1996

Cheffer v. Reno: Is the Regulation of Abortion Clinic Protests the Regulation of Interstate Commerce

John M. Scheib

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Constitutional Law Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol41/iss3/9

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
CHEFFER v. RENO: IS THE REGULATION OF ABORTION CLINIC PROTESTS THE REGULATION OF INTERSTATE COMMERCE?

I. INTRODUCTION

Prior to the 1930s, the United States Supreme Court often interpreted Congress's power under Article I, Section 8, Clause 3 of the United States Constitution, the Commerce Clause, narrowly. Since then, the Supreme Court has instead found that the Commerce Clause encompasses nearly every congressional action purporting to relate to commerce, thus, allowing Congress to regulate many facets of American life. In 1995, however, the Supreme Court, for the first time in over fifty years, held that a congressional act did not fall under the Commerce Clause. Despite this ruling, the United States Court of Appeals for the Eleventh Circuit in Cheffer v. Reno held that the Freedom of Access to Clinic Entrances Act ("FACE") represented a constitutional exercise of congressional power under the Commerce Clause.

The extent of abortion related violence in the United States has increased greatly in recent years. More than 1,000 acts of violence against

1. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). For a further discussion of the Supreme Court's Commerce Clause jurisprudence, see infra notes 48-121 and accompanying text.
2. ROBERT H. BORK, THE TEMPTING OF AMERICA 158 (1990) ("[T]he expansion of Congress's commerce . . . powers has reached a point where it is not possible to state, that as a matter of articulated doctrine, there are any limits left."); PHILIP B. KURKLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT 51-97 (1970) (discussing federalism and its demise); Edward S. Corwin, Passing of Dual Federalism, 36 VA. L. REV. 1, 2 (1950) (discussing shift of power toward consolidated national power); Larry Kramer, Understanding Federalism, 47 VAND. L. REV. 1485, 1494 (1994) (noting that some commentators believe "federalism is 'dead,' Congress is free to run berserk" (citing MARTIN H. REDISH, CONSTITUTION AS POLITICAL STRUCTURE ch. 2 (1994)) for a discussion of the breadth of the Commerce Clause, see infra notes 48-121 and accompanying text.
3. United States v. Lopez, 115 S. Ct. 1624 (1995) (holding that Gun Free School Zone Act ("GFSZA") was unconstitutional because it did not fall within Commerce Clause). For a further discussion of Lopez, see infra notes 108-21 and accompanying text.
4. 55 F.3d 1517 (11th Cir. 1995).
6. Cheffer, 55 F.3d at 1517. For a further discussion of the Cheffer court's rationale, see infra notes 122-50 and accompanying text.
abortion providers and more than 6,000 clinic blockades and other disruptions occurred between 1977 and 1993. These acts included "36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic 'invasions,' and one murder." That one murder, the murder of abortion provider Dr. David Gunn in 1993, brought the issue of abortion clinic violence to the forefront of public discourse. In response to this violence, Congress attempted to reduce the latter type of violence by enacting FACE. H.R. REP. No. 103-306, at 6-7 (1993), reprinted in 1994 U.S.S.C.A.N. 699, 703-04 (discussing Congress's rationale behind enactment of FACE); S. REP. No. 103-117, at 31 (1993) (same). For a further discussion of FACE, see infra notes 43-47 and accompanying text.

In 1991, a two-year campaign of blockades and invasions was launched against the only medical facility offering abortion services in North Dakota. Arrests were made on ten occasions in the first seven months. On one of these occasions, 26 people stormed the clinic, broke down a door, and chained themselves together inside the facility. In Wichita, Kansas, clinics were targeted by Operation Rescue from July through August of 1991. Hundreds of people came from across the country and engaged in acts of trespass and obstruction that overwhelmed local law enforcement's ability to respond. This 46-day blockade resulted in more than 2,600 arrests and a cost of over half a million dollars to local government. In April 1992, Operation Rescue targeted Buffalo, New York, causing 605 arrests of blockaders and trespassers and almost $400,000 in government costs. Less publicized but more frequent blockades have taken place regularly for years in places like Dobbs Ferry, New York (1,000 arrests in four year period for police force of 23 officers) and in northern Virginia.

In 1992, [the National Abortion Federation] recorded 57 of these attacks with estimated clean-up costs of almost half a million dollars. From January 1, 1993, through May 5, 1993, there were 14 reported attacks, with clean-up costs alone totalling over $65,000." Id. at 706. Abortion protestors inject the butyric acid into the clinics through key holes and under doors. One injection can shut down a clinic for up to a week. Id.

Dr. Gunn was shot during an anti-abortion rally outside the Pensacola, Florida clinic at which he worked. Id.; see FBI Is Urged to Investigate Abortion Foes: Slaying of Doctor at Fla. Clinic Spurs Call for Federal Action, ATLANTA J. & CONST., Mar. 11, 1993, at A1 ("Two congressmen and three abortion-rights groups called today for a wide-ranging FBI probe of the anti-abortion movement, saying the slaying of a doctor in Pensacola, Fla., caps a decade of arsons and bombings at family planning clinics . . . . [Congressmen Edwards and Shumer] also urged passage of [FACE]."); Garry Mitchell, Doctor Is Killed Outside Abortion Clinic, NEW ORLEANS TIMES-PICAYUNE, Mar. 11, 1993, at A1 (reporting on shooting of Dr. David
Congress passed FACE and President Bill Clinton signed it into law on May 26, 1994.11

Following the enactment of FACE, several pro-life groups filed challenges to the statute.12 Most notable was the suit filed by Myrna Cheffer and Judy Madsen.13 They strongly opposed abortion and attempted to persuade pregnant women to find other alternatives.14 Their efforts consisted of distributing literature, oral protest and sidewalk counseling.15 Although they were not arrested or charged with violating FACE, Cheffer and Madsen complained that fear of punishment under FACE "chilled" their activities.16

Cheffer and Madsen made several claims in their attempt to strike down FACE. The most notable of these claims challenged the constitutional power of Congress to enact the law.17 Specifically, they alleged that

Gunn); Mike Williams, Doctor Slain at Abortion Clinic in Fla.: Pensacola Demonstrator Is Charged with Murder, ATLANTA J. & CONST., Mar. 11, 1993, at A1 (same).


12. Cheffer v. Reno, No. 94-0611-CIV-ORL-18, 1994 WL 644873, at *1 (M.D. Fla. July 26, 1994) (seeking "declaratory and injunctive relief enjoining Defendants from enforcing the recently enacted Freedom of Access to Clinic Entrances Act of 1994"), aff'd, 55 F.3d 1517 (11th Cir. 1995); American Life League, Inc. v. Reno, 855 F. Supp. 137 (E.D. Va. 1994) (challenging constitutionality of FACE and filing motion for preliminary injunction against its enforcement), aff'd, 47 F.3d 642 (4th Cir. 1995), cert. denied, 116 S. Ct. 55 (1995); see Linda Feldman, Anti-Abortion Protests Face Tough New Obstacles, CHRISTIAN SCI. MONITOR, May 17, 1994, at 3 ("Anti-Abortion groups are gearing up to fight [FACE]."). In addition to preliminary constitutional challenges, protesters actively sought to be charged under FACE in order to challenge the statute. See Abortion Foes Plan to Challenge New Law Banning Blockades, N.Y. TIMES, May 26, 1994, at A20 (quoting opponents of abortion as saying they planned to challenge FACE with legal action and civil disobedience); Bill Against Abortion Protests Signed: Foes File Challenges Even Before Clinton Approves Measure, AZ. REPUBLIC, May 27, 1994, at A4 (noting that challenges were filed before President Clinton even signed FACE into law); Lyle Denniston, Abortion Clinic Bill Becomes Law and Immediately Is Challenged, BALT. SUN, May 27, 1994, at A3 (noting that challenges to FACE were filed as it was signed into law).


15. Id. Madsen admitted to participating in trespass on several occasions, but Cheffer claimed that her activities did not violate any laws. Id.

16. Id.

17. Id. In addition, Cheffer and Madsen raised several other claims. Id. In particular, they charged that the statute was "vague and overbroad, content and viewpoint based, and acted as a prior restraint, in violation of their First Amend-
Congress lacked the power to enact the statute under the Commerce Clause of the Constitution. The Eleventh Circuit disagreed, however, and ruled that Congress had the power under the Commerce Clause to pass FACE. This Note analyzes the Eleventh Circuit's decision in Cheffer v. Reno. Part II provides the backdrop upon which the Eleventh Circuit reviewed Cheffer. Part II first reviews the legislative history and purpose of FACE, and also addresses the specific statutory language. Part II then outlines the history of Commerce Clause litigation with particular emphasis on the Supreme Court's recent decision in United States v. Lopez. Part III discusses the Cheffer court's rationale. Part IV then critiques and criticizes the Eleventh Circuit's application of Commerce Clause jurisprudence to FACE. Finally, Part V discusses the implications of the Cheffer decision and discourages future courts from following the Eleventh Circuit's reasoning.

II. BACKGROUND

A. Freedom of Access to Clinic Entrances Act

1. Legislative History of FACE

The congressional investigation into abortion clinic protest violence began with one hearing in the 102d Congress. Then, in the 103d Congress, a bill similar to FACE was pending before the Congress and the Judiciary Committee's Subcommittee on Crime and Criminal Justice, which called an oversight hearing regarding blockades of abortion clinics. Id. The Subcommittee failed to act, however, thus killing the legislation for that Congress. For a further discussion of the Tenth Amendment implications, see infra notes 52-53 and accompanying text.

18. Id. at 1519. Appellants asserted that FACE infringes upon state authority under the Tenth Amendment because Congress lacked authority to pass the Act. Id. For a further discussion of the Tenth Amendment implications, see infra notes 52-53 and accompanying text.

19. Cheffer, 55 F.3d at 1521 ("[FACE] is a constitutional exercise of the Congress's power under the Commerce Clause."). For a further discussion of the opinion of the United States Court of Appeals for the Eleventh Circuit, see infra notes 122-50 and accompanying text.

20. For a further discussion of FACE, see infra notes 25-47 and accompanying text.


22. For a further discussion of the court's rationale in Cheffer, see infra notes 122-50 and accompanying text.

23. For an evaluation of the Cheffer court opinion, see infra notes 151-87 and accompanying text.

24. For a discussion of the impact of the Cheffer decision, see infra notes 188-92 and accompanying text.

25. H.R. REP. NO. 103-306, at 7-8 (1993), reprinted in 1994 U.S.S.C.A.N. 699, 700 (noting that 102d Congress held hearings on legislation similar to FACE). In that Congress, a bill similar to FACE was pending before the Congress and the Judiciary Committee's Subcommittee on Crime and Criminal Justice, which called an oversight hearing regarding blockades of abortion clinics. Id. The Subcommittee failed to act, however, thus killing the legislation for that Congress. For a re-
gress, the House Judiciary Committee's Subcommittee on Crime and Criminal Justice held two hearings on the FACE proposal. The first hearing studied the "issue of intimidation and violence other than clinic blockades against providers of reproductive health services, patients, and clinic facilities." The second hearing, held at the minority members' request, illustrated the range of nonviolent pro-life activities and explored the violent activities of pro-choice advocates.

Concurrently, the Senate held a hearing on the proposed legislation. During this hearing, the Senate learned about the extent of pro-
life activists' violence and its impact on abortion patients and providers. Moreover, the Senate inquired about the ability of state and local law enforcement to handle this problem.

Following these hearings, the House and Senate approved the legislation. Congress then forwarded FACE to the White House. Finally, on May 26, 1994, President Clinton signed the legislation into law while urging vigorous enforcement.

2. Congressional Findings

Congress made several findings regarding the need for FACE and its Commerce Clause implications. Congress found that the campaign of violence represented a coordinated, national and interstate effort beyond the control of state and local jurisdictions. In addition, Congress found

---

30. Id. at 9-17.
31. Id. at 3.
34. American Life League, Inc. v. Reno, 855 F. Supp. 137, 140 (E.D. Va. 1994) ("On May 26, 1994, President Clinton signed [FACE] into law, stating that he intended it to be vigorously enforced."); Michael Kranish, Ban on Abortion Clinic Strife Signed, BOSTON GLOBE, May 27, 1994, at 3 (quoting President Clinton as saying: "We simply cannot and must not continue to allow the attacks, the incidents of arson, the campaigns of intimidation upon law-abiding citizens that has given rise to this law.").
35. H. Conf. Rep. No. 103-488, at 1 (1994), reprinted in 1994 U.S.S.C.A.N. 699, 724. Congress enumerated additional findings that were unrelated to the commerce question, but were related to other issues surrounding the enactment of FACE such as the First Amendment issue of free speech. Id. at 725.
36. Id. at 724. In addition, the House Report mentions, numerous times, the interstate scope of the problem and that state and local law enforcement officials could not handle the problem. H.R. Rep. No. 103-306, at 703 ("[I]ncidents have occurred all across the nation, large-scale operations have been and are continuing to be organized on an inter-state basis . . . a national strategy has emerged, orchestrated largely by Operation Rescue and its affiliates, that has, as one of its goals, the goal of forcing doctors and others to stop performing abortions. . . . Attorney General Janet Reno has testified that 'much of the activity has been orchestrated by groups functioning on a nationwide scale.'") (quoting Freedom of Access to Clinic Entrances Act of 1993: Hearings on S. 636 Before the Senate Comm. on Labor and Human Resources, 103d Cong. 9 (1993) (testimony of Janet Reno, Attorney General of the United States)). It concludes that current State and local laws are inadequate. Id. at 707 ("[E]xisting criminal laws at the state and local level
that state and local law enforcement authorities could not or would not stop the violence by enforcing injunctions and local laws, such as criminal trespass, vandalism and assault. Congress also decided that the violent conduct infringed upon constitutionally guaranteed rights, in particular the right to choose, as well as federal and state law.

Most importantly, Congress found that the national scope of abortion clinic violence burdened interstate commerce. Section 2, clause 3 of FACE states:

have failed to provide the certainty of prosecution, conviction and punishment necessary to deter these activities on a nationwide scale.

37. H.R. REP. NO. 103-306, at 707. House Report 306 notes that: “Enforcement of local laws such as trespass, vandalism and assault have proven inadequate . . . the reluctance of local authorities to protect the rights of individuals provides a powerful justification for the enactment of federal protections that has been evoked previously by Congress in passing laws to protect civil rights.” Id. (quoting testimony of Janet Reno, Attorney General, Hearings on S. 636, supra note 36, at 9). The House Report also found that current federal laws were inadequate. Id. It failed, however, to address the use of the Racketeering Influenced and Corrupt Organization Act (RICO) in prosecuting abortion protestors. Id.; see 18 U.S.C. § 1962(e) (1994) (RICO); see also NOW v. Scheidler, 114 S. Ct. 798 (1994) (holding that prosecutors could use civil RICO to prosecute abortion protestors); Hilber, supra note 7, at 157 (“Use of civil RICO recently received a great lift with the United States Supreme Court decision in NOW v. Scheidler.”); Carolyn J. Lockwood, Regulating the Abortion Clinic Battleground: Will Free Speech Be the Ultimate Casualty, 21 OHIO N.U. L. REV. 995, 1013-17 (1995) (discussing use of RICO against abortion protestors); Golinski, supra note 11, at 163 (discussing NOW v. Scheidler and use of RICO against abortion protestors).

Conversely, the minority report notes the effectiveness of local law enforcement and current federal remedies:

What need is there for a federal statute given the abundance of state and local laws addressing rescue conduct when it becomes illegal . . . criminal trespass, criminal contempt, disorderly conduct, resisting arrest, and unlawful assembly are examples of criminal statutes used to punish some clinic sit-ins or “rescues.” Civil remedies, like injunctions, are often pursued by clinics or their patients.

H.R. REP. NO. 103-306, at 717 (dissenting views of Honorable F. James Sensenbrenner, Jr., Carlos J. Moorhead, Henry J. Hyde, Bill McCollum, Howard Coble, Lamar S. Smith, Elton Gallegly, Charles T. Canady, Bob Inglis and Robert W. Goodlatte). Specifically, the minority reported that there were 2,700 arrests, prosecutions, criminal contempt proceedings and jailings for injunction violations in Wichita, Kansas, 500 arrests in Buffalo, New York and 68 arrests during an abortion clinic blockade in Manassas, Virginia. Id. at 718. Thus, they concluded that approximately 70,000 arrests were made in the last five years. Id. at 719. The minority also contended that no federal court injunction regarding a clinic protest rested on state or local officials’ failure to enforce laws on behalf of abortion patients. Id. at 718 (relying on Bruce Fein, Triumph for Rule of Law, WASH. TIMES, Jan. 19, 1993, at F1). The minority, however, recognized the use of RICO to prosecute violent abortion clinic protestors. Id. at 719 (“Civil RICO has been used against anti-abortion sit-ins and is now the subject of Supreme Court litigation.”).

38. H. CONF. REP. NO. 103-488, at 724. The House specifically notes: “[The campaign of violence] has resulted, as intended, in access to the constitutionally protected right to choose being denied to thousands of women nationwide against their will.” H.R. REP. NO. 103-306, at 703.

Such conduct also burdens interstate commerce by forcing patients to travel from states where their access to reproductive health services is obstructed to other states, and by interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states.40

Based upon this rationale, Congress decided that abortion clinic protests infringed upon interstate commerce.41 Accordingly, Congress enacted the legislation "to protect and promote the public safety and health and activities affecting interstate commerce."42

3. The Act

FACE provides for both federal criminal penalties and civil remedies.43 To prove a violation of FACE, the prosecution or civil plaintiff must prove three elements.44 First, they must show that a defendant used force, threat of force, physical obstruction or intimidation or that the de-

40. H. CONF. REP. NO. 103-488, at 724. While the House Report did not specifically address the Commerce Clause, the Senate Report did. S. REP. No. 103-117, at 30-32. It concluded that Congress had constitutional authority under the Commerce Clause to enact FACE. Id. The Senate Report noted that abortion service providers were involved indirectly and directly in interstate commerce. Id. at 31. Specifically, it found that clinics "purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income." Id. Thus, the Committee decided clinics were within the stream of interstate commerce. Id.


42. 18 U.S.C. § 248; see also Cheffer v. Reno, 55 F.3d 1517, 1518 (11th Cir. 1995) (addressing statutory purpose).

43. 18 U.S.C. § 248(b)-(c). Federal criminal penalties are available when the Attorney General or a state attorney general raises the claim. Id. Civil penalties are available when the individual affected by the violation raises the claim. Id. For the language of the statute, see infra note 44.

44. 18 U.S.C. § 248; see also United States v. White, 893 F. Supp. 1423, 1427 (C.D. Cal. 1995) (discussing elements of a FACE violation). The text of the statute is as follows:

Freedom of access to clinic entrances

(a) Prohibited Activities.—Whoever—

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

(2) 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 lawfully exercising or seeking to exercise the First Amendment right of religious freedom a place of worship; or
(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties.—Whoever violates this section shall—
(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and
(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, 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; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil Remedies.—
(1) Right of Action.—
(A) In General.—Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a) (1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a) (2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such a place of religious worship.
(B) Relief.—In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States.—
(A) In General.—If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.
(B) Relief.—In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1) (B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent—
(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and
(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any subsequent violation.

(3) Actions by State Attorneys General.—
(A) In General.—If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.
(B) Relief.—In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of Construction.—Nothing in this section shall be construed—
(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;
(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;
(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or
(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions.—As used in this section:
(1) Facility.—The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.
(2) Interfere with.—The term "interfere with" means to restrict a person's freedom of movement.
(3) Intimidate.—The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.
(4) Physical Obstruction.—The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.
(5) Reproductive health services.—The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.
(6) State.—The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.
fendant destroyed property. Second, they must prove that the defendant did so with the intent to injure, intimidate or interfere with a provider or seeker of abortion services. Finally, the statute requires the complainant to demonstrate that the defendant acted because the victim provided or sought reproductive health services.

B. The Commerce Clause, the Tenth Amendment, Federalism and the Supreme Court's Jurisprudence: A Ship Blown by the Prevailing Winds

Defendants have challenged FACE on numerous grounds. In each case, the defendants argue that the law is an ultra vires action outside the scope of Congress’s Commerce Clause power. In constitutional challenges to the powers of Congress, such as these, the court’s inquiry must attack the statute on two tiers. The first tier implicates the extent of the


45. 18 U.S.C. § 248(a)(1). For the text of the statute, see supra note 44.

46. 18 U.S.C. § 248(a)(1). For the text of the statute, see supra note 44.

47. 18 U.S.C. § 248(a)(1). For the text of the statute, see supra note 44.

affirmative constitutional grant of power to Congress. 49 In this case, the affirmative grant of power is the Commerce Clause. 50 Article I, Section 8, Clause 3 of the Constitution provides that Congress has the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." 51 Conversely, the second tier involves the negative constraints of the Tenth Amendment that limit congressional authority. 52

The Tenth Amendment, which reserves to the states or the people those powers not granted to the federal government by the Constitution, creates a balance of power between state and federal governments. 53

49. The analysis of any congressional enactment must start with the question: Where does Congress get its power to regulate such activity or to enact such a law? See Wesley N. Hohfield, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1917) (discussing nature of legal power and noting it to be one of "lowest common denominators of the law"). According to Judge Bork, the United States Supreme Court often fails to ask and answer this question. Bork, supra note 2, at 74-84, 110-26 (arguing that in cases dealing with desegregation and abortion, among others, Court failed to base its opinion on Constitution and looked to social and psychological reasons instead).

50. U.S. Const. art. I, § 8, cl. 3; see Hearing on State Sovereignty and Role of Federal Government Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Judiciary Comm., 104 Cong. (1995), available in LEXIS, Legis Library, CmtRpt File (testimony of John G. Kester) [hereinafter Kester Testimony] ("[T]here is a built-in tension between the Tenth Amendment and some of the Constitution's grant of federal authority, particularly the Commerce Clause."); C. Herman Pritchett, Constitutional Law of the Federal System 215 (1984) ("The language [of the Commerce Clause], be it noted, is in terms of a positive grant of power to Congress."). For a further discussion of the history of the Commerce Clause, see supra notes 48-49 and infra notes 51-121 and accompanying text.

51. U.S. Const. art. I, § 8, cl. 3.

52. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."); see United States v. Lopez, 2 F.3d 1342, 1346 (5th Cir. 1993) (noting that Tenth Amendment and Commerce Clause "are but two sides of the same coin"), aff'd, 115 S. Ct. 1624 (1995); United States v. Mussari, 894 F. Supp. 1360, 1367 (D. Ariz. 1995) (noting that when Congress does not act pursuant to one of its constitutionally enumerated powers, it is infringing upon those powers which are reserved to states by Tenth Amendment); United States v. Wilson, 880 F. Supp. 621, 633 (E.D. Wis.) (quoting Lopez, 2 F.3d at 1342) (noting that Commerce Clause and Tenth Amendment are two sides of same coin), rev'd, 73 F.3d 675 (7th Cir. 1995).

53. U.S. Const. amend. X; see Kansas v. Colorado, 206 U.S. 46 (1907) (noting that notion of limited, enumerated federal powers is "made absolute by the Tenth Amendment"); Kester Testimony, supra note 50 (observing that Tenth Amendment was meant to ensure that, unlike states, federal government could only legislate under enumerated powers); William N. Eskridge, Jr. & John Ferejohn, The Elastic Commerce Clause: A Political Theory of American Federalism, 47 Vand. L. Rev. 1355, 1359 (1994) ("A robust federalism must maintain boundaries between state and national authority by protecting the states against invasions by national institutions, by protecting the states from transgression by their neighbors, and by restraining states from transgression on core national/constitutional values."). But see United States v. Darby, 312 U.S. 100, 124 (1941) (stating that Tenth Amendment is "but a truism" and has no substantive impact).

The balance of power between the federal government and the states, however, is continually evolving and depends on the relative significance the courts
Over the years, the Supreme Court has grappled with these two tiers of Commerce Clause analysis. In particular, it has tried to resolve the inherent conflict between the two. Since 1787, the Supreme Court’s Constitution has attribute to the constitutional grants of power to the federal government and the Tenth Amendment. Thus, federalism is dynamic, not static. See Mussari, 894 F. Supp. at 1360 (“When Congress criminalizes conduct already denounced as criminal by the States, it effects a ‘change in the sensitive relation between federal and state criminal jurisdiction.’” (quoting United States v. Bass, 494 U.S. 336, 349 (1971))); see also Joseph Lesser, The Course of Federalism in America—An Historical Overview, in FEDERALISM: THE SHIFTING BALANCE 1 (Janice C. Griffith ed., 1989) (providing overview of historical shifts in extent of federalism); Jeff Powell, Comment, The Compleat Jeffersonian: Justice Rehnquist and Federalism, 91 YALE L.J. 1517 (1982) (discussing emergence of Justice Rehnquist’s theory of federalism and its historical basis).

54. Kester Testimony, supra note 50 (discussing evolution from time when every congressional action was challenged as infringement on powers of states to post-New Deal era when extent of federal legislation greatly expanded, leaving states little authority). The nature and content of the limitations on federal power have bewildered the Supreme Court. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (observing that federal structure’s imposition of limits on Commerce Clause is not problematic, but nature and content of those limitations is). An often-quoted Supreme Court statement dismisses the Tenth Amendment, concluding that the Amendment “states but a truism that all is retained which has not been surrendered.” Darby, 312 U.S. at 124; see 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, 106 (1994) (“To the dismay of many, not the least of whom would surely be the Framers, the Tenth Amendment, as well as the principle underlying it, has with rare exception been rendered a dead letter.”). In Garcia, the Supreme Court ignored the Tenth Amendment in holding that political procedural safeguards, rather than judicial limitations, best protect state sovereignty. Garcia, 469 U.S. at 528. This decision expressly overturned a Court decision that interpreted the Tenth Amendment as an “affirmative limitation” on Congress “akin to” others in the Bill of Rights. National League of Cities v. Usery, 426 U.S. 833, 841 (1976), overruled by Garcia, 469 U.S. at 528. Thus, the balance of power shifted in favor of the federal government, especially in Commerce Clause cases. See generally Kester Testimony, supra note 50 (noting that “[a]s for the Tenth Amendment, once the grant of power to Congress in Article I, [Section] 8, was interpreted to be virtually limitless, the requirement that Congress had to stay within that grant lost any practical significance”).

Nevertheless, in some recent cases, the Supreme Court may have constructed a legal framework to reinvigorate the Tenth Amendment and the principles of federalism. Richard C. Reuben, Court Bolsters 10th Amendment, A.B.A. J., Apr. 1995, at 78 (“While today’s renewed focus on federalism is being driven by political events, much of the legal groundwork already has been plowed by the U.S. Supreme Court.”). For example, the Rehnquist Court breathed new life into the balance of power issue. See New York v. United States, 505 U.S. 144, 162 (1992) (holding that federal government requirement that states “take title” to radioactive waste lies outside Congress’s enumerated powers and is inconsistent with “the Constitution’s division of authority between the federal and state governments”); Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (refusing to strike down mandatory retirement system for judges in Missouri after it was challenged under Age Discrimination and Employment Act); see also Kester Testimony, supra note 50 (noting that Court has treated Tenth Amendment as separate limitation on federal power in some instances); Reuben, supra, at 79 (using Gregory as illustration of Court’s “reaffirmation of federalism principles”).

Published by Villanova University Charles Widger School of Law Digital Repository, 1996
merce Clause analysis has reflected this debate and been a ship blown across the waters by the prevailing political winds. Nevertheless, for years the Court's attempts to meld an intelligible rule for applying the Commerce Clause were divisible into three time frames: an age of plenary power, an age of restraint and the modern age. The Supreme Court's decision in United States v. Lopez, however, represents the dawn of a fourth age in Commerce Clause interpretation.

1. Age of Plenary Power: Gibbons v. Ogden

Beginning with Chief Justice John Marshall, the Supreme Court broadly interpreted Congress's power to regulate under the Commerce Clause. In Gibbons v. Ogden, the Court defined the constitutional term "among" as "concern[ing] more states than one"; thus, it distinguished interstate commerce from intrastate commerce. The Court then ruled...
that Congress could regulate interstate commerce but not intrastate commerce. The Court also held that Congress's power to regulate, where it existed, was plenary. Subsequently, the Court used its definition of interstate commerce and the plenary power of Congress to uphold several congressional actions and federal regulations under the Commerce Clause.

supra note 55, at 476 (citing Gibbons as creating distinction between Congress's power over interstate commerce and states' power over intrastate commerce); Pritchett, supra note 50, at 218 (noting that Marshall, in Gibbons, laid basis for splitting commerce into two parts). Then, under Chief Justice Taney, the Court specifically defined an interstate-intrastate distinction. The License Cases, 46 U.S. (5 How.) 504 (1847); see O'Brien, supra note 55, at 476 (noting that Taney Court based interstate-intrastate distinction on Marshall Court dicta). Relying on dicta from the Gibbons opinion, the Court created two mutually exclusive commerce powers in The License Cases. 46 U.S. at 504. The first was intrastate commerce: "internal or domestic commerce, which belongs to the States, and over which Congress can exercise no control." Id. at 575; see also The Passenger Cases, 48 U.S. (7 How.) 283, 400 (1849) (stating "[a]ll commercial action within the limits of a State, and which does not extend to any other State or foreign country, is exclusively under State regulation"). The second was interstate commerce, commerce between two or more states, over which Congress had exclusive control. The License Cases, 46 U.S. at 578.


62. Id. at 197. In another important case, Champion v. Ames, 188 U.S. 321 (1903), the defendant challenged the constitutionality of a federal statute that prohibited the shipment of lottery tickets. Id. at 344. The Court concluded that prohibition was a necessary aspect of regulation and, therefore, encompassed within the meaning of the term. Id. While the Court also recognized that the Constitution was the only restraint on congressional power, it held that the Tenth Amendment did not limit Congress's power to regulate health, safety and morals. Id. at 357. Thus, the Court held that the federal government may supplement the states' authority under their police power through regulation. Id.; see generally Pritchett, supra note 50, at 222 (noting that Champion v. Ames created national police power).

63. See, e.g., The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) (upholding federal license requirements for ships operating interstate if goods they carried were destined for another state). There were only a few challenges to Congress's commerce power during this period because Congress rarely asserted this power until after the Civil War. See generally O'Brien, supra note 55, at 476 (noting that Congress did not assert its commerce power until after Civil War); Laurence H. Tribe, American Constitutional Law § 5-4, at 906 (2d ed. 1988) ("Until Congress enacted the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890, Commerce Clause litigation rarely involved the Supreme Court in the review of congressional action."). By the end of the Civil War, the interstate-intrastate distinction was very formalistic with the determination hinging upon whether commerce crossed a state line. See O'Brien, supra note 55, at 476 (noting that Court applied interstate-intrastate distinction in formalistic way by late 1800s).
2. Age of Restraint: Limiting Congressional Power Under the Production-Distribution Distinction

The reshaping of the Supreme Court in the late 1880s produced a new line of Commerce Clause decisions. While the Court continued to rely on Gibbons's interstate-intrastate dichotomy, it also created a new distinction: the production-distribution distinction. In so doing, the Court was able to invalidate federal regulation, thereby limiting congressional power over commerce.

The Court created the production-distribution rule in United States v. E.C. Knight Co. In Knight, the Court held that the Sherman Antitrust Act did not apply to a sugar company because the company's production of sugar did not relate to commerce between the states. The Court based

---

64. Rachel J. Littman, Gun-Free Schools: Constitutional Powers, Limitations, and Social Policy Concerns Surrounding Federal Regulation of Firearms in School, 5 SETON HALL CONST. L.J. 723, 745 (1995). Littman notes that the Court has not always interpreted the Commerce Clause to give Congress broad regulatory powers. Id. She comments that “during the late Nineteenth Century and until the late 1930s, the Court routinely struck down federal laws that sought to regulate areas of local economic or state concern.” Id.

After the Civil War, the composition of the Court drastically changed with economic conservatives, such as Chief Justice Melville Fuller and Justices Stephen Field and Samuel Miller, leading the charge. O'BRIEN, supra note 55, at 477. Joining them were other Justices, such as Justices David Brewer, Edward White and Rufus Peckham, who opposed social change and supported laissez-faire capitalism. Id. Their philosophies and ideologies contributed to this new line of Commerce Clause cases. Id.


66. See O'BRIEN, supra note 55, at 477 (“[T]he production/distribution rule enabled the Court . . . to . . . strike down federal regulations and thereby limit the reach of congressional power over commerce.”). For a further discussion of the production-distribution distinction, see infra notes 67-74 and accompanying text.

67. 156 U.S. 1 (1895). The Court began to create this distinction in Kidd v. Pearson. 128 U.S. 1 (1888). In that case, the Court defined manufacturing as “the fashioning of raw materials into a change of form for use” and commerce distribution as “[t]he buying and selling and the transportation incidental thereto.” Id. at 20.

68. Knight, 156 U.S. at 16-17. The United States brought the claim against the American Sugar Refining Company under the Sherman Antitrust Act. Id. at 9. Congress passed the Sherman Antitrust Act in 1890 to “protect trade and commerce against unlawful restraints and monopolies.” Id. at 6. Through the purchase of stock, the company acquired an interest in a large majority of refined sugar manufacturers. Id. at 9. Thus, it “acquired nearly complete control of the manufacture of refined sugar within the United States,” thereby establishing a practical monopoly. Id. The United States averred that in acquiring the stock of other sugar companies, American Sugar Refining intended to restrain the sale of refined sugar and increase the market price. Id. at 4. The Court ruled in favor of the company saying, “[W]hat the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States . . . but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations.” Id. at 17.
its decision on the assumption that two spheres of commerce power existed. Specifically, it held that the Constitution grants the regulation of manufacturing to the states and the regulation of distribution to Congress.

Following Knight, *Hammer v. Dagenhart* was the most noticeable attempt to restrain Congress's power under the Commerce Clause. In that case, the Court held that a child-labor law in effect regulated the manufacture of goods and services. Thus, the Court ruled that the child-

69. Id. at 11-12. The Court noted that "[c]ommerce succeeds to manufacture, and is not a part of it." Id. at 12. Whereas manufacture is the transformation of supplies into products, commerce is the buying and selling. Id. at 14. Thus, the Court concluded that the two were separate. Id.

70. Id. at 11. Specifically, the Court stated:

> It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. . . . On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. Id.

Id. The Court provided guidance by defining manufacturing and distribution. Id. at 14. The Court defined manufacture as "transformation—the fashioning of raw materials into a change of form for use." Id. Meanwhile, it defined commerce in the distribution sense as "the buying and selling and the transportation incidental thereto." Id. Applying this distinction, the Court concluded that the acts of acquiring the Philadelphia sugar refineries were wholly internal to Pennsylvania because it dealt exclusively with manufacturing processes. Id. at 17. Moreover, the Court placed the regulation of monopolies in the category of regulating manufacture, not in the category of regulating traffic. Id. Therefore, the Sherman Antitrust Act "bore no direct relation to commerce between the States or with foreign nations." Id. See generally Tribe, supra note 63, § 5-4, at 308 (discussing manufacturing-distribution distinction).


71. 247 U.S. 251 (1918).

72. Id. In *Hammer*, a father filed suit to enjoin the enforcement of a child-labor law that prohibited the shipment of goods in interstate commerce within thirty days of employing certain categories of children. Id. at 268-69. The law prohibited the employment of children under age 14 and it prohibited children age 14 to 16 from working more than either the prescribed number of hours per day, days per week or before six o'clock AM or past seven o'clock PM. Id. at 269.

73. Id. at 272. The Court meant that the law practically regulated manufacture because it forced companies to change their workforce practices in order to have access to the stream of commerce for shipment. Id. Furthermore, the Court held that the law was not within the Commerce Clause because the mere intent to ship the products or services did not constitute commerce. As the Court noted:

> [W]hen the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another

Published by Villanova University Charles Widger School of Law Digital Repository, 1996
labor act was unconstitutional because it sanctioned "an invasion by the federal power . . . [over] a matter purely local in its character, and over which no authority has been delegated to Congress." 74

Based on these precedents, the Court generally restrained congressional action under the Commerce Clause. While the Court occasionally upheld a congressional act by creating special, narrow rules, the use of these rules was rare. 75 As a general matter, the Court continued to con-

state for sale, nor by his preparation of it for transportation, or the actual commencement of its transfer to another state. . . . If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States.

Id. at 272-73. 74. Id. at 276.

75. See Tribe, supra note 63, § 5-4, at 308 ("Despite the narrow formalism of its doctrine, the Supreme Court of this era occasionally ratified important congressional exercises of the commerce power."). To uphold a congressional act, however, the Court created a special rule—the "effect on commerce rule." See O'Brien, supra note 55, at 478 (noting that when Court upheld legislation, it derived formal rules from interstate-intrastate distinction); see, e.g., Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down slaughterhouse's conviction under National Industrial Recovery Act because its activity only indirectly affected interstate commerce); Stafford v. Wallace, 258 U.S. 495, 496 (1922) (using stream of commerce test to sustain federal regulation of stockyards); Houston & Tex. Ry. v. United States, 234 U.S. 342, 348-49 (1914) (holding federal government could regulate train rates for trains operating wholly intrastate); Southern Ry. v. United States, 222 U.S. 20 (1911) (holding federal government could regulate safety of rail cars used by interstate rail companies even though cars in question were operated wholly intrastate); Swift & Co. v. United States, 196 U.S. 375, 376 (1905) (holding that federal government could regulate stockyards because they were acting in stream of commerce). Under this rule, Congress could only regulate activity within a state if it had "an obvious effect or impact on interstate commerce." O'Brien, supra note 55, at 478 ("[T]he Court rationalized federal regulation on an 'effect on commerce' rule."); see Pritchett, supra note 50, at 225 (noting that under "effect upon commerce" concept, Congress could regulate activities which affected interstate commerce). In order to implement this rule, the Court devised four tests for measuring the effect of these local activities on interstate commerce: the stream of commerce test, the intermingling test, the Shreveport Doctrine and the direct-indirect distinction. O'Brien, supra note 55, at 479-80.

(1) Stream of Commerce—In Swift & Company v. United States, members of the cattle industry were charged with violating the Sherman Antitrust Act for "conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meats throughout the United States." Swift & Company, 196 U.S. at 375. The Court noted that commerce is not technically defined but practically defined. Id. at 398. Thus, when the course of business is continually recurring, it creates a stream of commerce. Id. at 398-99. In this case, the sale of cattle at market was only a temporary stop in the stream of commerce that originated in the grazing fields and terminated at the slaughter house. Id. Thus, the Court upheld the Act because the cattle producers' purpose was to monopolize the interstate commerce of cattle by controlling parts of the stream of commerce. Id. at 397; see also Stafford, 258 U.S. at 495 (using stream of commerce test to sustain
(2) Intermingling—In *Southern Ry. v. United States*, the Supreme Court affirmed Congress's power to regulate, under the Safety Appliance Acts of Congress, rail cars used by interstate rail companies even though the cars in question were only used for intrastate transportation. *Southern Ry.*, 222 U.S. at 26-27. The fact that the cars were not traveling among the states was without significance. *Id.* at 25. The Court reasoned that the words in the statute, "on any railroad engaged," were intended to "embrace all locomotives, cars and similar vehicles used on any railroad which is a highway of interstate commerce." *Id.* at 25-26. Next, the Court defined the intermingling test:

> Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement?

*Id.* at 26. Thus, the Court held that the dangers from the simultaneous use of the railroad by both interstate and intrastate cars, the interchangeability of interstate and intrastate cars, the interchangeability of rail workers and the interdependence, rather than independence, of multiple trains on the same railroad created a substantial connection to interstate commerce. *Id.* at 27. See generally *Pritchett*, supra note 50, at 225-26 (discussing intermingling).

(3) Shreveport Doctrine—In *Houston & Tex. Ry. v. United States*, the railway appealed a ruling by the Interstate Commerce Commission (ICC) that required the railroad to "equalize the terms and conditions upon which they will extend transportation to traffic of a similar character moving into Texas from Shreveport with that moving wholly within Texas." *Houston & Tex. Ry.*, 234 U.S. at 348-49. At the time of the ICC's ruling, the railway was charging significantly more for transport from Shreveport to Texas cities than it was for transport under similar circumstances and over similar distances wholly within Texas. *Id.* at 346. The railway challenged the validity of this order on the grounds that Congress could not regulate their intrastate charges even if necessary to prevent discrimination against interstate traffic. *Id.* at 350. The Supreme Court, however, decided that the authority of Congress:

> [E]xtending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.

*Id.* at 351 (emphasis added). In expressing its rationale, the Court created what came to be known as the Shreveport Doctrine. See generally *Pritchett*, supra note 50, at 226 (discussing the Shreveport Doctrine).

(4) Direct-Indirect distinction—The Court had already begun to create the direct and indirect effects doctrine in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding that federal government could not, under Sherman Antitrust Act, forbid merger of sugar companies solely because trade or commerce might be indirectly affected); see also *O'Brien*, supra note 55, at 480 (discussing beginning of direct-indirect distinction in *Knight*). The distinction, however, clearly emerged in the "Sick Chicken" case, *Schechter*. 295 U.S. at 495. In *Schechter*, New York slaughterhouses received chickens from outside the state, slaughtered them and sold them in local stores. *Id.* at 520. The Court found that the slaughterhouses were involved in intrastate commerce that had only an indirect effect on interstate commerce. *Id.* at 546-49. Because the activity did not have a direct impact on interstate commerce, the Court overturned the convictions under the National Industrial Recovery Act. *Id.* at 551.
true the Commerce Clause narrowly and invalidated much of President Franklin D. Roosevelt's New Deal legislation, thereby creating the "New Deal Crisis."  

3. The Modern Age: A Return to Gibbons

In the 1930s, a reversal occurred in the Supreme Court's Commerce Clause jurisprudence. Initially, the Court remained true to its prior decisions and continued to invalidate many of President Roosevelt's New Deal legislation. However, later the Court better defined direct and indirect effects on commerce in *Carter v. Carter Coal Co.*, 298 U.S. 238, 307 (1936). In that case, the Court said:

> The word "direct" implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about.

*Carter v. Carter Coal Co.*, 298 U.S. 238, 307 (1936). In that case, the Court said:

> The word "direct" implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about.

The Court formalistically applied this distinction outlined in *Schechter* and *Carter Coal*. See O'BRIEN, supra note 55, at 481 (noting that rigid use of direct-indirect distinction drew sharp dissent from some members of Court). See generally PRITCHETT, supra note 50, at 227-30 (discussing direct-indirect distinction)


77. See O'BRIEN, supra note 55, at 493-94 (discussing evolution of Commerce Clause jurisprudence during New Deal); Epstein, supra note 55, at 1443-54 (discussing New Deal transformation of Commerce Clause).
Deal programs. In *NLRB v. Jones & Laughlin Steel Corp.*, however, the Supreme Court reversed direction and initiated the modern expansion of the Commerce Clause.

78. See, e.g., *Carter Coal*, 298 U.S. at 238 (striking down Bituminous Coal Conservation Act of 1935); *Butler*, 297 U.S. at 1 (invalidating scheme for subsidies under Agricultural Adjustment Act); *Schechter*, 295 U.S. at 495 (striking down National Recovery Act); *Alton R.R.*, 295 U.S. at 330 (striking down railroad retirement program); *Panama Ref.*, 293 U.S. at 388 (invalidating provisions of National Industrial Recovery Act). President Roosevelt consequently sent a plan to Congress to expand the number of Justices on the Court to twelve. See *Bork*, supra note 2, at 54-56 (discussing Roosevelt’s Court-packing plan and its developments); *O’Brien*, supra note 55, at 481 (remarking that Court’s striking down important New Deal legislation embittered President Roosevelt and that he responded by proposing to expand size of Court in order to get majority of Court sympathetic to his programs); David O. Stewart, *Back to the Commerce Clause*, A.B.A. J., July 1995, at 48 ("Decisions like *Schechter Poultry* were a major cause of President Franklin D. Roosevelt’s re-election landslide in 1936, as he campaigned against the ‘Nine Old Men’ who had struck down New Deal programs . . . . The election results encouraged him to pursue his ‘Court-packing’ plan of 1937."); see also President Roosevelt’s Radio Broadcast, Mar. 9, 1937 (announcing his Court-packing plan), reprinted in *O’Brien*, supra note 55, at 63. The decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), saved the nine Justice Court. See *Tribe*, supra note 63, at 308-09 ("[W]ith its watershed decision in *NLRB v. Jones & Laughlin Steel Corp.*, the Court acceded to political pressure."); Epstein, supra note 55, at 1443 ("[T]he 1936 Roosevelt mandate and the prospect of court packing could hardly have been lost on the Court.").

79. 301 U.S. 1 (1937).

80. Id. Actually, there were three cases that came down from the Supreme Court within days of one another. *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *Jones & Laughlin Steel*, 301 U.S. at 1. *Jones & Laughlin Steel*, however, is recognized as the major case that ended the New Deal crisis. See *Epstein*, supra note 55, at 1443 (citing *Jones & Laughlin Steel* as first major case to challenge traditional Commerce Clause analysis).

The Court’s newly found support for Roosevelt’s initiatives arose when Chief Justice Hughes and Justice Roberts switched their positions on New Deal legislation. *O’Brien*, supra note 55, at 493. Justices Hughes and Roberts’s switch became known as the “switch in time that saved nine.” See id. (explaining that by upholding New Deal legislation, Justices Hughes and Roberts convinced Congress not to enact Roosevelt’s Court-packing plan). Scholars have concluded that political considerations motivated the Justices’ vote switch. See, e.g., Henry J. Abraham, Justices and Presidents 211 (3d ed. 1992) ("No matter how insistently Hughes and Roberts would later deny that their switch to the liberal wing had been politically motivated, few students of the Court view their move as anything but a recognition of, and inevitable bowing to, the handwriting on the wall."); 7 Robert Mayer, The Supreme Court in American Life: The Court and the American Crises 1930-1952, at 228 (1987) (arguing that Justice Roberts’s newly found support for Roosevelt’s legislative programs resulted from his sensitivity to 1936 election, labor unrest of time and Roosevelt’s Court-packing plan). Fellow Justice Felix Frankfurter, however, argued that Roberts’s switch was not at all politically motivated, but rather that he was true to his political philosophy and that Roberts silenced his desire to overturn *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), because “a majority could not be had for overruling.” Felix Frankfurter, *Mr. Justice Roberts*, 104 U. Pa. L. Rev. 311, 311-17 (1955).
The *Jones & Laughlin Steel* case arose when the *Jones & Laughlin Steel* Corporation challenged the National Labor Relations Act ("The Wagner Act") on the grounds that it was a regulation of labor relations and not commerce. The Court held, however, that the National Labor Relations Board had jurisdiction over any person engaging in unfair labor practices "affecting commerce." It ruled that "[t]he close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local." Thus, the Court held that the steel industry's "ramifying activities" that affected interstate commerce "at every point" illustrated the close and intimate relation that a manufacturing industry may have with interstate commerce. Consequently, the Court simultaneously upheld *The Wagner Act*, began marching back down the path towards *Gibbons* and produced the broadly interpreted Commerce Clause of the modern age.

In the years that followed *Jones & Laughlin Steel*, the Supreme Court continued to expand the scope of congressional power under the modern Commerce Clause interpretation while further refining the "affecting commerce" test. For example, the Court expressly overturned *Hammer* and held that if an activity "is so related to the

---

81. *Jones & Laughlin Steel*, 301 U.S. at 25. *Jones & Laughlin Steel Corp.*, a steel producer, discharged ten employees for their union activity in order to discourage their membership in the union. *Id.* at 29. The National Labor Relations Board (NLRB) ordered the company to reinstate these workers. *Id.* See generally *Pritchett*, *supra* note 50, at 231 (discussing facts surrounding *Jones & Laughlin Steel*).

82. *Jones & Laughlin Steel*, 301 U.S. at 31. The Court noted that the Act specifically defined what activities "affected commerce." *Id.*

83. *Id.* at 38. The company contended that the employees were engaged in local production. *Id.* at 34. Therefore, they argued that the government could not regulate production under the production-distribution distinction. *Id.* The Court disagreed. *Id.* at 38-41. For a further explanation of the production-distribution distinction, see *supra* notes 65-74 and accompanying text.

84. *Jones & Laughlin Steel*, 301 U.S. at 32.

85. See *O'Brien*, *supra* note 55, at 493-94 (remarking that *Jones & Laughlin Steel* reaffirmed Congress's plenary power under Commerce Clause and signaled return to *Gibbons*); *Tribe*, *supra* note 63, § 5-4, at 309 (noting that *Jones & Laughlin Steel* signaled "return to Chief Justice Marshall's original empiricism"). The effect of the *Jones & Laughlin Steel* decision was the advent of the modern, broad regulatory powers of Congress. See Epstein, *supra* note 55, at 1443 ("The old barriers were stripped away; in their place has emerged the vast and unwarranted concentration of power in Congress that remains the hallmark of the modern regulatory state."); Robert L. Stern, *Problems of Yesteryear-Commerce and Due Process*, 4 VAND. L. REV. 446, 468 (1951) ("It may be true that the application of the principles now approved by the Supreme Court may leave only minor aspects of our economy free from the regulatory power of Congress."). For a further discussion of cases illustrating the extent of the modern Commerce Clause and of Congress's plenary power to regulate under it, see *infra* notes 87-107 and accompanying text.

86. See *O'Brien*, *supra* note 55, at 494 (observing that after New Deal crisis, Court legitimated steady expansion of congressional power).

87. 312 U.S. 100 (1941).
commerce and so affects [commerce]," it is within the realm of congres-

sional power to regulate. Moreover, the Court ruled that because Con-

gress's power is plenary, the judiciary has extremely limited power to

question congressional motive or the purpose of a regulation.

Then, in Wickard v. Filburn, the Court redefined the test used in

Darby. The Court held that "even if [the] 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." In applying this test, the Court found that while a farmer's

personal consumption of wheat in excess of government mandated quotas

may be small in quantity, the cumulative effect of many farmers personally

consuming wheat affects the market price. Thus, the Court held that

Congress may not only regulate acts that individually affect interstate com-

merce, but also those acts that cumulatively affect interstate commerce.

88. Id. at 115-19. The government charged the company with a violation of

the Fair Labor Standards Act. Id. at 111. The company manufactured finished

lumber with the intent to ship in interstate commerce. Id. at 109. The company's

actions violated the Fair Labor Standards Act that prohibits interstate shipment of

goods produced by employees whose wages and hours do not conform to the Act's

specifications. Id. The Court decided that Hammer was an inconsistent deviation

from the conclusion that Congress's power under the Commerce Clause is pleni-

ary. Id. at 116. Thus, the Court held that:

The conclusion is inescapable that Hammer v. Dagenhart, was a departure

from the principles which have prevailed in the interpretation of the

Commerce Clause both before and since the decision and that such vital-

ity, as a precedent, as it then had has long since been exhausted. It

should be and now is overruled.

Id. at 116-17.

89. Id. at 115.

90. 317 U.S. 111 (1942).

91. Id.; see Darby, 312 U.S. at 100 (defining "affecting commerce" test). In

Wickard, the Court heard a challenge to the constitutionality of the Agriculture

Adjustment Act of 1938 that regulated and set quotas for wheat production, in-

cluding production that was wholly for the farmer's consumption. Wickard, 317

U.S. at 113-17. Filburn sought to enjoin Secretary of Agriculture Wickard's en-

forcement of the Act. Id. at 113. The defendant charged that personal consump-

tion of wheat was local in character, and its effect on commerce was "indirect." Id.

at 119. Therefore, such regulation, he claimed, was beyond the scope of the Com-

merce Clause. Id.

92. Wickard, 317 U.S. at 125. The Court specifically abandoned the direct-

indirect and production-distribution doctrines on which it had relied in the past.

Id. Noting that the production-distribution distinction was based on dicta, the

Court held that: "Whether the subject of the regulation in question was 'produc-

tion,' 'consumption,' or 'marketing' is, therefore, not material for purposes of de-

ciding the question of federal power before us." Id. at 124.

93. Id. at 119.

94. Id. For a further discussion of the "cumulative effect" doctrine see Tribe,
supra note 63, § 5-5, at 310-11. Commentators feared and discussed a holding that

extended as far as that of Wickard prior to the actual ruling:

If a man plants a patch of potatoes in his back yard, he may feel reason-

ably assured that he is engaged in a purely local enterprise. Yet the more

food that is produced locally, the less will be brought into and more sent

out of the state. The patch of potatoes has an influence—slight, it is
In the 1960s, the Court continuously rejected Commerce Clause challenges to the Civil Rights Act of 1964 and simultaneously expanded congressional regulatory power.\(^95\) In *Heart of Atlanta Motel, Inc. v. United States*\(^96\) and *Katzenbach v. McClung*,\(^97\) the Court concluded that Congress could regulate the intrastate activity of hotel and restaurant management if the activity had a "substantial and harmful effect" on interstate commerce.\(^98\) Moreover, the Court held that courts should defer to Congress when the legislature has a rational basis for finding that the regulated activity affects interstate commerce.\(^99\) After reviewing the congressional

true—on the movement of food supplies. If every activity which bears any discernible relation to interstate commerce is subject to federal control, the commerce power has become all-embracing. Congress could require a federal license for the planting of a patch of potatoes. D.G. Ribble, *State and National Power Over Commerce* 148 (1937); see also Steven Breker-Cooper, *The Commerce Clause: The Case for Judicial Non-Intervention*, 69 Or. L. Rev. 895, 900 n.22 (1990) (discussing extent of holding in *Wickard* and how Ribble’s prophecy came to pass in that case).

95. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). In *Heart of Atlanta Motel, Inc. v. United States*, a hotel challenged a provision of the Civil Rights Act of 1964 that made it illegal for hotels to discriminate against blacks. 379 U.S. at 243-45. The parties stipulated that the hotel had 216 rooms, was accessible to interstate highways, advertised on billboards and that 75% of its guests were from out of state. *Id.* at 243.

98. *Katzenbach*, 379 U.S. at 304; *Heart of Atlanta*, 379 U.S. at 258. In addition, the Court found it particularly noteworthy that the Civil Rights Act of 1964 defined what types of restaurant operations affected interstate commerce. *Katzenbach*, 379 U.S. at 304. In effect, Congress prohibited discrimination only in those establishments having a close tie to interstate commerce and, thus, it effectively allowed for a case-by-case analysis to determine if the actions in question truly affected interstate commerce. *Id.* As the Court noted in *Katzenbach*: “Congress acted well within its power to protect and foster commerce in extending the coverage of Title II [of the Civil Rights Act] only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.” *Id.*

99. *Katzenbach*, 379 U.S. at 303-04; *Heart of Atlanta*, 379 U.S. at 258; see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (holding that courts must defer to congressional findings that "a regulated activity affects interstate commerce, if there is any rational basis for such finding"). In *Heart of Atlanta*, the Court held that the question was "whether Congress had a rational basis for finding that racial discrimination by motels affected commerce." *Heart of Atlanta*, 379 U.S. at 258. Similarly, the *Katzenbach* Court ruled that "[w]here we find that the legislators, in light of the facts and testimony before them, have a
findings, the Court concluded that Congress had a rational basis for finding that racial discrimination in a local hotel or restaurant affected interstate commerce. Finally, the Court added a second prong to the Commerce Clause analysis by holding that "the [regulatory] means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." Because the Civil Rights Act of 1964 was "reasonably adapted" to eliminate the harm of discrimination to interstate commerce, the Court refused to conduct any further inquiry into other means that Congress could have chosen.

Following these cases, the scope of the Commerce Clause appeared clear. First, Congress had plenary power to regulate commerce. Second, courts had a duty to determine whether the regulated activity affected interstate commerce. Third, courts would then consider whether Congress had a rational basis for enacting the regulation. Finally, courts would determine whether the means were "reasonably adapted for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." Katzenbach, 379 U.S. at 303-04.

In contrast, Justice Rehnquist's dissent in Hodel argues against such deference to Congress: "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Hodel, 452 U.S. at 311 (Rehnquist, J., dissenting).

100. Katzenbach, 379 U.S. at 304; Heart of Atlanta, 379 U.S. at 262. Congress found that racial discrimination both qualitatively and quantitatively affected interstate commerce by restricting the travel of black-Americans. Heart of Atlanta, 379 U.S. at 253. The Court noted that congressional findings demonstrated qualitative impact because of the "obvious impairment...that resulted [from continual uncertainty] of finding lodging." Id. The quantitative impact was that "there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community." Id. Even though the regulation legislated morals rather than commerce, the Court ruled that this fact did not detract from the disruptive effect of racial discrimination on commercial intercourse. Id. at 257.

101. Katzenbach, 379 U.S. at 299; Heart of Atlanta, 379 U.S. at 262; see also Hodel, 452 U.S. at 276 (holding that Court must determine "whether ...are reasonably adapted to the end permitted by the Constitution") (quoting Heart of Atlanta, 379 U.S. at 262)). In Heart of Atlanta, the Court held that the question was "if [Congress had a rational] basis [for finding that racial discrimination by motels affected commerce], whether the means it selected to eliminate that evil are reasonable and appropriate." Heart of Atlanta, 379 U.S. at 258. Likewise, Katzenbach ruled that the courts must determine "whether the [Civil Rights] Act is a reasonable and appropriate means toward its solution." Katzenbach, 379 U.S. at 299.

102. Katzenbach, 379 U.S. at 305; Heart of Atlanta, 379 U.S. at 257.
104. Hodel, 452 U.S. at 264; Katzenbach, 379 U.S. at 303-04; Heart of Atlanta, 379 U.S. at 258.

105. Hodel, 452 U.S. at 264; Katzenbach, 379 U.S. at 303-04; Heart of Atlanta, 379 U.S. at 258; see also Littman, supra note 64, at 746-47 (concluding that Court "applies a rational basis test to federal legislation that regulates an activity affecting interstate commerce ... [and] has been extremely deferential to Congress's use of the commerce power, often looking not only to the text and legislative history of the law, but even speculating as to Congress's underlying purpose").
adapted" to the constitutionally permissible ends. In applying these rules, the Court made it clear that courts would uphold most congressional actions as valid exercises of Congress's Commerce Clause power.

4. United States v. Lopez: Revising the Commerce Clause Rules?

The Supreme Court shocked the legal world in 1995 when it invalidated the Gun-Free School Zones Act ("GFSZA") in United States v. Lopez, as violating the Commerce Clause. Following a historical review of Commerce Clause litigation over the previous 171 years, the Court divided the congressional power to regulate under the Commerce Clause into three categories: (1) the use of interstate commerce channels; (2) the instrumentalities of commerce even when the threat is from intrastate activity; and (3) those activities having a "substantial affect" on interstate commerce. The Court then found that GFSZA did not fall within the


107. See Breker-Cooper, supra note 94, at 895 n.22 (noting that since late 1930s, "Court will accept as commerce anything that Congress is likely to legislate about under that rubric"); James L. Huffman, Lopez Pops Fed's Ballooning Powers, Nat'l J., May 22, 1995, at A21 (observing that most lawyers have come to accept that there are no bounds on federal commerce power); Lesser, supra note 53, at 11 ("What we have today is a Congress that shows no reluctance in exercising a national police power to regulate state and local governments as well as private parties, and a Supreme Court that has abdicated its historic role as ultimate arbiter of controversies over federalism."); Littman, supra note 64, at 746 (noting that current Commerce Clause test is more amenable to federal legislation).

108. United States v. Lopez, 115 S. Ct. 1624 (1995); see David O. Stewart, Back to the Commerce Clause, A.B.A. J., July 1995, at 46 (noting shock resulting from Lopez ruling which was "the first time in almost 60 years that the Court invalidat[ed] on Commerce Clause grounds federal legislation regulating private parties"). During the 1980s and early 1990s, many of the liberal Justices again were replaced by conservatives. Reuben, supra note 54, at 78 ("Chief Justice William H. Rehnquist has long espoused a judicial philosophy that includes a healthy regard for state sovereignty . . . . But, after the replacement of the most liberal [J]ustices with conservatives . . . . Rehnquist's views on federalism now command a majority on the Court . . . ."). This shift may have contributed to the outcome of the case and may indicate another shift in the Court's Commerce Clause jurisprudence.


The third category is important because the Lopez Court clarified its prior ambiguous interchange of the terms "affect" and "substantially affect." Compare Heart of Atlanta, 379 U.S. at 241 (using "substantial affect"), and United States v. Darby, 312 U.S. 100, 119-20 (1941) (using "substantial affect"), with Hodel, 452 U.S. at 277 (using "affects"), and Perez, 402 U.S. at 150 (using "affecting"), and Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 647 (1944) (using "affects" test). Chief Justice Rehnquist said that they have always meant "substantially affects": "[A]dmittely, our case law has not been clear whether activity must 'affect' or 'substantially affect' interstate commerce. . . . We conclude . . . the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." Lopez, 115 S. Ct. at 1630; see also White, 893 F. Supp. at 1433 ("The Court clarified in Lopez
first two categories and could only be constitutional if it met the elements of the third category.¹¹⁰

Despite the absence of legislative history or congressional findings, the government argued that gun possession in schools "indeed substantially affect[ed] interstate commerce."¹¹¹ The Court, however, disagreed with the government on three grounds.¹¹² First, it concluded that the regulation of gun possession near a school was not a regulation of commerce.¹¹³ Thus, the Court held that GFSZA "cannot . . . 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."¹¹⁴ Second, the Court found that GFSZA failed to ensure that the firearm possession in question specifically affected interstate commerce.¹¹⁵ Finally, the Court rejected the government for purposes of the final category, 'the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.'" (quoting *Lopez*, 115 S. Ct. at 1630)).

¹¹⁰. *Lopez*, 115 S. Ct. at 1630. The Court quickly disposed of the first two categories stating that § 922(q) of the Gun-Free School Zones Act ("GFSZA") "is not a regulation of the use of the channels of interstate commerce" nor can § 922(q) be justified as "a regulation by which Congress has sought to protect an instrumentality of interstate commerce." *Id.* (emphasis added). Therefore, the Court concluded that to sustain GFSZA it must do so under the third category of activities substantially affecting interstate commerce. *Id.*

¹¹¹. *Id.* at 1632 (discussing government argument that possession of firearm in school zone may result in violent crime that can be expected to affect national economy). First, the government said that insurance spreads the costs of violent crime throughout society. *Id.* The Court referred to this argument as the "costs of crime" reasoning. *Id.* Second, the government contended that violent crime reduces the incentive for people to travel to unsafe areas. *Id.* Finally, the government argued that guns in schools substantially threaten the learning environment and, therefore, result in a less trained and a less productive workforce. *Id.* The Court referred to this argument as the "national productivity" reasoning. *Id.* Consequently, the government contended that a less productive citizenry has a "substantial affect" on the country's economic welfare. *Id.*

¹¹². *Id.*

¹¹³. *Id.* at 1630-31 ("[S]ection 922(q) 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.").

¹¹⁴. Id. at 1631. In his dissent, Justice Breyer contended that this holding created a technical distinction between commerical and noncommercial similar to those, such as manufacturing and distribution, that the Court abandoned in the post-New Deal era. *Id.* at 1663-64 (Breyer, J., dissenting).

¹¹⁵. *Id.* at 1631 ("[Section] 922(q) contains no jurisdictional element that would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."); see United States v. Sherlin, 67 F.3d 1208, 1213 (6th Cir. 1995) (noting that lack of jurisdictional element was problematic for Court in *Lopez*). The *Lopez* Court referenced *United States v. Bass*, 404 U.S. 336 (1971), where the Court interpreted a statute, which made it a crime for a felon to receive, possess or transport a firearm in commerce, as requiring an additional nexus to commerce. *Lopez*, 115 S. Ct. at 1631; see *Sherlin*, 67 F.3d at 1215 (upholding constitutionality of federal arson statute, because it contained jurisdictional element); United States v. Bishop, 66 F.3d 569, 585 (3d Cir. 1995) (upholding federal
The government also contended that possession of a gun in a school zone may result in violent crime that affects the national economy by increasing insurance costs and by threatening the educational process. While this reasoning was logical, the Court feared it would permit Congress to regulate all activities that related to the economic productivity of citizens, no matter how tenuous the nexus. Therefore, the Court found that acceptance of this reasoning would make it difficult to "posit any activity by an individual that Congress is without power to regulate." Based on these three factors, the Court held that GFSZA was unconstitutional. Yet, because the Court was sharply divided, the long-term impact of the decision is unclear.

Carrying the statute because “it contains a ‘jurisdictional element’ which ostensibly limits its application to activities substantially related to interstate commerce”).

117. *Id.*
118. *Id.* (noting that under government’s “national productivity” reasoning, “Congress could regulate any activity that it found was related to the economic productivity of individual citizens”).
119. *Id.*
120. *Id.*
121. *Lopez* was a five to four decision and the Justices filed numerous concurring and dissenting opinions. *Id.* at 1625. Chief Justice Rehnquist wrote for the majority. *Id.* at 1626. Justice Kennedy filed a concurring opinion that Justice O’Connor joined. *Id.* at 1634 (Kennedy, J., concurring). Justice Thomas also filed a concurring opinion. *Id.* at 1642 (Thomas, J., concurring). Additionally, Justice Stevens and Justice Souter filed dissenting opinions. *Id.* at 1651 (Stevens, J., dissenting); *Id.* (Souter, J., dissenting). Finally, Justice Breyer filed a dissenting opinion that Justices Stevens, Souter and Ginsberg joined. *Id.* at 1657 (Breyer, J., dissenting).

Justice Kennedy emphasized in his concurring opinion that education is traditionally a concern of the states. *Id.* at 1640 (Kennedy, J., concurring). In addition, he agreed with the majority opinion that the connection to interstate commerce was attenuated. *Id.* at 1641 (Kennedy, J., concurring). Therefore, Justice Kennedy argued that the Court had a duty to ensure that the “federal-state balance was not destroyed.” *Id.* at 1640 (Kennedy, J., concurring).

In his concurring opinion, Justice Thomas argued that the meaning of the constitutional term “commerce” is much narrower than Supreme Court case law would indicate. *Id.* at 1644 (Thomas, J., concurring). In fact, he contended that the use of a “substantial affects” test is untrue to the Constitution. *Id.* (Thomas, J., concurring). Justice Thomas argued that an interpretation of the Commerce Clause that allows regulation of all matter that “substantially affects” interstate commerce renders much of Congress’s other enumerated powers “surplusage.” *Id.* (Thomas, J., concurring). Finally, he claimed that this construction of the Constitution rendered the Tenth Amendment useless. *Id.* at 1645 (Thomas, J., concurring). Thus, Justice Thomas left open the possibility of further modification of the Commerce Clause and even a re-examination of the “substantial affects” test. *Id.* (Thomas, J., concurring).

The dissenting opinions, however, illustrated a different reading of the Constitution and prior case law. Justice Souter merged the “substantially affects” test with the Court’s deference to Congress in the post-New Deal era: “In reviewing congressional legislation under the Commerce Clause, we defer to what is often a
III. THE COMMERCE CLAUSE AND FACE: THE ELEVENTH CIRCUIT’S ANALYSIS

Cheffer v. Reno\(^{122}\) was the first challenge to FACE in a circuit court in the post-\(Lopez\) era.\(^{123}\) In this case, Cheffer and Madsen claimed that the statute was unconstitutional because Congress lacked the power under the Commerce Clause to enact the legislation.\(^{124}\) The Eleventh Circuit, however, rejected that claim.\(^{125}\)

The Eleventh Circuit adopted the rationale expressed by the United States Court of Appeals for the Fourth Circuit in American Life League, Inc. merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce “if there is any rational basis for such a finding.” Id. at 1651 (Souter, J., dissenting) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264, 276 (1981)). In fact, Justice Souter argued that the Court adapted the rational basis test because it learned its lesson in the pre-New Deal era about involving itself in judicial policy judgments. Id. at 1651-52 (Souter, J., dissenting). He contended that if Congress had a rational basis for enacting the legislation, then the regulated activity substantially affected interstate commerce. Id. (Souter, J., dissenting). Therefore, he argued for continued great judicial deference to Congress: “The practice of deferring to rationally based legislative judgments ‘is a paradigm of judicial restraint.” Id. at 1651 (Souter, J., dissenting) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)).

In his dissenting opinion, Justice Breyer simply argued that possession of a gun in a school zone “substantially affected” interstate commerce. Id. at 1657 (Breyer, J., dissenting). Actually, Justice Breyer renamed the test by substituting “significant” for “substantial.” Id. at 1657-58 (Breyer, J., dissenting). He argued this interpretation of the test was more consistent with prior case law and allowed for the incorporation of cumulative effects into the equation. Id. (Breyer, J., dissenting); see Wickard v. Filburn, 317 U.S. 111 (1942) (creating cumulative effects doctrine). Furthermore, he accepted the government’s contention that guns affect interstate commerce by destroying the education process as an application of pre-existing law to changing circumstances. \(Lopez\), 115 S. Ct. at 1662 (Breyer, J., dissenting). Thus, Justice Breyer concluded that the Court had simply created more legal uncertainty by creating the commercial-noncommercial distinction. Id. at 1663-64 (Breyer, J., dissenting).

Although some may see \(Lopez\) as a dramatic reversal in Commerce Clause law, many commentators worry about overextending the ruling because of the varied opinions. See Kester Testimony, supra note 50 (observing that current Court is not likely to cut back sharply on Commerce Clause, particularly in light of dissenting opinions). While \(Lopez\) has been characterized as a “cautious” opinion, it does lay the framework for further constraint on congressional power. Kester Testimony, supra note 50 (“\(Lopez\) provides the theory for challenging other federal laws as unconstitutional if their tie to actual interstate commerce is too tenuous.”); Huffman, supra note 107, at A21 (“Chief Justice Rehnquist’s opinion in \(Lopez\) . . . is cautious, but it lays the foundation for the recognition of further limits on congressional power.”).

122. 55 F.3d 1517 (11th Cir. 1995).
123. The Supreme Court decided \(Lopez\) on April 26, 1995 and the Eleventh Circuit handed down its opinion in Cheffer v. Reno on June 23, 1995. \(Lopez\), 115 S. Ct. at 1624; Cheffer, 55 F.3d at 1517.
124. Cheffer, 55 F.3d at 1518. For a further discussion of alternative claims raised by Cheffer and Madsen, see supra note 17.
125. Cheffer, 55 F.3d at 1521.
a pre-Lopez decision regarding the Commerce Clause issue. 127 American Life League was also a challenge to Congress's power to enact FACE in which the court held that Congress had the power under the Commerce Clause to enact the legislation. 128 The Fourth Circuit explained that a federal statute is valid under the Commerce Clause if Congress meets the two standards enumerated in Jones & Laughlin Steel and its progeny. 129 First, Congress must rationally conclude that the regulated activity affects interstate commerce. 130 Second, Congress must choose a regulatory means reasonably adapted to a permissible end. 131

The American Life League court held that Congress rationally concluded that abortion protest activity affects interstate commerce. 132 In support of this position, the court looked to the four connections between protest activity and commerce found in the legislative history of FACE. 133 First, the court noted that women travel across state lines for reproductive health care services. 134 Second, the court concluded that abortion clinics engage personnel in an interstate market. 135 Third, abortion facilities buy medical and office supplies that move in interstate commerce. 136 Finally, the court referred to "clinics [that] have been closed because of blockades and sabotage and have been rendered unable to provide services." 137 These four connections signaled to the court that Congress arrived at a

126. 47 F.3d 642 (4th Cir. 1995).
127. Cheffer, 55 F.3d at 1519-21; American Life League, 47 F.3d at 642.
128. American Life League, Inc. v. Reno, 855 F. Supp. 137, 141 (E.D. Va. 1994), aff'd, 47 F.3d 642 (4th Cir. 1995). American Life League was also a pre-emptive challenge to the constitutionality of FACE. Id. at 139. While the plaintiffs were not charged for violation of the law, they feared its enforcement. Id. Although they claimed to be a nonviolent and peaceful group, the plaintiffs alleged that the mere number of protesters that had participated with them "he[d] caused and will cause physical obstruction of the entrance to facilities providing reproductive health care." Id. at 140.
129. American Life League, 47 F.3d at 647.
130. Id.
131. Id.
132. Id. (holding that Congress rationally concluded that abortion violence affected interstate commerce).
133. Id.
134. Id. ("Many women travel across state lines to seek reproductive health care.").
135. Id. ("Reproductive health facilities engage doctors and other staff in an interstate market."). The Fourth Circuit used Dr. Gunn, a murdered abortion doctor, as an example of a physician who performed abortions in several states. Id.; see also H.R. REP. NO. 103-306, at 7-8 (1993), reprinted in 1994 U.S.C.A.N. 699, 704 (noting that Dr. Gunn performed abortions in several states); S. REP. NO. 103-117, at 3 (1993) (same). For a further discussion of Dr. Gunn, see supra note 10 and accompanying text.
136. American Life League, 47 F.3d at 647 ("These facilities buy medical and office supplies that move in interstate commerce.").
137. Id. (referencing S. REP. NO. 103-117, at 31).
rational conclusion concerning the effect of abortion protests on interstate commerce.\textsuperscript{138}

The \textit{American Life League} court next ruled that Congress chose a regulatory means reasonably adapted to a permissible end by creating criminal and civil penalties for certain types of abortion protest.\textsuperscript{139} The court held that criminal and civil penalties were "designed to deter violent, obstructive and destructive conduct."\textsuperscript{140} In addition, the court ruled that these penalties were reasonably adapted to achieve the Act's five permissible ends:

1. protecting the free flow of goods and services in commerce,
2. protecting patients in their use of the lawful services of reproductive health facilities,
3. protecting women when they exercise their constitutional right to choose an abortion,
4. protecting the safety of reproductive health care providers,
5. protecting reproductive health care facilities from physical destruction and damage.\textsuperscript{141}

Having passed both the rational basis and the reasonable relation tests, the Fourth Circuit held that FACE constituted a constitutional enactment under the Commerce Clause.\textsuperscript{142}

Subsequent to its adoption of the \textit{American Life League} rationale, the Eleventh Circuit dismissed the \textit{Lopez} decision.\textsuperscript{143} The court recognized that Congress had failed to make findings on whether GFSZA fell within its authority under the Commerce Clause.\textsuperscript{144} Then, the court interpreted the holding in \textit{Lopez} to mean that GFSZA was invalid because it neither

\begin{itemize}
\item \textsuperscript{138} Id. (holding "[f]rom these facts Congress concluded that interstate commerce was threatened") (citing S. REP. No. 103-117, at 31).
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Cheffer v. Reno, 55 F.3d 1517, 1520-21 (11th Cir. 1995).
\item \textsuperscript{144} Id. at 1520. The Eleventh Circuit notes that Congress is not required to make findings, but that such findings help the courts determine if the regulated activity "substantially affects" interstate commerce. \textit{Id.} The Supreme Court has often held that Congress is not required to make findings. \textit{See} Perez v. United States, 402 U.S. 146, 156 (1971) ("Congress need [not] make particularized findings in order to legislate."); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (noting that Congress's failure to include formal findings was "not fatal to the validity of the statute"). Nevertheless, findings are helpful to the Court. United States v. Lopez, 115 S. Ct. 1624, 1632 (1995). As Chief Justice Rehnquist noted in \textit{Lopez}:

\begin{quote}
Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce . . . . But to the extent that congressional findings could enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.
\end{quote}
\end{itemize}

\textit{Id.} at 1961-62 (citations omitted). Some commentators believe that judges have an obligation to insist that Congress provide express findings of purpose in legislation. Patrick E. Higginbotham, \textit{Federalism in the Future, in Federalism: The Shift-
regulated commercial activity nor required that the possession of a firearm in a school be related to interstate commerce in any way. 145

Having outlined what it believed to be the relevant portions of the Lopez opinion, the court then distinguished FACE from GFSZA. 146 First, the court differentiated the two cases by explaining American Life League enumeration of the legislative findings regarding FACE. 147 Based on these findings, it ruled that, unlike GFSZA, FACE regulated commerce by “protecting the commercial activities of reproductive health providers.” 148 Without explanation, the court concluded that Congress’s findings were “plausible and provide a rational basis” for determining that abortion protest violence “substantially affects” interstate commerce. 149 Based on this analysis, it held that FACE represented a constitutional exercise of power under the Commerce Clause. 150

IV. A MISGUIDED APPLICATION OF COMMERCE CLAUSE JURISPRUDENCE TO FACE

In Cheffer, the Eleventh Circuit did not fully recognize the importance of the holding and rationale of Lopez. Granted, the Cheffer court correctly determined that if the Commerce Clause permits Congress to regulate abortion protest, such regulation must be justified under the “substantially affects” interstate commerce test. 151 The court nonetheless failed to accurately apply the “substantially affects” test. 152 In essence, the court failed to recognize that FACE does not regulate commerce, to consider the ab-

145. Cheffer, 55 F.3d at 1520.
146. Id. at 1521-22.
147. Id. at 1520.
148. Id. In a citation to Lopez, the court acknowledged that the Supreme Court defined the proper standard to be “substantially affects” but it did not address how the congressional findings illustrate “substantial effect.” Id. (referring to Lopez, 115 S. Ct. at 1630).
149. Id. at 1520-21.
150. Id. at 1521.
152. Cheffer, 53 F.3d at 1520. For a further discussion of the Eleventh Circuit’s misapplication of the “substantially affects” test, see infra notes 153-63 and accompanying text. The Eleventh Circuit is not the only circuit that failed to recognize the importance of the Lopez test. In fact, the Seventh Circuit addressed whether FACE violated the Commerce Clause without even citing Lopez. United States v. Soderna, 82 F.3d 1370 (7th Cir. 1996) (holding FACE did not violate Commerce Clause).
sence of a jurisdictional element and to contemplate the availability of remedies on the state level. Thus, the Eleventh Circuit's cursory review of FACE was a misguided application of Commerce Clause jurisprudence after Lopez.

A. Failure to Apply the "Substantially Affects" Test and the Resulting Cursory Judicial Review

The Eleventh Circuit did not undertake an investigation into whether the regulated activity "substantially affects" interstate commerce. As the court noted, there were some legislative findings in FACE that provided Congress with a rational basis to conclude that abortion clinic protests affect interstate commerce. Nevertheless, the Cheffer court erred by merely adopting the congressional findings without independently inquiring whether the effect on interstate commerce was substantial. Congress concluded that its own action was within the Commerce Clause power. Therefore, the court deferred to Congress without further inquiry and abandoned its role as the ultimate arbiter of the Constitution. As a result, the court applied the pre-Lopez line of reasoning to conclude that because Congress had a rational basis there must be a substantial effect.

153. Cheffer, 55 F.3d at 1520. For a further discussion of the congressional findings regarding FACE, see supra notes 35-42 and accompanying text.

154. Cheffer, 55 F.3d at 1520. After reviewing the congressional findings, the court simply held that the findings illustrate that "[FACE] protects and regulates commercial enterprises operating in interstate commerce." Id. Arguably, FACE regulates the actions of private individuals outside the industry. United States v. Wilson, 880 F. Supp. 624, 621 (E.D. Wis.), rev'd, 73 F.3d 675 (7th Cir. 1995).

155. Cheffer, 55 F.3d at 1520. It is very important that courts strike the proper balance between deference to the legislature and active review of the legislature. Otherwise, courts will begin to execute the role of the legislature by making policy decisions. This constitutional tension, however, even perplexes the Supreme Court. Lopez, 113 S. Ct. at 1624 (Souter, J., dissenting) (noting that judicial activism in area of Commerce Clause questions involves Court in policy decisions). Nevertheless, the Court has decided it sometimes must review congressional action, rather than simply look for a rational basis, or else Congress is the only institution reviewing the constitutionality of its actions. See Hodel v. Virginia Surface and Mining Reclamation Ass'n, 452 U.S. 264, 311 (1981) ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.") (Rehnquist, J., concurring); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964) (urging that it is judicial inquiry to determine whether something affects interstate commerce sufficiently to come under Congress's constitutional power) (Black, J., concurring); United States v. Bishop, 66 F.3d 569 (3d Cir. 1995) (holding that federal courts play role in regulating exercise of congressional power). See generally Kramer, supra note 2, at 1495 (arguing that Framers intended courts to play role in policing limits on power of national government).

156. Cheffer, 55 F.3d at 1520-21 (holding that Congress's findings provide rational basis for concluding that FACE is constitutional). The result of deference as extreme as that in Cheffer is a cursory review because the court conclusorily states that congressional findings illustrate a rational basis without articulating how the findings demonstrate a rational basis. As the court noted in United States v. Wilson, 880 F. Supp. 621 (E.D. Wis. 1995), "the Court does not defer to the Congress..."
The Supreme Court in *Lopez*, however, abandoned this rational basis test and created a higher standard in the "substantial affects" test. Had the Court desired to keep the rational basis test, it simply could have held that Congress made no findings regarding GFSZA, and it was thus unable to determine if Congress had a rational basis. By proceeding in that manner, the Court could have held GFSZA unconstitutional without altering the Commerce Clause test. Because the Court ruled otherwise, *Lopez* reinstated judicial review in Commerce Clause cases and abandoned the blind deference to Congress that accompanied the traditional rational basis test.

By merely adopting Congress's findings, the Eleventh Circuit made little more than a cursory review of the legislature's basis for enacting FACE, thereby ignoring the mandate of the *Lopez* Court. The Supreme Court's abandonment of the rational basis test demands that lower courts now scrutinize Congress's rationale much more closely.

simply because it has acted rationally in a purely 'logical' sense. For there may always be a plausible rationale for Congressional action that meets the requirement of simple logic." *Id.* at 625. Thus, the rational basis test, as applied in *Cheffer*, was, in practice, a logical basis test. *Id.*

157. *Lopez*, 115 S. Ct. at 1630. The *Lopez* Court concluded that the proper test "requires an analysis of whether the regulated activity 'substantially affects' interstate commerce" and not whether Congress had a rational basis to determine if the regulated activity "substantially affects" interstate commerce. *Id.* The abandonment of the rational basis test in the third category, which includes the cases with the most tenuous tie to interstate commerce, is logical and based on a textual reading of the Constitution. As two commentators have noted: "To meet the requirements of legitimate interpretation, the [Commerce] Clause must properly be limited by its language. At a minimum, in order to be an appropriate subject for regulation, the regulated activity must . . . at least have a non-negligible impact upon commerce [that crosses state lines]." Martin Redish & Karen L. Drizin, Constitutional Federalism and Judicial Review: The Role of Textual Analysis, 62 N.Y.U. L. Rev. 1, 41 (1987). Without such a tie, the Commerce Clause would encompass all activity. *Id.* Therefore, in areas that implicate federalism, i.e., the Commerce Clause and Tenth Amendment conflict, the question of whether a rational basis standard is appropriate is debatable. *Id.* at 49.

158. Cursory review was one of the problems with the rational basis test. David Faigman, Madisonian Balancing: A Theory of Constitutional Adjudication, 88 Nw. U. L. Rev. 641, 683 (1994) ("The Court largely evaluates ... action under the rational basis test with the lights turned out."); Redish & Drizin, *supra* note 157, at 45-47 (arguing that while rational basis test has been used to "disguise abstention," it could be and should be more meaningful test). But see Christopher J. Sprigman, Comment, Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis, 59 U. Chi. L. Rev. 1645, 1665 (1992) (noting that Supreme Court is content with "rationality" test rather than "an unguided judicial inquiry").

159. Hoffman v. Hunt, 923 F. Supp. 791, 817 (W.D.N.C. 1996) ("[I]n *Lopez* . . . the Supreme Court affirmed the traditional duty of Article III courts to determine whether a congressional enactment exceeds the scope of the commerce power and demonstrated that deferential judicial review cannot be equated with judicial obsequience."). A cursory review is not true to the text of the Constitution because it renders the enumeration of powers in Article I and the constraints in the Tenth Amendment meaningless. Redish & Drizin, *supra* note 157, at 47. Thus, the courts must play a role in ensuring Congress does not overstep its constitutional bounds. *Bishop*, 66 F.3d at 577. As the court said in *Bishop*.
Circuit should have conducted a deeper analysis of the congressional rationale in order to determine if the regulated activity substantially affected interstate commerce. The Eleventh Circuit, for example, relied upon a congressional finding that the problem of abortion protest violence is nationwide in scope. After *Lopez*, however, it is not sufficient that a problem is national in scope. Rather, the only proper inquiry remaining is whether the problem substantially affects interstate commerce.

B. **FACE on Its Face**

The *Cheffer* court also failed to realize that FACE, like GFSZA, does not regulate commerce or economic activity on its face. Rather, FACE regulates activity one step removed from commerce by prohibiting actions of those persons outside the abortion industry. Thus, FACE differs from the Civil Rights Act of 1964 in *Heart of Atlanta* and *Katz*, which directly regulated commercial activity, and is analogous to GFSZA struck down in *Lopez*.

The federal courts must also play a role in regulating the exercise of Congressional power: When the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions... [the Court was given the power] of determining whether the Congress has exceeded limits allowable in reason for the judgment it has exercised.

*Id.* Closer judicial scrutiny achieves this goal.

160. For a further discussion of the Court's abandonment of the rational basis test, see *supra* notes 155-57, and accompanying text.

161. *Cheffer*, 55 F.3d at 1520; *see also Wilson*, 880 F. Supp. at 631 (“Congress found that the problem is nationwide in scope and beyond the ability of states to control.”).

162. *Wilson*, 880 F. Supp. at 631 (holding that abortion violence was nationwide in scope did not prove “substantial effect” on interstate commerce); *see also Hoffman*, 923 F. Supp. at 807 (“The mere fact that Congress believes a problem is national in scope does not warrant ignoring the constitutional requirement that an activity must have a substantial effect on interstate commerce.”).

163. *Wilson*, 880 F. Supp. at 631. As the dissent noted in *Perez v. United States*, “[i]t is not enough to say that [the crime]... is a national problem... for... interstate business suffers from almost all criminal activity be it shoplifting or violence in the streets.” *Perez v. United States*, 402 U.S. 146, 157-58 (1971) (Stewart, J., dissenting).

Similarly, the states' failure to control a problem like abortion violence, does not prove a “substantial effect” on interstate commerce. *Wilson*, 880 F. Supp. at 631. Indeed, the court found that with an increasing crime rate, such a finding would allow Congress to regulate all criminal activities that the states traditionally regulated. *Id.*

164. *Wilson*, 880 F. Supp. at 628 (“Unlike Title II [of the Civil Rights Act of 1964], FACE does not regulate commercial entities, but rather regulates private conduct affecting commercial entities which in turn receive goods that have traveled in interstate commerce.”); *see United States v. Lopez*, 115 S. Ct. 1624, 1630-31 (1995) (holding that FACE has nothing to do with commerce).


166. *Hoffman*, 923 F. Supp. at 813 (“[FACE] purports to regulate the activity of persons who protest outside abortion clinics and here, as in *Lopez*, the regulated
FACE does not regulate an activity that is commercial or economic in nature because FACE is not an inherently commercial statute. In FACE, the economic impact centers on clinics, while the regulation focuses on individual protesters. Therefore, FACE regulates local, individual conduct such as injuring, intimidating or interfering by force, threat of force or physical obstruction. While interstate commerce may encompass the regulation of health care services, FACE does not regulate the commercial activity of reproductive care or reproductive care provid-
ers. 170 Thus, the aggregate effect of abortion protests is too insubstantial to be considered inherently commercial. 171

Finally, as in Lopez, the nexus between abortion protest violence and interstate commerce was insufficient to link FACE to commercial activity. 172 The argument is as follows: abortion protests prevent clinics from operating; consequently, the need for doctors’ services and supplies and the availability of abortion procedures decreases. 173 This reasoning, however, exhibits an effect on commerce that is solely logical. 174 All activity can be characterized as affecting commerce in a logical sense. 175 Therefore, if there are limits to the scope of the Commerce Clause, as the


Similarly, in GFSZA, the economic impact centered on schools, and the regulation focused on individual conduct near, but unrelated to, schools. United States v. Lopez, 115 S. Ct. 1624, 1630-31 (1995) (“Section 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise . . .”); United States v. Bishop, 66 F.3d 569 (3d Cir. 1995) (Becker, J., concurring in part, dissenting in part) (noting that Lopez refused to apply prior case law to statute that had nothing to do with commerce). In Lopez, the government contended that: “[T]he presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry, that in turn would have an adverse effect on the Nation’s economic well being.” Lopez, 115 S. Ct. at 1632. Clearly, this argument demonstrates that the economic impact of GFSZA was on schools. Nevertheless, the law regulated personal possession of a firearm rather than possession in schools. 18 U.S.C. § 922(q).

Although the Eleventh Circuit could have relied on a Wickard aggregation analysis, Lopez clearly warned not to overextend that holding: Lopez, 115 S. Ct. at 1624; see Wickard v. Filburn, 317 U.S. 111 (1941) (creating cumulative affect analysis in Commerce Clause cases). Specifically, the Court said that the Wickard line of cases “may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” Lopez, 115 S. Ct. at 1628-30. The Lopez Court noted that Wickard involved a statute which regulated an activity that was economic and commercial in nature—the production of wheat. 172

171. Wilson, 880 F. Supp. at 628.

172. Id.

173. Id. at 630-32.

174. Id. at 630 (noting that for practical purposes “all persons and all entities operate within the stream of commerce”).

175. Hoffman v. Hunt, 923 F. Supp. 791, 807 (W.D.N.C. 1996) (“Congress’ reasoning calls to mind the idiom that little fleas have litter fleas on thier backs to bite them and litter fleas have littler fleas on their backs to bite them and so on ad infinitum.”); Wilson, 880 F. Supp. at 630 (“All activity ‘affects’ commerce because virtually all activity requires commerce and all commerce requires activity.”).
Supreme Court has held that there are, then the connection must be more than logical to rise to the level of "substantially affects." Thus, the tenuous connection between abortion protest and commerce does not reach the level of "substantially affect."

C. The Missing Jurisdictional Element

The Cheffer court also did not consider the significance of a jurisdictional element. A jurisdictional element allows for a case-by-case inquiry that ensures that the particular action in question substantially affected interstate commerce. Without a jurisdictional element, there is no assurance of a relationship between a law, its enforcement and the Commerce Clause. For example, the National Labor Relations Act, the Fair Labor Standards Act and the Civil Rights Act of 1964 each had a jurisdictional element and the Supreme Court upheld their enactment as a regulation of commerce. Indeed, the National Labor Relations Act and the Fair Labor Standards Act defined what constituted "affecting commerce." Likewise, the Civil Rights Act of 1964 defined what activities in the restaurant and hotel industry constituted interstate commerce and therefore subjected these businesses to the Act.

By contrast, GFSZA did not contain a jurisdictional element. The absence of such an element represented another factor in the Court's

176. Wilson, 880 F. Supp. at 630 (noting that if courts accept merely logical connections, "no one is immune from federal regulation under the Commerce power").


striking down the statute in *Lopez*. Like GFSZA, FACE also lacks a jurisdictional element. Therefore, the absence of such an element should have concerned the Eleventh Circuit in the *Cheffer* decision. The *Cheffer* court, however, failed to address this issue.

D. Ignoring Other Remedies: Another Nail in Federalism's Coffin

The Eleventh Circuit did not contemplate the impact of finding FACE constitutional. The laws of the individual states, injunctions and the availability of the federal Racketeering Influenced and Corrupt Organization Act adequately remedy abortion clinic violence. Similar to GFSZA

182. *Lopez*, 115 S. Ct. at 1631 (holding that GFSZA did not contain jurisdictional element); see *Sherlin*, 67 F.3d at 1215 (noting that lack of jurisdictional element was problematic in *Lopez*), cert. denied, 116 S. Ct. 795 (1996); see also David F. Pike, *Law on Guns Near Schools is Overturned*, L.A. DAILY J., Apr. 27, 1995, at A1 ("The law also lacks a jurisdictional element that would ensure, through case-by-case inquiry, that the gun possession has the requisite nexus with interstate commerce.").


   [E]ven if Congress could properly regulate the Plaintiff's protest activities and rationally conclude that those activities substantially affect interstate commerce, [FACE] does not contain an express jurisdiction element which would ensure, through a case-by-case inquiry, that the noncommercial activity regulated by the statute has an explicit connection with or effect on interstate commerce.

*Id.*

185. Since the founders adopted our federal system of governance, the police power resided with the states. Among these traditional state powers is the power to make certain actions criminal. See *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (ruling that federal intrusion into state criminal trials frustrate state's sovereign power); *Screws v. United States*, 325 U.S. 91, 109 (1945) (holding that states possess primary authority over criminal law); United States v. Mussari, 894 F. Supp. 1360, 1363 (D. Ariz. 1995) (holding that states possess primary authority over criminal law).

Additionally, in a footnote in *Lopez*, Chief Justice Rehnquist reminded the Court that the primary authority for defining and enforcing criminal law belonged to the states. *Lopez*, 115 S. Ct. at 1631 n.8. Furthermore, he noted that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Id.* (quoting *United States v. Enmons*, 410 U.S. 396, 411-12 (1973)).

In the case of FACE, when the violence is disassociated from abortion, the laws of the individual states provide the remedies for the underlying crime. As one commentator noted:

   Stripped of its ideological aspects, [the murder of an abortion doctor in Pensacola, Florida] is a routine homicide, not distinguishable at law from any of the 25,000 other murders that will occur across the nation this year. The city of Pensacola is perfectly capable of trying the accused. Why should federal prosecutors and judges intervene? In recent years Congress has fallen into a bad habit of pre-empting state and local jurisdiction in criminal cases.

V. INADEQUACY OF THE ELEVENTH CIRCUIT'S OPINION: A MODEL NOT WORTH IMITATING

The Eleventh Circuit erroneously upheld FACE as a constitutional enactment under the Commerce Clause. In particular, it did not fully consider the holding and rationale of the Supreme Court's most recent Commerce Clause decision in *Lopez*.

Because the court did not engage in the proper analysis, Congress itself was left as the only institution deter-


These remedies are analogous to the state laws in over forty states that prohibit the possession of guns in schools prior to the enactment of GFSZA. Thomas Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 504 (1995) (“Congress’s action [in enacting GFSZA] is particularly odd given that nearly every state punishes firearm possession on school grounds as a crime.”).

186. *Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries of the spheres of federal and state authority would blur.”); *see also* United States v. Bishop, 66 F.3d 569 (3d Cir. 1995) (noting that Congress improperly interfered with New Jersey’s right to define crimes of violence and that intrastate crimes are left to states); United States v. Pappadopoulos, 64 F.3d 522, 528 (9th Cir. 1995) (applying *Lopez* substantial affects test to reject federal court jurisdiction over prosecution under federal arson statute noting that: “[T]his is a simple state arson crime. It should have been tried in state court.”).

187. *Hoffman*, 923 F. Supp. at 814 (holding that validation of FACE would “eviscerate the limited government secured by the enumeration of federal powers contained in the Constitution”); *see also* Hilber, *supra* note 7, at 165 (“The local nature of protester’s offenses challenges [FACE] because the legislation appears to reach into areas normally governed by the states.”).

188. For a comparison of *Lopez* and *Cheffer*, see *supra* notes 151-87 and accompanying text.
mining the constitutionality of FACE. In essence, the court failed to exercise judicial review under the constitutional system of checks and balances. Therefore, the court's cursory review and failure to recognize Lopez's heightened "substantially affects" test provides no guidance for other courts. Future courts must not abdicate their role of judicial review when considering whether the regulation of abortion clinic violence is the regulation of interstate commerce, and thus within Congress's Commerce Clause power.

John M. Scheib

---

189. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 451 U.S. 264 (1981) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.").

190. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1801) (establishing power of judicial review).

191. For a further discussion of the Cheffer court's failure to recognize the heightened "substantially affects" test, see supra notes 153-63 and accompanying text.

192. William Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603, 603-08 (1975). One commentator argued that the Court had not deferred to congressional decisions of constitutionality until Katzenbach v. Morgan, 384 U.S. 641 (1966). Cohen, supra, at 605. He further argued that the distinction between permissible and impermissible congressional constitutional interpretation depends "on the ability of the congressional staff to supply the appropriate testimony in hearings and to draft a statutory preamble picking the proper purpose." Id. at 608.

Another commentator also noted that the problem of defining when and how far a court should defer to congressional findings is not new. Archibald Cox, The Role of Congress in Constitutional Determinations, 40 U. Cinn. L. Rev. 199, 200 (1971); see also Faigman, supra note 158, at 683 ("Complaints of a legislative judiciary are at least as old as judicial review itself . . . . "). In addition, he notes that "although the Supreme Court purports to say that the challenged measure is constitutional, in truth the decision is only that the measure does not conflict with the Constitution given the findings and judgment that Congress has expressed." Id.; see also Faigman, supra note 158, at 683 ("[R]ational basis review is equivalent to finding the Constitution not implicated.").