About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light of Lopez

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ABOUT F.A.C.E. IN THE SUPREME COURT:
THE FREEDOM OF ACCESS TO CLINIC
ENTRANCES ACT IN LIGHT OF LOPEZ

The United States Constitution is the cornerstone of democratic
principles in our country. Since its adoption, it has provided the
balance between societal needs and individual rights. For more
than fifty years, the Commerce Clause has been instrumental in
effecting that balance. The United States Supreme Court, however,
recently gave that clause a narrow reading. As a result, civil
liberty, the essence of our creed as a democratic nation, is in jeop-
dardy. Although the arduous struggle to identify and protect indi-
vidual liberties has achieved some success, much remains to be
accomplished. The present United States Supreme Court has

1 See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 389 (1978) (stating that decla-
ration of principles in Constitution were “to provide the cornerstone of the new nation”); Flows-

2 See Lawrence S. Lustberg, Limiting Individual Choice in Education: The QEA and Inter-District Regionalization, 154 N.J.L. 20 (1993) (stating that “[t]he same conflict between individual rights and societal needs pervades our federal constitutional jurispru-
dence”); see also City of New Orleans v. Duke, 427 U.S. 297, 304 (1976) (balancing state’s interest “to preserve the appearance and custom valued by the Quarters residents” with individual’s economic rights); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) (balancing student’s free speech right with school system’s interest in avoiding “substantial disruption” of educational environment).


4 United States v. Lopez, 115 S. Ct. 1624, 1633 (1995) (striking down legislation prohibi-
ting gun possession in school zones as beyond congressional commerce power).

5 See, e.g., Gene R. Nichol, Jr., Constitutional Perils—Real and Otherwise, 1984 Duke L.J. 1002, 1003 (book review) (elaborating on uncertain status of American civil liberties); see id. at 1011 (expressing concerns that existence of conservative Supreme Court and Congress “exacerbates the dangers to individual liberties”).

6 See Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)-2000(e) (1988) (using Commerce Clause to remedy perceived moral wrong by allowing federal prohibition of employment discrimination based on individual’s “race, color, religion, sex or national origin”); see also Nichol, supra note 5, at 1002 (indicating that by any measure civil liberties protection has undergone “major expansion”).

7 See Nichol, supra note 5, at 1002 (stating civil liberties are not “static” and new problems arise regularly); see also Michael J. Zimmer et al., Cases and Materials on Employment Discrimination 76 (3d ed. 1994) (stating unemployment among black Americans is twice that of white Americans despite 30 years since enactment of Civil Rights Act of 1964).
placed obstructions in the path of future civil rights legislation and threatens to reverse the trend toward expanded civil liberties established by the Court under Chief Justice Earl Warren.

Since the late 19th century, Congress has attempted to use different constitutional clauses to protect individual liberties with varying degrees of success. The post-Civil War adoption of the Fourteenth Amendment held great promise as an instrument to secure individual liberty. The Equal Protection Clause was viewed as a potential source of congressional power to enact legislation that would protect civil liberties. It became evident, how-

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6 See, e.g., Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (holding that federal affirmative action programs are required to pass strict judicial scrutiny); Nichol, supra note 5, at 1011 (discussing that Burger Court “produced a strong activist record without promoting a clear vision of the role of the Supreme Court in protecting human rights”); see also William Eskeridge, Reneging on History? Playing the Court/Congress/President Civil Rights Game, 79 CAL. L. REV. 613, 680 (1990) (discussing Rehnquist Court’s possible obstructive bent in civil liberties arena); Reconstructing Civil Rights, N.Y. Times, Feb. 12, 1990, at A20 (criticizing Rehnquist Court’s narrow reading of federal civil rights legislation).


11 See Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335. Congress passed the Act, relying on the newly ratified Fourteenth Amendment. Id. The Act prohibited discrimination against individuals on the basis of race and applied to the conduct of private individuals. Id. at 336.

ever, that the Equal Protection Clause, standing alone, could not provide the necessary justification for this type of federal regulation. Consequently, Congress pursued other avenues as authority for its legislation.

The Commerce Clause became an effective vehicle for the passage of civil rights legislation. The recent trend in the Supreme Court, however, has cast doubt on the utility of the Commerce Clause in this area.

This departure from the traditionally broad interpretation of the Commerce Clause may leave Congress without an essential

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13 See The Civil Rights Cases, 109 U.S. 3, 11, 24-26 (1883) (holding that Fourteenth Amendment applied only to state action, related only to slavery and involuntary servitude, and would not authorize congressional regulation of discriminatory practices in public accommodations); see also Adarand Constructors, Inc., 115 S. Ct. at 2113 (holding that strict scrutiny standard of review is applicable to race-based classifications).


15 U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress to "regulate Commerce with Foreign Nations, and among the Several States, and with the Indian tribes").

16 See S. Rep. No. 872, supra note 14, at 2368-77 (indicating that Civil Rights Act of 1964 applies to public places engaged in interstate commerce or where patrons were interstate travelers); see also Katzenbach v. McClung, 379 U.S. 294, 301-05 (1964) (holding constitutional federal prohibition of discrimination in restaurants); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (holding constitutional federal prohibition of discrimination in public accommodations).

17 See, e.g., FRIEDELBAUM, supra note 9, at 2 (stating that while author generally avoids blanket characterizations of Court, he is compelled to classify Rehnquist Court as conservative); Bennett L. Gershman, Judicial "Conservatism", N.Y. L.J., June 21, 1995, at 2 (discussing present conservative Supreme Court); Lewis J. Liman, The Lawyer's Bookshelf, N.Y. L.J. June 30, 1995, at 2 (book review) (criticizing Rehnquist Court's "stingy interpretation" of civil rights statutes); see also Christopher E. Smith & Thomas R. Hensley, Unfulfilled Aspirations: The Court Packing Efforts of Presidents Reagan and Bush, 57 ALB. L. REV. 1111, 1111-13 (1994) (discussing that through appointment of conservative justices, Presidents Reagan and Bush hoped to change direction in which Court seemed headed, particularly in area of civil rights); cf. GERALD GUNTHER, CONSTITUTIONAL LAW 122-24 (12th ed. 1991) (discussing that while Lopez decision will not have material impact on presence of guns in schools, it may have impact on unrelated federal legislation).

18 See United States v. Lopez, 115 S. Ct. 1624, 1633 (1995) (holding that Commerce Clause will not support legislation aimed at providing safe educational environment in public schools); see also Gershman, supra note 17, at 2 (indicating that recent Court decisions "may have uprooted nearly 60 years of Commerce Clause jurisprudence"). See generally Earl M. Maltz, The Prospects for a Revival of Judicial Activism in Constitutional Jurisprudence, 24 GA. L. REV. 629, 633-34 (1990) (discussing extremely conservative trend in Supreme Court); Charles J. Russo, United States v. Lopez and the Demise of the Gun-Free School Zones Act: Legislative Over-Reaching or Judicial Nit-Picking?, 99 EDUC. L. REP. 11, 22 (1996) (discussing that while Lopez decision will not have material impact on presence of guns in schools, it may have impact on unrelated federal legislation).
tool to preserve individual liberties.\textsuperscript{19} The purpose of this Note is to explore the prospects for future civil liberties legislation enacted under the authority of the Commerce Clause. Part One of this Note traces the evolution of the Commerce Clause and its interpretation in the courts with regard to social welfare, particularly civil liberties. It also explores the opposing views present within two philosophies which lie at the heart of the Commerce Clause debate, federalism and interpretivism. Part Two discusses the recent trend of the Supreme Court, as demonstrated by the Court’s narrow interpretation of the Commerce Clause in \textit{United States v. Lopez}.\textsuperscript{20} Part Three addresses the effect of the Court’s stance on recent legislation passed under the Commerce Clause. Particular attention will be paid to the future of the Freedom of Access to Clinic Entrances Act of 1994 ("FACE").\textsuperscript{21} Part Four suggests alternative constitutional authority for the enactment of FACE. The narrow interpretation given the Commerce Clause in \textit{Lopez} suggests that FACE may not survive a challenge to its constitutionality under that clause. The Fourteenth Amendment, however, may provide Congress with an alternative constitutional justification to sustain the Act.

I. \textbf{COMMERCE CLAUSE JURISPRUDENCE}

A. \textbf{Historical Background}

The Framers of the Constitution granted Congress certain enumerated powers, including the power to regulate interstate commerce.\textsuperscript{22} In Federalist Paper No. 11,\textsuperscript{23} Alexander Hamilton opined

\textsuperscript{19} See Bell, supra note 9, at 598 (stating that absent developments reversing current conservative trend, Civil Rights Act of 1964 in jeopardy); David M. Burke, The "Presumption of Constitutionality" Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty, 18 HARV. J.L. \\& PUB. POL’Y 73, 74-75 (1994) (discussing debate regarding “Rehnquist Court’s respect for an adherence to the doctrine of stare decisis” and its negative effect on safeguarding of individual liberty). See generally John E. Nowak, Attacking the Judicial Protection of Minority Rights: The History Ploy, 84 MICH. L. REV. 608, 609 (1986) (reviewing RICHARD E. MORGAN, DISABLING AMERICA: THE “RIGHTS INDUSTRY” IN OUR TIME (1984)).
\textsuperscript{20} 115 S. Ct. 1624, 1628 (1995).
\textsuperscript{22} U.S. CONST. art. 1, § 8, cl. 3 (providing that Congress has authority "[t]o regulate Commerce"); see also David S. Gehrig, Note, The Gun-Free School Zones Act: The Shootout Over Legislative Findings, the Commerce Clause, and Federalism, 22 HASTINGS CONST. L.Q. 179, 180 (1994) (commenting that Framers intended commerce power to be “specific [and] narrow” but subsequent interpretation has expanded it).
that commerce was synonymous with "trade and navigation." He suggested that a broad application of the Commerce Clause was necessary to protect matters affecting trade. He also thought that it was in the best interests of the entire nation to be competitive in foreign markets. In *Gibbons v. Ogden*, decided in 1824, the Supreme Court offered an even broader reading of the clause than that espoused by Hamilton. In *Gibbons*, the Court determined that the Commerce Clause permitted Congress to regulate any activity that affected more than one state.

For nearly a century after *Gibbons*, the Court's decisions dealt with the limits placed on state regulation of commerce matters and did not discuss the scope of Congress' power under the clause. For example, certain activities, such as mining, production and manufacturing, were exempt from congressional regulatory legislation. This changed with the advent of President

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25 See *The Federalist* No. 11, supra note 23, at 85 (discussing meaning of Commerce Clause).

26 Id.

27 22 U.S. (9 Wheat.) 1, 19 (1824) (holding that one state could not grant steamboat monopoly at expense of another state).

28 Id. The Court's broad construction of the Commerce Clause gave Congress the power to regulate activities "affect[ing] the States generally." Id. at 195. See *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (stating that *Gibbons* gave Commerce Clause "breadth never yet exceeded"); see also *Russo*, supra note 16, at 22 (discussing *Gibbons* recognition of "far-reaching extent and accompanying limitations" of Commerce Clause).

29 See *Gibbons*, 22 U.S. at 194. The *Gibbons* Court also recognized that Congress's constitutional power to regulate commerce "among the several States" extends to activities within the interior of a state as well. Id. It seemed that the Court only excluded regulation of "completely internal" activities from this broad delegation of power. Id.

30 See, e.g., United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (holding that manufacture was distinct from "commerce"); *Kidd v. Pearson*, 128 U.S. 1, 20-22 (1888) (holding that prohibiting manufacture of liquor was within state's power); *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1853) (holding that state created steamboat monopoly did not infringe on Congress's commerce power). But see *The Shreveport Rate Case*, 234 U.S. 342, 350-51 (1914) (illustrating Supreme Court's slow departure from restrictive view of *Knight* by permitting regulation of intrastate rail rates).

31 See *Carter v. Carter Coal Co.*, 298 U.S. 238, 303-04 (1936) (finding that regulation of coal prices and employee wages in bituminous coal industry was beyond congressional Commerce Clause authority).

32 Id. The *Carter* Court found that provisions in the Bituminous Coal Conservation Act of 1935 regarding prices, wages and working conditions, fell within "production" which was deemed a local activity and subject to state, not federal regulation. Id.; see also *Hammer v. Dagenhart*, 247 U.S. 251, 271-77 (1918) (holding that federal laws attempting to regulate child labor were unconstitutional because "making of goods" was not considered part of commerce), overruled by United States v. Darby, 312 U.S. 100, 116-17 (1941).

33 See United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (holding that manufacturing was distinct from "commerce").
Franklin Delano Roosevelt's "New Deal" legislation and the Court's validation of congressional ability to regulate activities beyond those affecting traditional areas of commerce. In 1937, the Court recognized Congress's authority under the Commerce Clause to enact legislation affecting intrastate activities with a substantial relation to interstate commerce. Four years later, the Court again expanded the scope of the Commerce Clause in United States v. Darby. In Darby, the Court upheld the Fair Labor Standards Act of 1938, explaining that Congress was empowered by the Commerce Clause to enact legislation which had a rational relation to a legitimate government interest. A few months after Darby, the Court further expanded the scope of the clause when it held that the intrastate activities of an individual citizen could be constitutionally regulated when the cumulative effect of such activities would affect interstate commerce.

The New Deal legislation enacted under the Commerce Clause, and the Court's affirmation of it, provided Congress with the necessary foundation for the enactment of the Civil Rights Act of


35 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). The NLRB Court found the National Labor Relations Act to be a permissible and constitutional exercise of Congress' authority under the Commerce Clause. Id. at 49. But see Darby, 312 U.S. at 118 (holding that Commerce Clause legislation need only show that regulated activity "affects" commerce).

36 312 U.S. 100, 116-17 (1941) (holding regulation of labor within Congress's Commerce Clause power and overruling Hammer v. Dagenhart, 247 U.S. 251 (1918) which held that pre-New Deal legislation regulating child labor was not within Congress's Commerce Clause power).


38 Darby, 312 U.S. at 123; see United States v. Wrightwood Dairy, 315 U.S. 110, 119 (1942) (stating commerce power is not limited to regulation of commerce between states but extends to intrastate activities affecting interstate commerce when regulation of activities is appropriate means to legitimate end).

1964.40 The failure of earlier civil rights legislation such as the Civil Rights Act of 187541 to pass constitutional muster under the Equal Protection Clause of the Fourteenth Amendment necessitated reliance on Congress's Commerce Clause authority.42 The post-Civil War amendments, under which the earlier legislation was enacted, were interpreted by the courts43 as intending to place the newly-freed slaves on equal footing with other male citizens.44 Subsequent case law proved that the aim of the Amendments was not to protect the civil liberties of every individual in every circumstance.45 However, because the Civil Rights Cases46 intimated that the Commerce Clause might provide the necessary congressional authority to sustain a civil rights act,47 Congress relied upon this clause when it enacted the 1964 Act.48


41 ch. 114, § 1, 18 Stat. 335 (1875).


43 U.S. CONST. amend. XIII. The Thirteenth Amendment states "[n]either slavery nor involuntary servitude... shall exist within the United States...." Id. U.S. CONST amend. XIV. The Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States... nor deny to any person within its jurisdiction the equal protection of the laws." Id. U.S. CONST. amend. XV. The Fifteenth Amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." Id.

44 See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70-71 (1873) (adopting narrow interpretation of post-Civil War amendment protection to include only newly emancipated slaves); id. at 81 (expressing doubt that any action other than discrimination against blacks would ever fall under provisions of Fourteenth Amendment); see also Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (stating that Court's "initial view" of Fourteenth Amendment was that it provided freedom for "slave race"). But see Michael J. Klarman, Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments, 44 STAN. L. REV. 759, 772 (1992) (criticizing Ackerman's theory that Slaughter-House Cases would have been more appropriately decided if Court used egalitarian interpretation of post Civil War Amendments). Ackerman suggested that this view was more consistent with the "floundering principle of federalism." Id.


46 109 U.S. 3 (1883).

47 See The Civil Rights Cases, 109 U.S. at 17 (1883) (stating that although 1875 civil rights legislation was not authorized under Fourteenth Amendment, Commerce Clause may have provided necessary authority to sustain such legislation).

48 S. REP. No. 872, supra note 14, at 2367.
The use of the Commerce Clause proved prudent, as evidenced by the decisions in *Heart of Atlanta Motel, Inc. v. United States*\(^49\) and *Katzenbach v. McClung*.\(^50\) Whereas the Equal Protection Clause had not supported legislation prohibiting discrimination in public accommodations,\(^51\) the use of the Commerce Clause was successful.\(^52\) In *Heart of Atlanta*, the Court held that Congress was required to show only that a rational basis existed for finding that the proscribed activity affected interstate commerce and that the means used to remedy it was "reasonable and appropriate."\(^53\) In *McClung*, the companion case to *Heart of Atlanta*, the Court held that a congressional prohibition against discrimination in restaurants was warranted because Congress had a rational basis for finding that such discrimination affected interstate commerce.\(^54\)

In 1971, the Supreme Court further broadened congressional authority under the Commerce Clause when it decided *Perez v. United States*.\(^55\) In *Perez*, the Court upheld congressional regulation of criminal activity\(^56\) as consistent with the Commerce Clause


\(^{50}\) 379 U.S. 294, 297-99 (1964).

\(^{51}\) See *The Civil Rights Cases*, 109 U.S. 3, 11, 24-26 (1883) (holding that Fourteenth Amendment did not provide authority to regulate discriminatory practices in public accommodations); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70-71 (1873) (stating that post-Civil War Amendments were intended to protect only newly-freed slaves); see also Anthony B. Ching, *Travelling Down the Unsteady Path: United States v. Lopez, New York v. United States and the Tenth Amendment*, 29 Loy. L.A. L. Rev. 99, 136 (1995) (discussing narrow interpretation given to Fourteenth Amendment in *The Civil Rights Cases* and "Court's reluctance to apply the Fourteenth Amendment to non-racial discrimination").


\(^{53}\) *Heart of Atlanta*, 379 U.S. at 258 (upholding congressional use of Commerce Clause legislation prohibiting racial discrimination in motels and other public accommodations); see Gehrig, *supra* note 22, at 183-86 (commenting on *Heart of Atlanta* decision and use of Commerce Clause in area of civil liberties).

\(^{54}\) *McClung*, 379 U.S. at 299. The Congressional Record is "replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants." *Id.* The evidence was substantial enough in the eyes of the Court to support the use of the Commerce Clause as the basis for congressional action in this area. *Id.* at 299-304. See generally *S. Rep. No. 872*, *supra* note 14, at 2366-67 (outlining Senate Report on effects of racial discrimination on interstate commerce).

\(^{55}\) 402 U.S. 146, 151-53 (1971) (holding that "extortionate extension of credit" in entirely local activities was within Congress's Commerce Clause power); see also *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that "[e]ven if [an] . . . activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce").

\(^{56}\) *Perez*, 402 U.S. at 152-53. The *Perez* court found that loan sharking affected commerce and allowed Congress to regulate it. *Id.*
and clarified the three main categories under which Congress could enact legislation. The first category encompassed the misuse of "channels of interstate commerce." The second category permitted the "protection of the instrumentalities of interstate commerce." The third category, and probably the most useful in the protection of civil liberties, permitted regulation of those activities "affecting commerce."

Ten years later, in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, the Court found that environmental concerns fell within the third category as "affecting commerce" and upheld the Surface Mining Control and Reclamation Act of 1977. Justice William H. Rehnquist, in his concurrence, agreed that surface mining fell within the bounds of "affecting commerce," but he argued that the appropriate standard of review was whether the activity "substantially" affected commerce. This concurrence foreshadowed the Court's recent decision in *United States v. Lopez*, which stated the applicable standard to be "substantially affect[ing]" interstate commerce. It is important to address the

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57 Id.
58 Id. at 150. This included shipment of stolen goods or kidnapped persons. *Id.*; see Cammelli v. United States, 242 U.S. 470, 491 (1917) (holding prohibition of transportation of women in interstate commerce for immoral purposes within commerce power). *See generally NLRB v. Fainblatt*, 306 U.S. 601, 602 (1939) (discussing distribution of processed materials through channels of interstate commerce).
60 *Perez*, 402 U.S. at 150. The *Perez* Court held Title II of the Consumer Credit Protection Act constitutional because loan sharking in its "national setting" funded organized crime and thereby affected interstate commerce. *Id.* at 156-57; see United States v. *Lopez*, 115 S. Ct. 1624, 1630 (1995); *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (demonstrating that civil rights legislation was constitutional under Commerce Clause if it "affected" interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294, 297-99 (1964) (applying "affects interstate commerce" standard to uphold legislation). *But see Lopez*, 115 S. Ct. at 1630 (opining that case law surrounding Commerce Clause was not clear with regard to appropriate standard).
62 *Id.* at 268, 281-82 (upholding Act by accepting congressional finding that surface mining "affected" commerce and that rational basis existed for regulation).
63 *Id.* at 312 (Rehnquist, J., concurring).
64 *Id.* Rehnquist voiced his concern that the Court was either misstating or broadening the applicable standard. *Id.*
66 *Id.* at 1629-30 (holding "rational basis" insufficient to support regulation and requiring showing that activity "substantially affects" commerce).
philosophical foundations which lie at the heart of the Commerce Clause debate before analyzing the landmark *Lopez* decision.

**B. The Basis of the Commerce Clause Dispute**

The dichotomy in Commerce Clause jurisprudence seems to stem from differing opinions as to whether the appropriate standard is "affects commerce" or "substantially affects" commerce. More basically, however, the controversy has engendered a dispute between divergent political philosophies surrounding federalism. States' rights proponents argue for less federal governmental intervention, while their opponents advocate an activist federal government. In addition, a parallel debate concerning constitutional interpretation permeates the issue. On the one

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70 See Epstein, *supra* note 24, at 1387 (stating that "too much water has passed over the dam" in Commerce Clause jurisprudence to rely on "first principles" in its interpretation); see also Friedelbaum, *supra* note 2, at 138-37 (relating that conservative Justice Scalia's emphasis on original intent has dissuaded more liberal Justices from joining his decisions).
hand are strict interpretivists who demand absolute fidelity to constitutional text, while on the other hand are non-interpretivists who favor a more flexible interpretational approach. These issues pervade the controversy regarding the proper scope of the Commerce Clause.

The degree of permissible federal invasion into states' rights has been a point of contention since our nation's birth and remains of contemporary significance. Many commentators contend that states are guaranteed the right to conduct their affairs as they see fit, free from unnecessary federal intervention. This view relies primarily on ideas present at the founding of our country, when state autonomy was given great deference. Contrary thought holds that if the federal government can more effectively address

72 Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 703-07 (1975).
73 See Stephen B. Presser, The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence, 84 Nw. U. L. Rev. 106, 106-07 (1989) (stating that non-interpretivists argue search for original understanding of Constitution is futile and that open-ended constitutional phrases indicate an intent to create living document); Ronald D. Rotunda, Original Intent, the View of the Framers and the Role of the Ratifiers, 41 Vand. L. Rev. 507, 508 (1988) (discussing non-interpretivists belief that framers did not intend for courts to be bound by their intent).
74 United States v. Wilson, 880 F. Supp. 621, 625 n.5 (E.D. Wis. 1995) (quoting Felix Frankfurter, The Commerce Clause 66-67 (1937) ("[T]hroughout the Court's history [the Commerce Clause] has been the chief source of its adjudications regarding federalism."); see Gunther, supra note 17, at 157 (stating that dispute in Commerce Clause challenges is whether federal regulation impinges on state's autonomy).
75 See NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937) (expressing concern that regulation of activities "indirect and remote" to commerce would "effectually obliterate the distinction between what is national and what is local," investing national government with authority beyond that justifiable in federal system). See generally The Federalist Paper No. 45 (James Madison) (advocating strong federal government); Friedelbaum, supra note 9, at 149-50 (discussing Rehnquist's preference for state autonomy and pointing out that Court's recent decisions reflect deference to states' rights particularly in regard to "personal" issues, such as right to die).
76 See also Cruzan v. Director, Mo. Dept' of Health, 497 U.S. 261, 261 n.5 (1990) (deferring to state courts). Friedelbaum, supra, at 38. Cruzan has been said to have set in motion the Supreme Court's movement for a revival of state constitutional law. Id.
77 See Klarman, supra note 44, at 783-84. The author points out the division which occurred over the issue of states' rights. Id. Most important along these lines was the introduction of the Bill of Rights by Anti-Federalists (those who supported strong state government) and the reaction in Federalist circles. Id. Although the Federalists initially reacted negatively, they eventually became supporters of the Bill of Rights due to concerns that the Constitution would not be ratified unless a Bill of Rights was forthcoming. Id.
78 See Kramer, supra note 68, at 1488-93 (discussing federalism and conservatives' views regarding allocation of power between state and national government); see also Eskeridge & Ferejohn, supra note 70, at 1360-61 (discussing Framers' goals of dividing national and state governmental authority).
79 Klarman, supra note 44, at 773-74 (commenting on "Founders' commitment to state sovereignty"); see Kramer, supra note 68, at 1515 (discussing Founders' attempts to establish political system which limited federal power).
This line of thinking proposes that the federal government is often in a better position to make sound decisions regarding issues of national concern because of its broader perspective and greater resources. It follows that the opposing approach fosters an interpretation of the Commerce Clause which restricts congressional authority, believing that problems are solved best on a local level, even when they are national in scope. Comparatively, those who advocate a broader reading of Congress's commerce power justify congressional reliance on the Commerce Clause when the federal government can be more effective than individual states in addressing a given situation. The Commerce Clause, in their view, provides the means to remedy problems that are national in scope.

Issues regarding constitutional interpretation overlap the states' rights dispute. Interpretivists advocate strict constitutional interpretation through reliance on the Framers' intent. Antithetically, non-interpretivists generally adhere to the idea of a Constitution which is interpreted to address changing societal

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79 See FRIEDELBAUM, supra note 9, at 21-23 (discussing belief that because local government is more attuned to nature of local problems it is more competent to act in resolving those problems).

80 Id. at 7-15.

81 See ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 95 (7th ed. 1991). At the Constitutional Convention, southerners were very concerned that northerners would use the commerce power to impose unwanted federal regulation on southern states. Id. To remedy this potential problem, southerners proposed that all Commerce Clause legislation could only be passed by at least a two-thirds vote of Congress. Id. The South eventually conceded to a simple majority vote on commerce legislation in exchange for a constitutional prohibition against taxation of imports. Id. See generally MARY M. WALKER, THE EVOLUTION OF THE UNITED STATES 2-10 (1974) (discussing federal versus state solutions to local problems).


83 See FRIEDELBAUM, supra note 9, at 21-23 (demonstrating that national government is sometimes better able to handle certain local situations).

84 See KELLY ET AL., supra note 81, at 416-17 (discussing comparative abilities of state and federal governments to exercise police power); WALKER, supra note 81, at 6 (stating that Commerce Clause evolved into great source of congressional power); see also Eskeridge & Ferejohn, supra note 70, at 1364-65 (discussing application of national and uniform responses to remedy national problems).

85 See generally Grey, supra note 72, at 709-14 (providing general overview of interpretivism and non-interpretivism).

86 Id. at 707-10 (describing non-interpretivists' perception of Framers' original intent).
needs. In arguing that the Framers' intent is less important than current needs, this group believes that our founding fathers could not have envisioned our world as it is today.

The present Supreme Court, led by Chief Justice Rehnquist, has been labeled a conservative one, having a strong respect for both states' rights and strict constitutional construction. This Court has handed down decisions which reflect this view, as evidenced by the recent decision in Lopez.

II. ANALYSIS OF LOPEZ

At issue in Lopez was the constitutionality of the Gun-Free School Zones Act of 1990, which made the knowing possession of a firearm within a school zone a federal offense. The defendant, a 12th-grade student at Edison High School in San Antonio, Texas, arrived at school carrying a concealed, unloaded .38 caliber handgun and five bullets. Acting on an anonymous tip, school authorities confronted the defendant, who was then arrested and indicted for violation of the Act.

87 Id.; see Presser, supra note 73, at 106-07 (discussing non-interpretivists' philosophy that Constitution was intended as living document to address needs of society); Rotunda, supra note 73, at 508 (stating non-interpretivists' ideology of a flexible Constitution).
88 See, e.g., New York v. Garcia, 505 U.S. 144, 157 (1992). The Garcia Court commented that the Framers could not have envisioned the need to address the disposal of nuclear wastes. Id.; see also Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 Nw. U. L. Rev. 226, 286 (1988). Adjudication based on original intent analysis results in set, abstract rules that yield unsatisfactory responses to the nation's collective and individual well-being. Id. One counter argument is that principles of stability and consistency support a reliance on the framers' intent. Id. at 289-90.
89 See supra notes 9, 17 (demonstrating how present Supreme Court has been labeled conservative); see also Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2114 (1995). Prior to the Adarand decision, the Court's equal protection decisions made a distinction between state and federal affirmative action legislation, applying strict scrutiny to state action and only intermediate scrutiny to federal action. Id. at 2100-01. The Adarand Court eliminated this distinction and held that strict scrutiny applied to all race-based classifications—a conservative position. Id.
90 United States v. Lopez, 115 S. Ct. 1624, 1630 (1995) (holding that Commerce Clause does not authorize federal legislation of activities that do not "substantially affect" interstate commerce).
91 18 U.S.C. § 922(q)(1)(A) (1990). The Act forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone." Id.
92 § 921(a)(26). The Act defined school zone as: "(A) in, or on the grounds of, a public, parochial or private school; or (B) within a distance of 1,000 feet from the grounds of a public, parochial or private school." Id. A school was defined as "a school which provides elementary or secondary education under State law." Id.
93 Lopez, 115 S. Ct. at 1626. Lopez is reported to have brought the weapon to school in order to sell it to another student who planned to use it in a gang war. Id.
94 Id. Lopez was originally charged with violating a state statute. Id. The state charges were dropped when federal charges were filed. Id.
Lopez moved to dismiss the indictment on the grounds that the Act was an unconstitutional exercise of congressional authority.\(^96\) Lopez claimed that the regulation of schools could not be deemed necessary to further any of Congress's enumerated powers under the Constitution.\(^97\) The United States District Court for the Western District of Texas denied the motion, concluding that the Act was well within Congress's Commerce Clause authority.\(^98\) Lopez was thereafter tried, convicted, and sentenced.\(^99\)

On appeal, the United States Court of Appeals for the Fifth Circuit reversed Lopez's conviction.\(^100\) The court held that in passing the Act, Congress had exceeded its authority granted under the Commerce Clause.\(^101\) The Fifth Circuit cited a series of cases which used the word "substantial" in formulating the applicable standard in Commerce Clause interpretation.\(^102\) The court relied on limited portions of prior decisions,\(^103\) and held that the regulated activity must "substantially affect" interstate commerce in


\(^96\) Id. The sole basis of Lopez's objection rested on Congress's constitutional authority to enact the Gun-Free School Zones Act of 1990.

\(^97\) Brief for Respondent at 25-27, United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993) (No. 93-1260) (arguing that Gun Free School Zones Act unconstitutionally invaded traditional state authority to regulate school zones because Act is not within commerce power nor any other authority put forth by Congress), cert. granted, 115 S. Ct. 1624 (1995).

\(^98\) Lopez, 2 F.3d at 1345. See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

\(^99\) Lopez, 2 F.3d at 1345. The defendant was sentenced to six months in prison to be followed by two years supervised release. Id.

\(^100\) See id. at 1364. The court ruled that the district court erred in convicting Lopez because the Gun Free School Zones Act was unconstitutional. Id. Congress was found to have gone beyond the bounds of their Commerce Clause authority. Id.

\(^101\) Id. The court thought that the Act represented an impermissible expansion of federal power which collided with the rights reserved to the states under the Tenth Amendment. Id.

\(^102\) United States v. Lopez, 2 F.3d 1342, 1360-63 (5th Cir. 1993).

\(^103\) Lopez, 2 F.3d at 1361. The Fifth Circuit relied on Wickard v. Filburn, 317 U.S. 111 (1942) which stated that a substantial economic effect on interstate commerce was required to sustain regulative legislation. Id. In addition, the court of appeals placed great weight on the remark in Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968) that "[n]either the Congress nor the Court has declared that Commerce Clause legislation is a license to regulate any state or private activity or practice which has any economic impact on interstate commerce." Id. Further, the court cited Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) to support its conclusion that where Congress's findings show that the regulated activities "substantially affect" interstate commerce, the courts must defer to Congress, given a rational basis for that finding. See Lopez, 2 F.3d at 1361. But see Hodel, 452 U.S. at 276. In Hodel, the Court's verbatim statement was "[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." Id.
order to be a permissible exercise of congressional power. The Court of Appeals found no rational basis to explain how firearm possession in a school zone substantially affected commerce. Absent formal findings to the contrary, the court held that the necessary nexus to interstate commerce was absent, and ruled the Act unconstitutional.

The Supreme Court affirmed the Court of Appeals' decision, adopting much of the same reasoning. The Court began its analysis by focusing on the enumerated powers of Congress as authorized by the Constitution. In relying on Federalist Paper No. 45, the Court noted that the enumerated powers were "few and defined" while those powers remaining in State governments were "numerous and indefinite." The majority conceded that modern-era precedent had "greatly expanded" Commerce Clause construction. Chief Justice Rehnquist, however, explained that despite existing precedent, there were limits on Commerce Clause authority, and the Gun-Free School Zones Act fell outside those limits. The Supreme Court agreed with the Fifth Circuit and held that the applicable standard required that the regulated ac-

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104 Lopez, 2 F.3d at 1366-67 (finding that mere possession of firearm does not substantially affect commerce).
105 Id. at 1367-68.
106 Id.
107 United States v. Lopez, 2 F.3d 1342, 1367-68 (5th Cir. 1993).
109 Id. at 1626.
111 See Clinton Rossiter, The Federalist Papers viii (1961). Although Rehnquist's majority opinion relied on the restraints on national power delineated in the Federalist Papers, it should be noted that those works were written primarily to persuade those states favoring state autonomy that questioned the necessity of a strong federal constitution. Id.
112 See Wickard v. Filburn, 317 U.S. 111, 128 (1942) (noting that commerce power extends to purely local, non-commercial activities when cumulative effect of activity would impact on interstate commerce); United States v. Wrightwood Dairy Co., 315 U.S. 100, 119 (1942) (commerce clause power extends to intrastate activities which in "substantial way interfere with or obstruct the exercise of the granted power"); United States v. Darby, 312 U.S. 100, 118 (1941) (holding commerce clause power extends to intrastate activities which so affect interstate commerce as to make regulation appropriate); NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937) (holding regulation of intrastate activities having "close and substantial relationship to interstate commerce" constitutional when essential to interstate commerce regulation).
114 Id.
tivity must “substantially affect” interstate commerce. The Court acknowledged that legislative findings are not required to support Commerce Clause legislation, but such findings could establish a nexus between the regulated activity and interstate commerce when one is not apparent. Absent such findings, the Court ruled the Act unconstitutional.

Although the Lopez decision purports to comply with precedent, in actuality, it relies on cases which do not fully support its propositions. As recently as 1981, in Hodel v. Indiana, the

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115 Id. at 1630. The Court maintained that its decision was “consistent with the great weight” of the pertinent case law. But see Hodel v. Indiana, 452 U.S. 314, 323-24 (1981) (holding that regulated activity must affect interstate commerce); Perez v. United States, 402 U.S. 146, 154 (1971) (holding that loan sharking affected commerce and so could be regulated by Congress); Katzenbach v. McClung, 379 U.S. 294, 302-04 (1964) (holding Civil Rights Act of 1964 constitutional because it affected commerce); Heart of Atlanta Motel v. United States, 379 U.S. 241, 258-61 (1964) (using affects commerce standard to prohibit discrimination in public accommodations); Wrightwood Dairy v. United States, 315 U.S. 110, 119-20 (1941) (holding intrastate milk price regulation constitutional because it affected commerce); United States v. Darby, 312 U.S. 100, 118 (1941) (holding federal regulation of labor constitutional because it affected interstate commerce). It would seem from the foregoing that the “great weight” of authority supported the “affects interstate commerce” standard rather than that of “substantially affects interstate commerce.”

116 Lopez, 115 S. Ct. at 1631-32. Although the Lopez Court recognized that formal congressional findings were not required to sustain federal legislation, they commented that such findings would have been useful in determining whether the required nexus with interstate commerce existed. Id. at 1634. The Court found that possession of a gun is not an economic activity which substantially affects interstate commerce. Id.

117 Id. at 1634. The Court found that possession of a gun is not an economic activity which substantially affects interstate commerce. Id.


Court held that it may invalidate Commerce Clause legislation "only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." While the *Lopez* Court cited *Hodel* as support for its decision, the Court relied on the concurring opinion of Justice Rehnquist as partial justification for the "substantially affecting interstate commerce" requirement. Similarly, the Court gave minimal attention to *Heart of Atlanta* and *Katzenbach*, two cases which served as the basis of *Hodel*. These two decisions comprise the cornerstone of modern Commerce Clause jurisprudence in the area of civil liberties and are relevant to the *Lopez* decision. The Court's interpretation of the Commerce Clause in *Lopez*, however, declared the Act an impermissible invasion of states' rights. This narrow interpretation of federal commerce power threatens to invalidate other important social legislation enacted pursuant to the Commerce Clause. In particular, the Freedom of Access to Clinic Entrances Act of 1994 ("FACE") may not withstand the heightened judicial scrutiny announced in *Lopez*.

154 (permitting congressional regulation of activities which affect commerce) and *Katzenbach*, 379 U.S. at 302-04 (finding Civil Rights Act of 1964 constitutional because discrimination affected commerce) and *Darby*, 312 U.S. at 118 (holding that labor standards affect commerce).


122 *See* *Lopez*, 115 S. Ct. at 1629 n.2 (citing concurring opinion of Justice Rehnquist in support of standard requiring activity "substantially" affect interstate commerce).


126 *See* supra notes 49-54 and accompanying text (discussing Supreme Court's decisions in *Heart of Atlanta* and *McClung*).


(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person 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 . . . .

*Id.*
III. Freedom of Access to Clinic Entrances Act of 1994

FACE was enacted in response to the increasing violence occurring at entrances to reproductive health services clinics. In recent years, the debate between the pro-life and pro-choice activists has escalated to a war beyond words. Providers of reproductive services have been murdered or seriously injured, and women seeking such services have been threatened, intimidated and harassed. In order to promote public safety and protect the constitutional right to seek reproductive services, Congress found it not only necessary, but imperative, to enact FACE.

129 H. REP. NO. 306, 103d Cong., 2d Sess. 4 (1994), reprinted in 1994 U.S.C.C.A.N. 699, 703-04 (reporting "more than 1,000 acts of violence" against United States providers of abortion services from 1977 to 1993 (citing NATIONAL ABORTION FEDERATION, INCIDENTS OF VIOLENCE AND DISRUPTION AGAINST ABORTION PROVIDERS (1993)). The report detailed at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder. Id. Further, more than "6,000 clinic blockades and other disruptions have been reported since 1977." Id. Attorney General Janet Reno testified that violence associated with reproductive clinics was on the increase and a federal remedy needed to be provided. Id. at 707; see Cook v. Reno, 859 F. Supp. 1008, 1011 (W.D. La. 1994) (stating that language of FACE does not support conclusion that Commerce Clause was used "for the primary purpose of paralyzing the protests of anti-abortionists").

130 See, e.g., Melissa Jaco, Radical Foes of Abortion Test Limits of Protest, CHRISTIAN SCI. MONITOR, Aug. 4, 1995, at 4 (reporting American Coalition of Life Activist's view that Dr. David Gunn's 1993 murder was "justifiable homicide"); Ana Puga, Radicalizing Right to Life: Newcomers Preach Violence, BOSTON GLOBE, Oct. 30, 1994, at 26 (documenting increase of anti-abortion movement that condones death threats, bombings, murder and other violent acts); see also Saul Friedman, Monitoring Militias: Are They Linked to Anti-Abortion Violence?, NEWSDAY, May 17, 1995, at A15 (reporting that Michigan Militia has picketed in "full camouflage gear" outside one abortion clinic and indicating that evidence exists that other "militias" are one driving force behind anti-abortion violence).

131 See H. REP. NO. 306, supra note 129, at 704-06; see also Tamar Lewin, Citing Violence, Abortion Clinics Sue Over Threats, N.Y. TIMES, Oct. 27, 1995, at A21. Planned Parenthood has initiated a class action suit against the American Life League, among others, in an effort to stop the groups' publication of "wanted" posters portraying 13 abortion doctors. Id. Of the 13 doctors, five have been shot at and threatened. Id. Planned Parenthood maintains that the publication amounts to intimidation within the meaning of FACE as "individuals who have failed to heed similar threats have been murdered or seriously injured.

132 H. REP. NO. 306, supra note 129, at 700. The majority view held that right to abortion was found in the Equal Protection Clause of the Fourteenth Amendment and was, therefore, entitled to federal protection. Id. But see id. The dissenting view found that FACE was not an appropriate federal response to the violence occurring at reproductive services clinics. Id. at 713. The dissenters expressed concern that FACE violated First Amendment protection of speech. Id. at 719.
A. Constitutional Authority for FACE

The Commerce Clause provided the primary constitutional foundation for the enactment of FACE. The House Judiciary Committee Report and House Conference Report reflect Congress's determination that the obstruction of access to clinic entrances affects interstate commerce, particularly because clinic employees and medical supplies moved in interstate commerce. In addition, the reports focus on the fact that women seeking reproductive services often travel to other states to obtain them. Thus, it is clear that a rational basis existed for the congressional finding that the regulated activity, violent anti-abortion protests, affected interstate commerce.

B. Challenges to FACE

Soon after FACE was enacted, it was challenged in the United States District Court for the Southern District of California on the grounds that it chilled protestors' freedom of expression and reli-

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133 See H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 5 (1994) (stating that protestors' conduct burdens interstate commerce by forcing patients to travel to states where access to reproductive health services is unobstructed); S. Rep. No. 117, 103d Cong., 1st Sess. 64-65 (1993) (recognizing that FACE is constitutionally authorized under Commerce Clause because Congress had "a rational basis" for finding that regulated activity affected commerce); id. (noting that pursuant to Necessary and Proper Clause, Congress can regulate activity which is purely local if it has requisite effect on interstate commerce). But see S. Rep. No. 117, supra, at 67-68 (1993) (citing Equal Protection Clause and Section Five of Fourteenth Amendment as independent basis for Act's passage). See generally Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 759 (holding that § 1985(3) of Public Health Law did not authorize federal courts to enjoin clinic blockades and illustrating deficit in federal protection of clinic entrances).

134 See S. Rep. No. 117, supra note 133, at 65 (relying on Attorney General Reno's testimony that many patients traveled from out of state); H.R. Conf. Rep. No. 488, supra note 133, at 724 (discussing burden placed upon women who are forced travel out of state to clinics which are not obstructed).


137 E.g., American Life League, Inc. v. Reno, 47 F.3d 642, 647 (4th Cir. 1995) (holding that Commerce Clause provided necessary authority for FACE enactment), cert. denied, 63 U.S.L.W. 2538 (U.S. May 12, 1995); Cheffer v. Reno, 55 F.3d 1517, 1520-21 (11th Cir. 1995) (finding that rational basis existed to sustain FACE legislation under Commerce Clause).
gion and that it exceeded Congress's Commerce Clause authority. The court held that because FACE proscribed only violent conduct, it was not violative of freedom of expression. Further, the court found that because the regulation of the protestors' activities affected interstate commerce, FACE did not exceed congressional commerce power. Subsequently, federal district courts in Louisiana and Arizona decided in favor of the constitutionality of FACE on grounds similar to those found by the California court. These three decisions were reached prior to the Supreme Court decision in United States v. Lopez.

The Federal District Court for the Eastern District of Wisconsin, however, relying on the Fifth Circuit's decision in United States v. Lopez, reached a conclusion contrary to those reached by the district courts of California, Louisiana and Arizona. In United States v. Wilson, the court held that no constitutional authority for the enactment of FACE existed. The court took the position that Congress had no "inherent power" to protect civil

139 Id. at 1431.
140 Id. at 1426-27 (stating that FACE is directed toward conduct rather than expression).
141 Id. at 1431.
142 Cook v. Reno, 859 F. Supp. 1008, 1010 (W.D. La. 1994) (holding FACE constitutional as content-neutral restriction on speech). The petitioners claimed that the Commerce Clause was a pretextual means employed by Congress to chill the anti-abortionists' First Amendment rights of expression. Id. at 1010-11. The court disagreed and explained that the primary purpose of the Act was to ensure public safety and protect individual rights not to hinder the acts of anti-abortionists. Id.
143 Riely v. Reno, 860 F. Supp. 693, 707 (D. Ariz. 1994). FACE was found to be constitutional under the Commerce Clause. Id. The court also determined that FACE was not an impermissible regulation of protected expression. Id. at 702. The court determined that the statute was narrowly drawn to serve a legitimate state interest, i.e., protecting the rights of those who seek reproductive services while allowing protestors to express their ideas. Id. at 703.
144 See Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1426-27 (deciding FACE did not violate anti-abortionists' First Amendment rights of expression since regulation was adopted without reference to speech).
146 2 F.3d 1342, 1366-67 (5th Cir. 1993).
147 See United States v. Wilson, 880 F. Supp. 621, 634 (E.D. Wis. 1995) (holding that Congress did not have authority to pass FACE under Commerce Clause or Fourteenth Amendment).
148 880 F. Supp. 621 (E.D. Wis.), rev'd, 73 F.3d 675 (7th Cir. 1995).
149 Id. at 636. The court held that FACE exceeded the limits of congressional commerce power. Id.
liberties absent a specific constitutional provision permitting them to do so. This court also considered the Equal Protection Clause as a possible constitutional basis for the legislation, but rejected the notion, holding that the clause applied only to state action and could not be used to prohibit the actions of private individuals. More significantly, the court followed the Commerce Clause standard enunciated in the Fifth Circuit’s decision in *Lopez* which required that the regulated activity substantially affect interstate commerce. Since the court found that the obstruction of clinic entrances did not substantially affect interstate commerce, it concluded that the Commerce Clause could not be used to support legislation such as FACE.

The *Wilson* court reached its decision one month after the United States Court of Appeals for the Fourth Circuit found FACE to be constitutional in *American Life League, Inc. v. Reno*. *American Life League* was decided prior to the Commerce Clause standard set forth in the Supreme Court’s *Lopez* decision. *American Life League* validated the Act as a legitimate exercise of commerce power and found that the regulated activity affected inter-

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150 *Id.* (acknowledging that right to abortion was recognized by Supreme Court but disagreeing that fact allowed Congress to enact legislation to protect right). *But see* H. Rep. No. 306, *supra* note 129, at 700 (noting majority view contention that right to abortion entitled to protection through federal legislation); *see also* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (holding that right to privacy existed within “penumbras” of Bill of Rights). *See generally* Roe v. Wade, 410 U.S. 113, 152-54 (1973) (holding that constitutionally-protected right to privacy encompassed constitutional right to abortion).

151 *Wilson*, 880 F. Supp. at 634-35 (noting that while former Justices Brennan and Clark had suggested Fourteenth Amendment might be applied to private action, no such application had yet occurred). *But see* United States v. Guest, 383 U.S. 745, 782 (1966) (Brennan, J., concurring in part, dissenting in part) (noting that majority found Fourteenth Amendment applied to private conduct). *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 648 (1966) (finding that congressional power to enforce Fourteenth Amendment is broader than judicial power to do same).


153 United States v. Wilson, 880 F. Supp. 621, 628, 632-33 (E.D. Wis.), rev’d, 73 F.3d 675 (7th Cir. 1995). The court found that FACE regulated private conduct which only impacted interstate commerce as a subsequent trivial chain reaction. *Id.*

154 *Id.* The *Wilson* court made a distinction between commerce legislation that regulated the conduct of commercial liberties, as the Civil Rights Act of 1964 did, and legislation that regulated the conduct of private individuals, as FACE did. *Id.* The *Wilson* court determined that the Commerce Clause did not reach private individuals’ conduct and that the conduct did not substantially affect commerce. *Id.*

155 47 F.3d 642, 645, 647 (4th Cir.) (holding that Commerce Clause provided necessary authority for FACE enactment), *cert. denied*, 63 U.S.L.W. 2538 (U.S. May 12, 1995).
state commerce. Shortly after the *Lopez* decision, the United States Court of Appeals for the Eleventh Circuit, in *Cheffer v. Reno*, adopted much of the Commerce Clause reasoning used by the court in *American Life League*. The *Cheffer* court determined that Congress' findings provided a plausible basis for sustaining the Act under the "substantially affects" standard pronounced in *Lopez*.

C. FACE In Light of Lopez

The controversy has continued beyond the circuits. While the American Life League was denied its petition for certiorari, the denial was reportedly founded on the grounds that FACE did not infringe upon the anti-abortion protestors' First Amendment rights to freedom of speech and religion. Given the Court's position in *Lopez*, one must wonder how the Court would decide the issue should certiorari be granted on a Commerce Clause challenge. The Court could find, as the Wilson court did, that the obstruction of clinic entrances and the associated violence does not substantially affect interstate commerce. Were the Court to decide the issue applying this reasoning that it did in *Lopez*, FACE may fall.

A strong basis, however, exists for finding that protestors' activities substantially affect interstate commerce. Of fundamental

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157 55 F.3d 1517 (11th Cir. 1995).

158 Id. at 1520-21.

159 Id. at 1520 (finding interstate movement of patients, doctors, and supplies provided necessary nexus with interstate commerce).

160 E.g., *American Life League, Inc. v. Reno*, 47 F.3d 642, 647 (4th Cir.) (holding FACE constitutional under Commerce Clause), cert. denied, 63 U.S.L.W. 2538 (U.S. May 12, 1995).

161 Id.

162 *Law Securing Access to Abortion Clinics Left Standing*, N.Y. L.J., Oct. 3, 1995, at 1 (reporting that Supreme Court's denial of certiorari merely left standing Fourth Circuit Court of Appeals' decision that FACE did not infringe on protestors' freedom of speech or religion and noting that no definitive ruling has yet been rendered on Act's constitutionality).

163 Id.


importance is the fact that the provision of reproductive services is commerce.\textsuperscript{166} A significant number of women travel across state lines to obtain reproductive services.\textsuperscript{167} In addition, both clinic employees and medical supplies used within the clinics move in interstate commerce.\textsuperscript{168} Thus, the protestor's activities have a negative effect on interstate commerce because they reduce the flow of these goods and services among states.\textsuperscript{169} Further, it is unlikely that new clinics will open with the threat of violence looming,\textsuperscript{170} evincing an even greater negative impact on interstate commerce.\textsuperscript{171} It is proposed therefore, that the protestors' activi-


\textsuperscript{167} See Women's Health Care Servs. v. Operation Rescue, 773 F. Supp. 258, 266-67 (D. Kan. 1991) (noting that 44% of Women's Health Care Services' patients were from outside Kansas during given time period and at same time 8-10% of Wichita Family Planning patients were from another state); see also Randolph M. Scott-McLaughlin, \textit{Operation Rescue Versus a Woman's Right to Choose: A Conflict Without a Federal Remedy}, 32 DUQ. L. REV. 709, 715 (1994) (providing statistics that significant number of women travel interstate to obtain reproductive services); Christopher W. Tomlin, \textit{The Reign of Terror: The Judiciary's Inability to Stop Anti-Abortion Violence Forces Congress Back to the Drawing Board}, 18 LAW & PSYCHOL. REV. 423, 437-38 (1994) (reporting that increased violence has resulted in significantly decreased number of abortion providers); Tribe, supra note 118, at 292 (stating that over 80% of United States counties do not have clinics offering abortions); Rori Rabin, \textit{Eviction Allowed, Judge; Landlord May Boot Targeted Abortion Clinic}, NEWSDAY, Oct. 31, 1995, at A3 (reporting New York Supreme Court ruling permitting eviction of abortion doctor tenant whose medical practice attracted abortion protestors and noting that of 320 metropolitan areas in United States, only 90 had abortion providers in 1992, down from 105 in 1988); Telephone Interview with Donna Lieberman, Attorney and Associate Director of N.Y. Civil Liberties Union, N.Y. (Oct. 31, 1995) (commenting that eviction ruling was "inconsistent with the spirit of FACE"); cf. Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (finding that restaurant patrons traveled interstate and reasoning that fewer restaurants would be in business if racial discrimination was allowed to persist).

\textsuperscript{168} See generally S. REP. No. 117, supra note 133, at 65 (discussing movement of employees and medical supplies in interstate commerce); H.R. CONF. REP. NO. 488, supra note 133, at 724 (same). Cf. McClung, 379 U.S. at 301-05 (holding restaurant supplies and patrons' movement in interstate commerce justified regulation under Commerce Clause).

\textsuperscript{169} See Katzenbach, 379 U.S. at 300 (finding that reduced flow of goods affects interstate commerce); see also Merritt, supra note 119, at 725 (discussing burden on interstate movement of patients, employees, and medical supplies imposed by protestors' activities).

\textsuperscript{170} See Tomlin, supra, note 167, at 437-38 (documenting significant decrease in number of abortion providers); Tribe, supra note 118, at 292 (relating that majority of United States counties have no abortion providers); Rabin, supra note 167, at A3 (reporting decline in number of abortion providers between 1988 and 1992); see also Courtland L. Reichman, \textit{Federal Remedies for Abortion Protest: Discordance of First Principles}, 44 EMORY L.J. 773, 774 (1995) (noting that protestors' goals include closing clinics and forcing clinics to cease providing abortion services). See generally Michele R. Moretti, \textit{Using Civil RICO to Battle Anti-Abortion Violence: Is the Last Weapon in the Arsenal the Sword of Damocles?}, 25 NEW ENG. L. REV. 1363, 1389-91 (1991) (discussing severe economic harm caused by protestor activity).

\textsuperscript{171} Cf. Katzenbach, 379 U.S. at 300 (noting that new businesses may refrain from opening in areas where discrimination is prevalent thereby affecting commerce).
ties meet the Court's requirement that the regulated activity substantially affect interstate commerce.\textsuperscript{172}

Given the recent conservative trend of the Supreme Court with respect to states' rights\textsuperscript{173} and reproductive rights,\textsuperscript{174} however, the prospects for FACE's survival are not bright.\textsuperscript{175} If FACE is held unconstitutional, it may mean that the Supreme Court will limit congressional efforts to protect the constitutional right to privacy in reproductive matters,\textsuperscript{176} at least through the Commerce Clause.\textsuperscript{177}

IV. ALTERNATIVE CONSTITUTIONAL AUTHORITY FOR FACE

If the Commerce Clause fails as sufficient authority to support the enactment of FACE, it will be necessary to seek alternative means to uphold the validity of the Act.\textsuperscript{178} As Congress noted dur-

\textsuperscript{172} Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1431 (S.D. Cal. 1994). The court relied on congressional findings establishing that obstruction of entrances to abortion clinics affected commerce. \textit{Id.}

\textsuperscript{173} See Seminole Tribe of Florida v. Florida, No. 94-12, 1996 U.S. LEXIS 2165, at *47 (Mar. 27, 1996) (emphasizing importance of state autonomy in evaluation of federal legislation's constitutionality); Calabresi, supra note 118, at 752 (discussing Court's return to doctrine of enumerated powers and limited federal government); Regan, supra note 119, at 555 (proposing Commerce Clause test that permits federal regulation only where matter cannot be successfully left to state regulation); Linda Greenhouse, \textit{Justices Curb Federal Power to Subject States to Lawsuits}, N.Y. \textit{Times}, Mar. 28, 1996, at A1 (reporting that Seminole holding lends credence to view that Lopez signaled the Court's inclination to place greater emphasis on states' rights when evaluating federal legislation); see also Friedelbaum, supra note 9, at 145 (posing that Rehnquist Court may be heading toward "moderate conservatism"); Bell, supra note 9, at 598 (expressing fear that present Court might well invalidate Civil Rights Act of 1964).

\textsuperscript{174} See Friedelbaum, supra note 9, at 31 (discussing Rehnquist's dissent in \textit{Roe v. Wade} where he expressed doubt as to whether right to abortion was "fundamental").


\textsuperscript{176} Tomlin, supra note 167, at 437-38 (1994) (commenting that "Supreme Court's slow but steady retreat from \textit{Roe v. Wade} increases, rather than deters, violence).

\textsuperscript{177} Wilson, 880 F. Supp. at 634 (holding that Congress exceeded its Commerce Clause authority in enacting FACE).

ing the passage of FACE, the Fourteenth Amendment may provide the necessary constitutional authority for the Act.179

The Fourteenth Amendment requires state action for its application.180 This state action requirement is a threshold issue which must be overcome in order to rely on the Fourteenth Amendment to protect individual rights against the conduct of non-state actors.181 Despite nineteenth-century Supreme Court rulings which held that the actions of private individuals were not within the Amendment's coverage,182 more recent authority suggests a broader construction.183

While the Supreme Court has held that a state's "mere acquiescence" does not amount to state action,184 it has also noted that the Constitution may impose upon the state a duty to act in cer-

179 See S. REP. NO. 117, supra note 133, at 67-68 (proposing Equal Protection Clause as alternative basis for sustaining FACE); Tribe, supra note 118, at 295, 298 (suggesting Equal Protection Clause as viable alternative in sustaining FACE legislation).

180 DeShaney v. Winnebago County Soc. Servs. Dep't, 489 U.S. 189, 193-94 (1989) (requiring state action for Fourteenth Amendment application); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 168 (1978) (reiterating Fourteenth Amendment state action requirement); The Civil Rights Cases, 109 U.S. at 11, 24-26 (holding state action prerequisite to Fourteenth Amendment violation); see Dilan A. Esper, Some Thoughts on the Puzzle of State Action, 68 S. CAL. L.R. 663, 677, 708-17 (1995) (discussing divergent theories of Fourteenth Amendment state action requirement and proposing "middle ground" where "collective action" by private actors may rise to level of state action when severe right infringement results).


182 See The Civil Rights Cases, 109 U.S. at 11, 25 (holding post-Civil War federal civil rights legislation invalid under Fourteenth Amendment because it attempted to regulate private conduct); Gunther, supra note 17, at 888 (stating that "private misconduct [is] not wholly outside congressional reach" under Fourteenth Amendment).

183 See Katzenbach v. Morgan, 384 U.S. 641, 648 (1966) (stating that Congress's power to enforce Fourteenth Amendment is much broader than judiciary's because of congressional "resourcefulness" and "responsibility"); United States v. Guest, 383 U.S. 745, 782 (1966) (Brennan, J., concurring in part, dissenting in part) (stating that "[a] majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not State officers or others acting under the color of state law are implicated in the conspiracy"); Shelley v. Kraemer, 334 U.S. 1, 20-21 (1948) (holding that judicial enforcement constituted state action for purposes of equal protection); see also Tribe, supra note 118, at 296-98 (confirming Congress's authority to regulate purely private conduct under Fourteenth Amendment when states and municipalities are unable to provide protection against private acts threatening enjoyment of federal constitutional rights).

184 DeShaney, 489 U.S. at 193-94 (1989) (holding failure of State to protect citizen from violence does not amount to state action).
tain circumstances. It is proposed that when the conduct of private individuals violates the Fourteenth Amendment and the state has a duty to prevent the violation but fails to do so, federal legislative action is appropriate. When this situation occurs, the state action requirement may be met by virtue of the state's inaction, bringing private conduct within the scope of the Fourteenth Amendment.

Once the state has failed in its duty to protect individual rights, Congress may, pursuant to the Enforcement Clause of the Amendment, enact remedial legislation. Admittedly, the scope of congressional power under the Enforcement Clause has been the focus of much debate. Significant authority makes clear, however, that Congress may use the Clause to enforce or expand Fourteenth Amendment protections. Therefore, it appears fed-

185 DeShaney v. Winnebago County Soc'y Servs. Dept, 489 U.S. 189, 197 (1989); see also Flagg Brothers, Inc. v. Brook, 436 U.S. 149, 164 (1978) (noting that state is responsible for acts of private actors when state, by law, compels act); Taylor v. Ledbetter, 318 F.2d 791, 795 (11th Cir. 1967) (stating that state inaction in protecting liberty of one confined to state mental health facility rises to level of state action).

186 See S. Rep. No. 117, supra note 133 (discussing breadth of Equal Protection Clause of Fourteenth Amendment); see also Robert A. Hillman, Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations, 75 CORNELL L. REV. 1053, 1081 (1990) (recognizing "acquiescence or deliberate inaction by state or a state actor" can also be state action for purposes of the Fourteenth Amendment); Tribe, supra note 118, at 298 (stating that certain circumstances warrant congressional regulation of private conduct). But see United States v. Wilson, 880 F. Supp. 621, 636 (E.D. Wis. 1995) (commenting that no authority supports "novel" approach that state inaction may constitute state action within meaning of Fourteenth Amendment for purposes of protecting fundamental rights).

187 See Tribe, supra note 118, at 298 (noting that state's inability to resolve problems justified congressional intervention to protect constitutional right).

188 U.S. Const. amend XIV, § 5 (providing that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article").

189 Tribe, supra note 118, at 296-98 (demonstrating use of Fourteenth Amendment's Enforcement Clause to regulate private conduct in certain situations when state is unable to protect constitutional rights).


191 See Katzenbach, 384 U.S. at 651 (discussing congressional enforcement power to expand, but not abrogate Fourteenth Amendment rights); Frederick A. O. Schwarz, Jr., The Constitution Outside the Courts, 14 CARDozo L. REV. 1287, 1304 (1993) (discussing broad congressional authority to fashion remedies for contravention of Fourteenth Amendment); Margot Bodine, Comment, Opening the School-house Door for the Children with AIDS: The Education for all Handicapped Children's Act, 13 B.C. ENVTL. L. REV. 583, 610 (1986) (discussing use of Enforcement Clause to broaden Fourteenth Amendment protections).
eral legislation may be enacted to give effect to both Equal Protection and Due Process guarantees under authority of the Enforcement Clause.

A. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment was cited by Congress as an independent basis for the enactment of FACE.\textsuperscript{192} The Clause forbids state action which denies to "any person within its jurisdiction the equal protection of the laws."\textsuperscript{193} The Court has interpreted this clause to require that persons similarly situated should be treated equally under the laws.\textsuperscript{194} This interpretation would seem to require that those seeking reproductive services be treated differently to claim a violation of the Equal Protection Clause. Since all those seeking reproductive services at a given facility are treated similarly, it appears unlikely that the Equal Protection Clause will provide adequate authority to hold FACE constitutional.\textsuperscript{195} While Congress placed some reliance on the Equal Protection Clause to enact FACE,\textsuperscript{196} it is submitted that the Due Process Clause would provide stronger support.

B. Due Process Clause

The Fourteenth Amendment also precludes state action which results in a deprivation of "life, liberty, or property, without due process of law."\textsuperscript{197} The Due Process Clause has been held to mean that some formal legal process is required before the state may infringe upon, or deprive an individual of, a constitutional

\textsuperscript{192} See S. Rep. No. 117, supra note 133, at 67-68 (proposing Equal Protection Clause as alternative basis for sustaining FACE).

\textsuperscript{193} U.S. Const. amend. XIV.


\textsuperscript{195} See Cruzan v. Director, Mo. Dept' of Health, 497 U.S. 261, 287 (1990) (citing Cleburne for proposition that Equal Protection Clause requires similarly situated persons be treated similarly); Cleburne, 473 U.S. at 439 (Equal Protection Clause mandates that similarly situated people be treated alike).

\textsuperscript{196} S. Rep. No. 117, supra note 133, at 67-688 (relying on Equal Protection Clause as alternative, independent congressional authority for FACE passage).

\textsuperscript{197} U.S. Const. amend. XIV.
right. When violence, intimidation and harassment by clinic protesters prevent individuals from seeking reproductive services, it results in a deprivation of a constitutional right. Statistics indicate that the states are unable or unwilling to stop violence associated with these obstructions. When the state fails to prevent protestors from blocking clinic entrances, a violation of the Fourteenth Amendment Due Process Clause has occurred. As such, federal regulation in accordance with the Enforcement Clause of the Fourteenth Amendment appears justified.

198 See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The Mathews decision required that three factors be considered in Due Process analysis: 1) private interest that will be affected by official action; 2) risk of erroneous deprivation of such interest through procedures used, and probable value of additional or substitute procedures; and 3) government's interest, including additional burden that additional procedures would entail. Id.; see also Gorman v. University of Rhode Island, 837 F.2d 7, 14 (1st Cir. 1988) (deciding that ten-day suspension was not "de minimus deprivation of liberty interest," thereby implicating the Due Process Clause); Jill D. Moore, Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process, 73 N.C. L. Rev. 2063, 2065 (1995) (noting that impeding one's employment implicates Fourteenth Amendment because it deprives one of liberty and property interests); Jim Rosenfeld, Deportation Proceedings and Due Process of Law, 26 COLUM. HUM. RTS. L. REV. 713, 729 (1995) (stating all people's constitutional rights are protected by due process).


200 See Molly K. Mosley, Torts; Commercial Blockade—Interference with Access to a Health Care Facility, 26 PAC. L.J. 729 (1995) (commenting on states inability to take effective action to prevent increasing violence a clinic entrances); Scott-McLaughlin, supra note 167, at 709 (noting that "sheer number of blockaders" often prevented state officials from keeping clinic entrances clear); see also Amy M. Snieerson, No Place to Hide: Why State and Federal Enforcement of Stalking Laws May Be the Best Way to Protect Abortion Providers, 73 Wash. U. L.Q. 635, 664, n.102 (1995) (reporting that local police refused to arrest "particularly harassing protestor" who later murdered abortion doctor at same clinic where complaint was issued). See generally Tribe, supra note 118, at 298 (stating that since states have been unable to prevent obstruction of clinic entrances or "private violence against abortion seekers and providers," Congress should have authority to intervene under Fourteenth Amendment).

201 See Tribe, supra note 118, at 298 (implying that where state is unable to prevent purely private conduct that deprives individuals of Fourteenth Amendment rights, state action requirement is satisfied); Rosenfeld, supra note 198, at 729 (stating that Due Process Clause protects constitutional rights); see also Casey, 505 U.S. at 845-46 (affirming right to abortion); Roe v. Wade, 410 U.S. 113, 152-54 (1973) (holding that constitutional right to privacy encompassed right to abortion). But see DeShaney v. Winnebago County Soc. Servs. Dept', 489 U.S. 189, 195-96 (1989) (noting Due Process Clause generally confers no affirmative duty on state to protect its citizens' life, liberty or property).


203 See Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (opining that Congress has broad power to enforce Fourteenth Amendment); United States v. Guest, 383 U.S. 745, 782 (1966) (suggesting that Congress may proscribe purely private conduct that violates Fourteenth Amendment); Tribe, supra note 118, at 295-97 (concluding that Congress has authority under Enforcement Clause to enact legislation protecting Fourteenth Amendment rights); see also Scott C. Idelman, The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power, 73 Tex. L. Rev. 247, 308 (1994) (noting general understanding that
The Framers arguably intended that the Commerce Clause be narrowly construed. Early Court decisions, however, evidenced a slow progression toward a broader application. Judicial approval of New Deal social legislation further expanded the interpretation of congressional authority under the clause. This authorization prompted Congress to rely on the Commerce Clause to enact such civil rights legislation as the Civil Rights Act of 1964. The scope of the Commerce Clause, however, was diminished by the recent decision in *United States v. Lopez*. If the Commerce Clause standard, adopted in *Lopez*, is applied to statutes that protect civil liberties such as FACE, these liberties may be circumscribed by this strict interpretation. Further, unless the Court construes the Fourteenth Amendment state action requirement broadly, it will not provide protection against individual infringements of civil liberties, such as private conduct that prevents the exercise of constitutional rights. The present Supreme Court has left Congress with little authority to enact new civil liberties legislation when it becomes necessary. Carried to an even greater extreme, it is conceivable that the *Lopez* standard could eradicate many of the civil rights advances of the past century.

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one purpose of Fourteenth Amendment is to expand federal power and circumscribe state power).