's Suitability," *The New York Times* (Sept. 16, 2005), at p. A22; David D. Kirkpatrick, "Conservatives Scrambling to Prepare for a Tough Fight," *The New York Times* (Nov. 1, 2005), at p. A23; "Judge Alito and Abortion," *The New York Times* (Dec. 3, 2005), at p. A18.

protest abortion vigorously and effectively.[4] Nevertheless, there is evidence that both Roberts and Alito share a narrow commerce clause philosophy, one that in principle is at odds with FACE.[5] Given the track records of certain long-standing members of the U.S. Supreme Court, the recent changes in the composition of the Court therefore suggest that the pro-life community's hope that the Act be invalidated might be realized.

This paper will begin with a look at some basic Commerce Clause principles, which are essential to an understanding of how and why the Roberts Court might find FACE unconstitutional. Next, it will look at the Act, both as it is written and as it has been interpreted by the lower federal courts. This section will also cover 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, the paper will offer an analysis of whether the addition of Roberts and Alito means that FACE can or will be invalidated by the Court.

THE COMMERCE CLAUSE

The Constitution provides that Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with

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[4] At one point before he was confirmed, NARAL Pro-Choice America did run 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," *The New York Times* (Aug. 27, 2005), at p. A11. However, NARAL's justification for such a contention apparently had nothing to do with the danger Roberts might pose towards FACE if he was confirmed.

[5] *See* Rancho Viejo, *LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting); *United States. v. Rybar*, 103 F.3d 273, 286-94 (3d Cir. 1996) (Alito, J., dissenting); see also "Quizzing Judge Roberts," *The New York Times* (Sept. 4, 2005), at p. 9; Jeff Bleich, Michelle Friedland, and Daniel Powell, "The New Chief," 66 *Oregon State Bar Bulletin* 18, 22-23 (Nov. 2005); Stephen Labaton, "Court Nominee Has Paper Trail Businesses Like," *The New York Times* (Nov. 5, 2005), at p. A1; Mark A. Graber, "Does It Really Matter? Conservative Courts in a Conservative Era," 75 *Fordham Law Review* 675, 676-77 (2006).

the Indian Tribes."[6] 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 that 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.[7] 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."[8]

In *Wickard v. Filburn*,[9] the Court clarified that while an individual's actions may only minimally affect interstate commerce, he is not exempt from the federal regulation where "his contribution, taken together with that of many others similarly situated, is far from trivial."[10] 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."[11]

In the 1990s, the Rehnquist Court placed further restrictions on Congress's Commerce Clause power.[12] According to *U.S. v. Lopez*, in addition to the substantial effects requirement, for the law to pass constitutional muster the activity being regulated must be economic in nature.[13] In finding the statute in question unconstitutional in *Lopez*, Chief Justice Rehnquist noted that "[t]he Act neither regulates a commercial

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[6] U.S. Constitution, art. I, § 8, cl. 3.

[7] 301 U.S. 1 (1937).

[8] *Id.* at 37.

[9] 317 U.S. 111 (1942).

[10] *Id.* at 128.

[11] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999).

[12] See, e.g., Stephan E. Oestreicher, Jr., "Scheidler Meets Morrison (at the Entrance to a Health Clinic)," 35 Creighton Law Review 693, 698-703 (2002).

[13] 514 U.S. 549 (1995).

activity nor contains a requirement that the possession be connected in any way to interstate commerce."[14] *Lopez* also indicated the Court's willingness to inquire into congressional purpose.[15] Additionally, in the case, the Court seemed to be concerned about the following:

> We pause to consider the implications of the Government's arguments. 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.[16]

In summarizing why the statute at issue in *Lopez* exceeded Congress's Commerce power, the Court stressed that the Gun-Free School Zones Act

> is 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.[17]

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[14] *Id*. at 551.

[15] 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.'"

[16] *Id*. at 564.

[17] *Id*. at 561.

The Court's willingness to enforce its own Commerce Clause standards continued in *U.S. v. Morrison*, where the Violence Against Women Act was held unconstitutional.[18] The statute granted federal relief for those subjected to violence because of their sex.[19] In *Morrison*, the Court reminded the reader that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case"[20] 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." In striking down the law, the Court stated that:

> 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 that "[w]e accordingly reject the argument that Congress may regulate noneconomic, 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] Additionally, Chief Justice Rehnquist pointed out: "Like 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's power to regulate interstate commerce."[23] The Court also noted that congressional findings, by themselves, do not make a regulation constitu-

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[18] 529 U.S. 598 (2000).

[19] See *id.* at 601-02.

[20] *Id.* at 610.

[21] *Id.* at 612.

[22] *Id.* at 617-18.

[23] *Id.* at 613.

tionally licit under the Commerce Clause.[24]

FREEDOM OF ACCESS TO CLINIC ENTRANCEWAYS ACT

FACE provides considerable challenges to pro-life rescues, in both the language of the statute and the way it has been interpreted by courts. Enacted in 1994, the Act specifically punishes anyone who:

> 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 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]

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.[26] Penalties are harsher for subsequent violations.[27] There is division among courts as to whether defendants are entitled to a trial by jury in a criminal FACE case.[28] Furthermore, if the pro-abortion side achieves a civil FACE judgment, a pro-life activist could be liable for $5,000.[29] The civil suit avenue is also available to the U.S. Attorney General,[30] who may collect $10,000 in money damages for an initial rescue and $15,000 for any

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[24] See *id*. at 614.

[25] 18 U.S.C.A. § 248(a)(1).

[26] See 18 U.S.C.A. § 248(b).

[27] See *id.*: "[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...."

[28] 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."

[29] See 18 U.S.C.A. § 248(c)(1)(B).

[30] See 18 U.S.C.A. § 248(c)(2)(A).

subsequent rescues.[31]

As to a civil violation, federal courts seem to be in agreement that the defendants are liable for the statutory damages in aggregate.[32] Thus, if a group of pro-lifers 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 possible additional costs; however, the pro-abortionists could not seek to collect the $5,000 fine from each member of the group for each rescue that occurred. In applying FACE, courts have shown signs of both mercy and harshness.[33]

FACE AND THE COMMERCE CLAUSE

There have been a number of unsuccessful challenges to the constitutionality of FACE.[34] The Commerce Clause is certainly not the only section

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[31] See 18 U.S.C.A. § 248(c)(2)(B)(i-ii).

[32] See *U.S. v. Gregg*, 226 F.3d 253 (3d Cir. 2000); *U.S. v. Operation Rescue Nat.*, 111 F. Supp. 2d 948 (S.D. Ohio 1999); *Milwaukee Women's Medical Services, Inc. v. Brock*, 2 F. Supp. 2d 1172 (E.D. Wis. 1998).

[33] 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 Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (Durham NC: Carolina Academic Press, 2006), p. 801.

of the Constitution that opponents of the Act allege it to violate.[35] However, the contention that FACE is an illicit application of Congress's Commerce Clause authority is arguably the one that has the greatest chance to be accepted by the Supreme Court, given its current configuration. Among others,[36] the Fourth,[37] Sixth,[38] Seventh,[39] and Eighth[40] Circuits have ruled that Congress legitimately enacted FACE under its Commerce Clause powers. This paper will now review the main arguments for and against the proposition that the Act is valid under the Commerce Clause.[41]

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[35] See, e.g., *Planned Parenthood Association of Southeastern Pennsylvania, Inc. v. Walton*, 949 F. Supp. 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 *U.S. v. Bird*, 279 F. Supp. 2d. 827, 828 n.1 (S.D. Tex. 2003) (*Bird* II), *order vacated by*, 401 F.3d 633 (5th Cir. 2005) (*Bird* III).

[37] See *Hoffman v. Hunt*, 126 F.3d 575, 588 (4th Cir. 1997).

[38] See *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002).

[39] See *U.S. v. Soderna*, 82 F.3d 1370 (7th Cir. 1996).

[40] See *U.S. v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996).

[41] For contentions in support of the Act's constitutionality under the Commerce Clause, see Elizabeth S. Saylor, "Federalism and the Family after Morrison: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entranceways Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers," 25 *Harvard Women's Law Journal* 57 (2002); Nicole Huberfeld, Note, "The Commerce Clause Post-*Lopez*: It's Not Dead Yet," 28 *Seton Hall Law Review* 182 (1997); Amy H. Nemko, Note, "Saving FACE: Clinic Access Under a New Commerce Clause," 106 *Yale Law Journal* 525, 526 (1996): "Even if review had been granted, however, it seems likely that Lopez would pose no threat to the new clinic access law." For arguments challenging FACE as a legitimate exercise of Congress's Commerce Clause power, see Arthur B. Mark, III, "Currents in Commerce Clause Scholarship since *Lopez*: A Survey," 32 *Capital University Law Review* 671, 744 (2004); Steven A. Delchin, Note, "Viewing the Constitutionality of the Access Act Through the Lens of Federalism," 47 *Case Western Reserve Law Review* 553 (1997); Anna Kampourakis & Robin C. Tarr, Note, "About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entranceways Act in Light of *Lopez*," 11 *St. John's Journal of Legal Commentary* 191, 194 (1995): "The narrow interpretation given the Commerce Clause in *Lopez* suggests that FACE may not survive a challenge

In *Norton v. Ashcroft*, the most recent circuit court case looking at the Commerce Clause aspects of the Act in depth, the Sixth Circuit set forth the following Commerce Clause 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.... And as our sister circuits have ruled, 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 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.... Considered along with the other *Morrison* factors, we hold that Congress validly enacted the Act pursuant to its Commerce Clause power.[42]

Other courts have used different Commerce Clause rationales to justify FACE. In finding that Congress had not overstepped its Commerce Clause boundaries, *Hoffman v. Hunt* alleged that direct action activities had a

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to its constitutionality under that clause. The Fourteenth Amendment, however, may provide Congress with an alternative constitutional justification to sustain the Act." See also Brief Amicus Curiae of Pacific Legal Foundation in Support of Defendant-Appellee, *United States v. Bird*, 401 F.3d 633 (5th Cir. 2005) (No. 03-20884) (available in electronic database, 2004 WL 3545114 (5th Cir.)) ("*PLF Brief*").

[42] 298 F.3d at 556-59 (citations omitted).

substantial effect upon the interstate abortion market.[43] In *U.S. v. Soderna*, the Seventh Circuit focused on the fact that the Act sought to remove serious hindrance to free movement of goods and citizens across state borders.[44] *U.S. v. Hill* 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."[45]

In deciding that FACE meets the substantial effects requirement for valid Commerce Clause legislation, the Third Circuit in *U.S. v. Gregg* specifically distinguished the Act from the statute at issue in *Morrison*: "In 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 court submitted that the main aim of pro-lifers affected by FACE is to disrupt the operations of abortion facilities and prevent potential customers from buying their services.[47] The Third Circuit pointed out that congressional studies found that such pro-life direct action activities had resulted in substantial monetary damage, abortion facility closings, delayed abortions, and the refusal of abortionists to commit abortions.[48] *Gregg* therefore concluded:

> 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

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[43] 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).

[44] 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.

[45] 893 F. Supp. 1034, 1037 (N.D. Fla. 1994).

[46] 226 F.3d 253, 262 (3d Cir. 2000).

[47] See *id*.

[48] See *id*.

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.[49]

In *U.S. v. Dinwiddie*, the court asserted that "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."[50] The Eight Circuit submitted that this condition was satisfied, and that therefore the Act was licit under the Commerce Clause, because of several pieces of evidence.[51] "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."[52] Additionally, according to the court, a significant amount of women travel between states to procure abortions.[53] The Eight Circuit also pointed to the fact that the abortion facility in question in the case was situated in a metropolitan area that spread over more than one state.[54] The court defended the constitutionality of the Act by contending that "[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."[55]

The most recent case where a federal court found FACE unconstitutional offers a good example of the reasoning of those who view the Act as illicit under the Commerce Clause, as does the dissent issued when the

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[49] *Id*.

[50] 76 F.3d at 919.

[51] See *id*.

[52] *Id*.

[53] See *id*.

[54] See *id*.

[55] *Id*.

circuit court reversed the initial anti-FACE decision.[56] In *Bird* II, a federal court in the Southern District of Texas ruled that the Act was unconstitutional.[57] The defendant in the case was Frank Lafayette Bird, who was charged with violating FACE by the U.S. government, after he allegedly used an automobile to damage a Planned Parenthood facility in Houston.[58] Bird had been found guilty under FACE before, when, in December 1994, he threw a bottle at an abortionist's car as the latter tried to enter a Houston area abortion facility.[59]

District Judge Kenneth M. Hoyt held that in enacting FACE, Congress had overstepped the bounds of its Commerce Clause authority. Specifically, the court 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. At the same time, it failed to satisfy the substantial effects test, which legitimizes Congressional action that might otherwise be considered the province of the states.[60]

Preliminarily, Hoyt pointed out that "while the abortion business is economic in nature, the conduct of Bird and the activities sought to be circumscribed are not."[61] He also noted that, ironically, pro-life activism had in fact helped interstate commerce in the abortion context. Normally, abortion is an intrastate activity. However, Congress found "that doctors and patients travel from state to state because of anti-abortion activities...."[62] Thus, rescues helped to create an interstate market for a service

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[56] For other decisions finding that the Act runs afoul of the Commerce Clause, see *Hoffman v. Hunt*, 923 F. Supp. 791, 806-19 (W.D. N.C. 1996); *U.S. v. Wilson*, 880 F. Supp. 621, 624-34 (E.D. Wis. 1995).

[57] See *Bird* II, 279 F. Supp. 2d at 838.

[58] See *id.* at 828.

[59] See *United States v. Bird*, 124 F.3d 667 (5th Cir. 1997) (*Bird* I).

[60] See *Bird* II, 279 F. Supp. 2d at 836. The district court stressed that "[e]ven 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.

[61] See *id.* at 829 n.4.

[62] *Id.* at 835.

that would otherwise have remained intrastate; they decidedly did not obstruct interstate commerce.[63] The district court concluded that "the aggregation analysis does not support a reverse impact on interstate commerce, which commerce is not illegal."[64]

Judge Hoyt dismissed the idea that, merely because economic activity goes on inside an abortion facility, that activity is interstate in nature. Nor did pro-life activism become interstate because it occurred around such a facility. The district court concluded: "The 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."[65] The district court explicitly denied to Congress the right to decide whether a specific activity passes the substantial effects test.

Judge Hoyt was also persuaded in his ruling 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."[66] This factor figured in the Supreme Court's reasoning in *Lopez*. Furthermore, the Act was not designed to regulate some bigger economic activity that is itself crucial to interstate commerce. Additionally salient to Hoyt was the fact that the goal of FACE was "at most a general regulatory purpose that fails to establish any substantial relationship to a commercial activity."[67] The district court summarized its reasoning as follows:

> The regulated activity is noneconomic criminal conduct that is allegedly perpetuated at a local level. While doctors and abortion clinics engage in

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[63] See *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."

[64] *Id*. at 835.

[65] *Id*. at 836. Hoyt made the further point that "there is no defined interstate criminal activity. All of the activity occurs within state lines." *Id*.

[66] *Id*.

[67] *Id*. at 837.

commerce at some level, that commerce was not the object of Congress's 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's regulation of a larger economic activity. Here, there is no larger regulated economic activity. In fact, there is no evidence in Congress's 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.[68]

Because Judge Hoyt found FACE unconstitutional, he ordered that the government's indictment against the defendant Bird be dismissed with prejudice. In the wake of *Bird* II, the government appealed the decision to the Fifth Circuit. Early in 2005 the Fifth Circuit vacated the district court's decision in so far as it struck down the Act.[69] In a brief opinion, written by Judge Garza,[70] the court ruled: "We 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."[71] 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

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[68] *Id.*

[69] See *Bird* III, 401 F.3d at 634.

[70] 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*, at http://www.lifenews.com/nat1352.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, J., concurring); *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir. 1997) (Garza, J., 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.

[71] *Bird* III, 401 F.3d at 634.

Congress's Commerce Clause power.[72] No circuits had yet sided with the view that the *Morrison* ruling invalidated the Act. Judge Garza found it immaterial that *Bird* I and *Bird* III dealt with different subsections of FACE.[73] The court remanded the case, so that it could be decided according to the principles laid down by *Bird* III.[74]

Judge Harold R. DeMoss, Jr., who had refused to join in *Bird* I's ruling that the Act is constitutional,[75] again issued a strong dissent in *Bird* III.[76] First, he stressed that the activity criminalized by the Act is intrastate, non-economic, and non-commercial in nature.[77] The dissent also noted that Congress itself has admitted that there are state criminal laws in effect that effectively cover FACE-type activity.[78] Judge DeMoss charged: "Because 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...."[79]

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

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[72] See *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, J., dissenting).

[73] See *id.* at 634 n.2.

[74] See *id.* at 634.

[75] See *Bird* I, 124 F.3d at 692 (DeMoss, J., concurring in part and dissenting in part).

[76] See *Bird* III, 401 F.3d at 634-37 (DeMoss, J., dissenting).

[77] See *id.* at 635 (DeMoss, J., dissenting). The dissent made the point that the Fifth Circuit had already accepted the fact that the proscribed conduct of FACE was not commercial in nature. See *id.* at 636 (DeMoss, J., dissenting).

[78] See *id.* (DeMoss, J., dissenting).

[79] *Id.* (DeMoss, J., dissenting).

commerce,"[80] which Judge DeMoss viewed as the crux of *Bird* I.[81] The dissent 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* renders FACE unconstitutional.[82] Judge DeMoss 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.[83]

In his dissent to the Third Circuit's decision in *Gregg*, Judge Weis addressed the fact that the lower federal courts have overwhelmingly 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*]."[84]

The dissent 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

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[80] *Id.* (DeMoss, J., dissenting).

[81] See *id.* at 637 (DeMoss, J., dissenting).

[82] See *id.* 636-37 (DeMoss, J., dissenting).

[83] *Id.* at 637 (DeMoss, J., dissenting).

[84] *Gregg*, 226 F.3d at 268 (Weis, J., dissenting).

operations.[85] "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."[86] 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.[87]

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.[88]

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[85] See *id*. at 269-70 (Weis, J., dissenting).

[86] *Id*. at 270 (Weis, J., dissenting): "Murder and robbery have monetary consequences, but that does not transform criminal codes into commercial regulation."

[87] See *id*. (Weis, J., dissenting).

[88] *Id*. at 271-72 (Weis, J., 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* n.42, at 17.

OTHER CONSTITUTIONAL MATTERS RELATING TO FACE

U.S. v. McMillan concluded that Section 5 of the Fourteenth Amendment provided the necessary authorization for Congress's passage of the Act.[89] Federal courts have held FACE valid, despite claims that it violates the Equal Protection Clause of the Fourteenth Amendment,[90] the Eighth Amendment's proscription of cruel and unusual punishment[91] and excessive fines,[92] and the Free Exercise Clause of the First Amendment.[93] In *U.S. v. Unterburger*, the Eleventh Circuit ruled that the Act did not run into Tenth Amendment trouble.[94] In *Hoffman*, the Fourth Circuit Court of Appeals rejected an argument that FACE violated the First Amendment free speech rights of pro-life activists.[95] 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

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[89] See 946 F. Supp. 1254, 1262 (S.D. Miss. 1995).

[90] 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.

[91] 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*.

[92] See *Walton*, 949 F. Supp. at 294.

[93] See *U.S. v. Weslin*, 964 F. Supp. 83, 87(W.D. N.Y. 1997), *aff'd*, 156 F.3d 292 (2d Cir. 1998).

[94] 97 F.3d at 1415 (citing Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995)).

[95] 126 F.3d at 588-89.

are sufficiently narrow."[96]

The Seventh Circuit found that FACE was not unconstitutionally vague,[97] while the D.C. Circuit Court dismissed a charge that the Act was overbroad.[98] In *U.S. v. Wilson*, the court ruled that First Amendment protected speech was not illicitly targeted by FACE.[99] 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."[100] *U.S. v. Dinwiddie* concluded that the Act was not "an impermissible content-based restriction on speech."[101] In *Cook v. Reno*, the court did not find any merit in the

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[96] 964 F. Supp. at 86.

[97] 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 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).

[98] 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).

[99] See 154 F.3d 658, 662-63 (7th Cir. 1998).

[100] 895 F. Supp. 1421, 1425, citing *U. S. v. O'Brien*, 391 U.S. 367, 376 (1968).

[101] *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

contention that FACE was passed "to eliminate, or at least chill," pro-life direct action events.[102] The Supreme Court has refused to hear any case concerning the constitutionality of the Act.[103]

FACE has been subjected to a variety of criticisms.[104] It is not the purpose of this paper to review them substantially. However, it is instructive that the Act has been attacked even by those who do not fully support the idea of the pro-life rescue. Consider the remarks of Michael

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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, 'intimidat[ion]' 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.

[102] 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's purpose was not to discriminate against a particular idea, but to prohibit particular conduct."

[103] See, e.g., *Bird v. U.S.*, 126 S.Ct. 150 (2005), denying certiorari to case where constitutionality of FACE was questioned.

[104] See, e.g., Note, "Safety Valve Closed: The Removal of Nonviolent Outlets for Dissent and the Onset of Anti-Abortion Violence," 113 *Harvard Law Review* 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 *Alabama Law Review* 853, 885 (1999), contending that the Act "has the potential to severely chill legitimate pro-life free speech"; Dellapenna, *supra* n.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."

W. McConnell, now a Judge for the Tenth Circuit, on *U.S. v. Lynch*,[105] a criminal contempt FACE case that originated in New York:

> 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.[106]

WILL THE ROBERTS COURT INVALIDATE FACE?

In order to answer this important question, it is necessary to review briefly the relevant Supreme Court decisions in the area of abortion protest. In 1988, in *Frisby v. Schultz*, the Court considered the constitutionality of a Wisconsin town ordinance under which it was "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual...."[107] The local municipal body enacted the law in response to the picketing of an abortionist's home by pro-life protestors.[108] The pro-life protestors, who were threatened by the town with arrest and prosecu-

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[105] 952 F. Supp. 167, 168 (S.D. N.Y. 1997).

[106] Michael W. McConnell, "Breaking the Law, Bending the Law," 74 *First Things* (June/July 1997): 13, 15. Elsewhere, McConnell has argued that FACE is probably unconstitutional. *See* Michael Stokes Paulsen & Michael W. McConnell, "The Doubtful Constitutionality of the Clinic Access Bill," *Virginia Journal of Social Policy & Law* 1 (1994): 264.

[107] 487 U.S. 474, 477 (1988).

[108] See *id.* at 476-77.

tion if they continued with their picketing, in turn challenged the ordinance on First Amendment grounds.[109] In rejecting this challenge, the Court, in an opinion written by Justice O'Connor, summarized its 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.[110]

In 1993, in *Bray v. Alexandria Women's Health Clinic*, the Supreme Court addressed the use of the Ku Klux Klan Act by pro-abortionists against Rescue groups.[111] In the words of the Court, the main question presented in the case 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."[112] The Klu Klux Klan 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.'"[113] 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,

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[109] See *id.* at 477.

[110] *Id.* at 488.

[111] 506 U.S. 263 (1993).

[112] *Id.* at 266.

[113] Sue Mota, "*Bray v. Alexandria Women's Health Clinic*: Abortion Protestors are not Liable under the Ku Klux Klan Act," 35 *Catholic University Law Journal* 381, 382 (1994).

any more than they do so (as we have held) when their objective is to stifle free speech.[114]

Prima facie, the Court's ruling deprived pro-abortion forces of one of their main weapons in their struggle against pro-life activists. *Bray's* immediate impact was lessened because some federal courts retained jurisdiction over rescue cases on account of the pro-abortionists' state law claims, under the legal doctrine of pendent jurisdiction.[115] Furthermore, federal courts disagreed as to the proper interpretation of *Bray*.[116] Some dismissed outright the Ku Klux Klan Act claims against rescuers,[117] while others allowed pro-abortion forces the chance to prove their case in light of what the Court stated in *Bray*.[118] Thus, while the situation is not entirely

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[114] *Id.* at 286.

[115] See, e.g., *Women's Health Care Services, PA. v. Operation Rescue*, Nat., 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*, 7th ed., ed. Bryan A. Garner (1999), p. 856.

[116] See Carolyn J. Lockwood, Comment, "Regulating the Abortion Clinic Battleground: Will Free Speech be the Ultimate Casualty?" 21 *Ohio Northern University Law Review* 995, 1006 (1995).

[117] See, e.g., *NOW v. Operation Rescue*, 816 F.Supp. 729 (D. D.C. 1993). In that case, the court ruled that: "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 *National Organization for Women v. Operation Rescue*, 37 F.3d 646, 651 (D.C. Cir. 1994).

[118] See, e.g., *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039 (2nd Cir. 1993). In *West Hartford*, 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

clear, one can confidently say that it would now be considerably more difficult–if not outright impossible–for pro-abortionists to bring a Ku Klux Klan Act cause of action in the wake of a rescue.

In 1994, in *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...."[119] This decision allowed the National Organization for Women's ("NOW") suit to proceed against Scheidler and his fellow pro-lifers.[120] However, in 2003, in *Scheidler v. National Organization for Women, Inc*. (*Scheidler* III), the Court held the following: "Because 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."[121] The Court went on to state that:

> 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

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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,'...'[g]iven 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).

[119] 510 U.S. 249, 252 (1994). For a review of the main events of this lengthy case, at least until 2005, see *National Organization for Women v. Scheidler*, 396 F.3d 807, 809-10 (7th Cir. 2005) (*Scheidler* V); "*NOW v. Scheidler*," *Pro-Life Action League*, at http://www.prolifeaction.org/nvs/index.htm (last visited Jul. 20, 2005).

[120] See *National Organization For Women, Inc. v. Scheidler*, 267 F.3d 687, 694 (7th Cir. 2001) (*Scheidler II*).

[121] 537 U.S. 393, 409 (2003).

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 ne National Organization for Women v. Scheidler ed 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.[122]

When the 8-1 ruling came down, it was generally viewed as a total victory for pro-life activists.[123] However, on February 26, 2004, 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.[124]

On January 28, 2005, in response to petitions for rehearing and rehearing en banc, the Seventh Circuit affirmed its February 2004 decision.[125] On June 28, 2005, the Supreme Court granted a "Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit," thereby

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[122] *Id.* at 410-11.

[123] See, e.g., Sue Ann Mota, "*Scheidler v. NOW*: The Supreme Court Holds that Abortion Protestors are not Racketeers," 16 *Regent University Law Review* 139 (2004); Eric J. Scheidler, "Scheidler Victory in the Supreme Court," *Pro-Life Action League*, at http://www.prolifeaction.org/nowvscheidler/victory.htm (last visited Jan. 17, 2005).

[124] *Scheidler* V, 396 F.3d at 810 (quoting *National Organization for Women, Inc. v. Scheidler*, 91 Fed.Appx. 510, 512 (2004) (*Scheidler* IV) (unpublished order)).

[125] See *Scheidler* V, 396 F.3d at 817.

agreeing to hear the Scheidler matter once more and to answer definitively the *Scheidler* V court's lingering questions.[126] On February 28, 2006, the Court handed down a unanimous decision, 8-0 with Justice Alito not taking part, in *Scheidler* VII.[127] In an opinion by Justice Breyer, the Court stated unequivocally: "We conclude 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."[128] By any reasonable account, this case ends any possibility of using civil RICO against pro-life protestors.

Since 1994, when FACE was enacted, the Court has decided three other cases that bear directly on pro-life activism. In *Madsen v. Women's Health Center, Inc.*[129] and *Schenck v. Pro-Choice Network Of Western New York*,[130] 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.[131] Specifically, in *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

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[126] *Scheidler v. National Organization for Women, Inc.*, 125 S.Ct. 2991, 2991 (U.S. 2005) (*Scheidler* VI); see *Operation Rescue v. National Organization for Women, Inc.*, 125 S.Ct. 2991 (U.S. 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, *Scheidler v. National Organization for Women, Inc*., 125 S.Ct. 2991 (U.S. 2005) (No. 04-1244) (available in electronic database, 2005 WL 1130231 (U.S.)). Thus, even before the decision was handed down, it appeared to informed observers that peaceful rescues could no longer be grounds for RICO liability.

[127] *Scheidler v. National Organization for Women, Inc.*, 126 S.Ct. 1264 (2006) (*Scheidler* VII).

[128] *Id.* at 1274.

[129] 512 U.S. 753 (1994).

[130] 519 U.S. 357 (1997).

[131] See *Madsen*, 512 U.S. at 776; *Schenck*, 519 U.S. at 361.

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.[132]

In *Schenck*, the Court stated: "We uphold the provisions imposing 'fixed bubble' or 'fixed buffer zone' limitations, as hereinafter described, but hold that the provisions imposing 'floating bubble' or 'floating buffer zone' limitations violate the First Amendment."[133] However, pro-life direct action participants suffered an unqualified loss in *Hill v. Colorado*, where the Court upheld a state statute that made 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 public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.[134]

From the case law discussed in this paper, as well as other sources, it is possible to speculate about the outcome of a case challenging the constitutionality of FACE that reaches the Supreme Court. Both *Lopez* and *Morrison* were decided 5-4.[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,[136] three members of the *Lopez* and *Morrison* majorities would still be on the bench: Justices Scalia, Thomas, and Kennedy. Scalia and Kennedy both joined the majority in *Frisby*,[137] while Scalia, Kennedy, and Thomas joined in Chief Justice Rehnquist's unanimous opinion in

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[132] *Madsen*, 512 U.S. at 776.

[133] *Schenck*, 519 U.S. at 361.

[134] 530 U.S. 703, 707 n.1 (2000). Clearly, this statute makes it considerably more difficult to sidewalk counsel.

[135] See *Lopez*, 514 U.S. at 550; *Morrison*, 529 U.S. at 600.

[136] See Richard W. Stevenson, "O'Connor to Retire, Touching Off Battle Over Court," *The New York Times* (July 2, 2005), at p. A1; Linda Greenhouse, "William H. Rehnquist, Chief Justice of Supreme Court, Is Dead at 80," *The New York Times* (Sept. 4, 2005), at p. 138.

[137] See 487 U.S. at 475.

Scheidler I.[138] However, Scalia wrote the majority opinion in *Bray*, in which Thomas, Rehnquist and Kennedy joined,[139] though Kennedy did add in a 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."[140]

Furthermore, Scalia, Thomas, and Kennedy voted in accord with pro-life direct action interests in *Madsen*[141] and *Schenck*,[142] dissented in *Hill*,[143] and sided with the pro-life activists in *Scheidler* III and *Scheidler* VII.[144] These justices have shown their concern for pro-life direct action participants in other cases as well. For example, in 1997, the Supreme Court denied certiorari to a California abortion protest case.[145] Justice Scalia dissented to this decision and was joined by Justices Thomas and Kennedy.[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 the speech rights of clinic protesters in a public forum."[147] Moreover, in the dissent's view, the lower court in the case had purposefully disre-

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[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).

[139] See 506 U.S. at 265.

[140] *Id.* at 288 (Kennedy, J., concurring).

[141] See 512 U.S. at 756.

[142] See 519 U.S. at 360.

[143] See 530 U.S. at 705.

[144] See 537 U.S. at 395; 126 S.Ct. at 1268.

[145] See *Williams v. Planned Parenthood Shasta-Diablo, Inc*., 520 U.S. 1133 (1997).

[146] See *id.* at 1133-39 (Scalia, J., dissenting).

[147] *Id.* at 1135 (Scalia, J., dissenting).

garded the relevant Supreme Court precedents.[148] Justice Scalia advocated "grant[ing] the petition for certiorari, summarily revers[ing] the judgment of the Supreme Court of California, and remand[ing] for further proceedings."[149] Justices Scalia and Thomas also dissented to the denial of certiorari in another abortion protest case in 2000.[150]

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*,[151] those same justices split over a Commerce Clause question in *Gonzales v. Raich*.[152] Some commentators have interpreted the latter case as a substantial defeat for federalism.[153] In *Raich*, the Court, per

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[148] See *id.* at 1134 (Scalia, J., dissenting).

[149] *Id.* (Scalia, J., dissenting).

[150] See *Cloer v. Gynecology Clinic, Inc*., 528 U.S. 1099, 1099 (2000) (Scalia, J., dissenting). 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).

[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 Supreme Court Reviewer* 113, 113 (2005-2006): "The Supreme Court''s 2005 decision in *Gonzales v. Raich* ;B1;B1severely 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: "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

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.[154] Kennedy joined the majority's opinion.[155] Scalia concurred in the Court's judgment, though not with Justice Steven's opinion.[156] 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.'"[157] Justice Thomas issued a strong dissent.[158]

Though it is impossible to be sure, *Raich* probably does not substantially alter the calculations made above 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 that there has been no fundamental change in his support of a narrowed Commerce Clause.[159] Indeed, his support for the

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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.... [O]thers 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* put the Court's seriousness to the test along both these dimensions.... [T]he Rehnquist Court...in so holding...invited–and received–vigorous questions about its seriousness in federalism cases." Ernest A. Young, "Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after *Gonzales v. Raich*," 2005 *Supreme Court Reviwer* 1, 1-3 (2005).

[154] See 545 U.S. at 15-33.

[155] See *Raich*, 545 U.S. at 4.

[156] See *id*.

[157] *Id*. at 39-40 (Scalia, J., concurring) (citations omitted).

[158] See *id*. at 57-58 (Thomas, J., dissenting).

[159] See *id*. at 33 (Scalia, J., concurring).

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."[160] Taking this as settled law, Scalia believed the main question to be answered in *Raich* was whether the means Congress had picked are "reasonably adapted" to the fulfillment of a valid goal under the Commerce Clause.[161]

If Kennedy threw his support behind others to uphold FACE, such a vote would run afoul of the great majority of his previous actions on the bench.[162] 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."[163] 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*[164] and Justice Breyer wrote the majority opinion in *Scheidler* VII,[165] there is on the whole not very much evidence that either of them or Justices Ginsburg or Souter would find the Act unconstitutional. Whether the Roberts Court can invalidate FACE therefore depends on the views of the new Chief Justice himself and Justice Alito. This paper will now review the main facts known about the two jurists in this regard. Before their confirmations, a fair amount of attention was paid to both Roberts's and Alito's outlooks on the Com-

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[160] *Id.* at 37 (Scalia, J., concurring).

[161] See *id.* (Scalia, J., concurring).

[162] See, e.g., Leslie Wepner, Comment, "The Machine Gun Statute: Its Controversial Past and Possible Future," 75 *Fordham Law Review* 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."

[163] 545 U.S. at 25-26.

[164] See 487 U.S. at 475.

[165] See 126 S.Ct. at 1268.

merce Clause.[166]

In 2003, in *Rancho Viejo, LLC v. Norton*, then-Judge Roberts dissented from a decision by the D.C. Circuit to deny 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 "Such 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 allowing him to author his dissent in *Rancho Viejo*, Roberts's short time on the D.C. Circuit does not seem to have illuminated substantially the Chief Justice's views on the Commerce Clause.

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[166] See, e.g., "Battle under way over Bush pick for top court; Roberts campaigns to nail support; Specter foresees no filibuster," *MSNBC*, at http://msnbc.msn.com/id/8644618/ (last visited May 16, 2007); 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* (Nov. 14, 2005), at p. 22.

[167] See 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 Law Review* 1, 9 (2006).

[168] *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting) (citations omitted) (emphasis added).

[169] See *id.* (Roberts, J., dissenting).

[170] *Id.* (Roberts, J., dissenting).

On his way towards confirmation, when he was before the Senate Judiciary Committee, Roberts answered a number of questions about the Commerce Clause.[171] Importantly, in 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 to the Senators that the sole problem, constitutionally, 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 cases involving firearms.[175] However, in response to one question, he did reiterate the fact that *Lopez* and *Morrison* required that, 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 had 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

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[171] See Lazarus, *supra* n.168, at 9-18; Paul Alexander Fortenberry & Daniel Canton Beck, "Chief Justice Roberts–Constitutional Interpretations of Article III and the Commerce Clause: Will the 'Hapless Toad' and 'John Q. Public' Have Any Protection in the Roberts Court?" 13 *University of Baltimore Journal of Environmental Law* 55, 93 (2005).

[172] Lazarus, *supra* n.168, at 15.

[173] *Id.*

[174] *Id.* at 17.

[175] See *id.*

[176] *Id.*

[177] See Elisabeth Bumiller and Carl Hulse, "Bush Picks U.S. Appeals Judge to Take O'Connor's Court Seat," The New York Times (Nov. 1, 2005), at p. A1.

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] In opposition to the majority, Alito urged, in strong terms, 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."[180]

Alito's dissent therefore indicated that he, for one, saw *Lopez* as anything but a "constitutional freak."

During his confirmation process, Alito also faced questions on the Commerce Clause when he went in front of the Senate Judiciary Committee.[181] He gave this general statement:

> Well, *Lopez* is a precedent of the court 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's 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

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[178] 103 F.3d 273 (3d Cir. 1996).

[179] *Rybar*, 103 F.3d at 286 (Alito, J., dissenting).

[180] *Id.* at 294 (Alito, J., dissenting).

[181] See Lazarus, *supra* n.168, at 28-29.

system set up by our Constitution.[182]

Alito did stand by his *Rybar* dissent.[183]

Since Roberts and Alito took their places on the Court, a number of federalism cases have been heard, with mixed results.[184] However, none of them involved an outright challenge to the constitutionality of a federal statute on Commerce Clause grounds and they will consequently not be reviewed as they are outside the scope of this paper. 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.[185] Apparently, neither Roberts nor Alito decided any cases concerning abortion protest when they were federal judges. There were significant inquiries into both men's views on abortion and the Court's abortion jurisprudence during the time leading up to their confirmations, however little information on their outlook on abortion protest was searched for or discovered. While the facts uncovered were, on the whole, positive from the pro-life perspective, it nevertheless does not seem wise to assume that what either justice thinks about abortion generally is synonymous with what Roberts or Alito thinks about the protesting of abortion. It is known that 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.[186] However, to say the least, opinions vary as to whether a person's role in preparing an appellate brief has any predictive value for the actions of that

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[182] "U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court," *The Washington Post*, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011001087.html (last visited May 16, 2007) ("Alito Nomination Hearings").

[183] See Maxwell L. Stearns, "The New Commerce Clause Doctrine in Game Theoretical Perspective," 60 *Vanderbilt Law Review* 1, 8 (2007).

[184] See Lazarus, *supra* n.168, at 4-7; Somin, *supra* n.154, at 122-33.

[185] See 126 S.Ct. at 1268.

[186] See Robin Toner, "Cold Paper Trail Leads Some to Scrutinize Nominee's Past Words on Abortion," The New York Times (July 21, 2005), at p. A22; "Abortion rights group pulls anti-Roberts ad," *MSNBC*, at http://www.msnbc.msn.com/id/8917728/ (last visited May 17, 2007).

same person as a justice on the Court.[187]

Scholars are divided as to the significance of this Roberts-Alito evidence. For example, Erwin Chemerinsky, Alston & Bird Professor of Law and Political Science at Duke University, writes confidently that "Over 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."[188] Conversely, Ernest A. Young, Judge Benjamin Harrison Powell Professor of Law at the University of Texas at Austin, opines that:

> 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.[189]

A review of the salient data therefore suggests that there is a fairly good chance that both Roberts and Alito would vote against the constitutionality of the Act, if such a matter were before the Court. It would thus appear, based on the evidence presented in this paper, that there are now five anti-FACE justices on the Court: Scalia, Thomas, Kennedy, Roberts, and Alito. However, whether the Roberts Court will invalidate the Act is a different matter for several reasons.

Despite the fact that FACE has been on the books for over ten years, and its constitutionality has been challenged many times, the Court has yet

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[187] See, e.g., Toner, *supra* n.187, at p. A22.

[188] Erwin Chemerinsky, "The Future of Constitutional Law," 34 *Capital University Law Review* 647, 657 (2006).

[189] Young, *supra* n.154, at 43.

to agree to hear a case concerning the validity of the Act. Indeed, the Court has denied certiorari to every post-*Morrison* FACE case.[190] In part, this must be due to the fact that no federal court of appeals has ever held FACE unconstitutional. The Court is more likely to grant a petition for certiorari when there is a dispute among the circuits in need of resolution.[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 agrees to look at only approximately 150.[194] Statistically, therefore, 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 that there are currently the requisite number of anti-FACE justices on the Supreme Court to find that the Act violates the Commerce Clause. At the same

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[190] See, e.g., *Gregg v. U.S.*, 532 U.S. 971 (2001); *Norton v. Ashcroft*, 537 U.S. 1172 (2003); *Bird v. U.S.*, 126 S.Ct. 150 (2005).

[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).

[192] Barbara Palmer, "The 'Bermuda Triangle?' The Cert Pool and its Influence Over the Supreme Court's Agenda," 18 *Constitutional Commentary* 105, 105 (2001).

[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 Texas Law Review 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 NewsHour: Supreme Court Watch; Court History; Choosing & Hearing Cases," *PBS*, at http://www.pbs.org/newshour/indepth_coverage/law/supreme_court/history_cases.html (last visited May 18, 2007).

[195] See *id.*

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 latter fact at least intimates that the justices labeled here as "anti-FACE," even if in strict terms they view the Act as unconstitutional, may not be particularly concerned about it.

The appointment of Roberts and Alito to the Court may well mean the end of FACE, however it is emphatically not a sure thing. In order to take advantage of this development, pro-life activists must work diligently to get the Court to hear a FACE case. To accomplish this necessary intermediate step, advocates for the pre-born 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 hear a substantial amount of post-*Morrison* cases where the validity of the Act is in question, it may be possible to produce a Circuit split, which certainly helps increases the chances of the Supreme Court's granting certiorari. Moreover, in addition to facial challenges, pro-lifers should seek cases with a sympathetic factual record, such as one involving an all-women rescue like the direct action event that occurred in Philadelphia in February 1990.[197] If such actions are pursued vigorously, the winds of change may blow in the direction of the pre-born and their defenders in an important area of the abortion struggle.

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[196] See *Bird v. U.S.*, 127 S.Ct. 1501 (2007).

[197] See Martha Woodall, "Women Picket Clinic," *Philadelphia Inquirer* (Feb. 4, 1990), at p. B01.