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## The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted To Embrace Federalism

Jordan Goldberg

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# THE COMMERCE CLAUSE AND FEDERAL ABORTION LAW: WHY PROGRESSIVES MIGHT BE TEMPTED TO EMBRACE FEDERALISM

*Jordan Goldberg\**

## INTRODUCTION

In 2000, Presidential candidate Ralph Nader, appearing on the political news program “This Week,” stated his belief that abortion rights did not depend solely on the balance of liberal to conservative judges on the Supreme Court, and thus should not be a deciding factor for voters in the Presidential election.<sup>1</sup> “Even if *Roe v. Wade* is reversed, that doesn’t end it,” Nader explained, “[i]t just reverts [control of abortion] back to the states.”<sup>2</sup> This statement caused such an uproar among progressives, who thought Nader’s comments demonstrated an indifference to abortion rights, that Nader was still backpedaling two years after the election.<sup>3</sup> Still, no one questioned his basic premise: that states would get control over abortion rights if *Roe* were overturned.<sup>4</sup>

Six years later, however, as the worrisome possibility that *Roe* might be overturned has become more real, legal scholars have begun to debate this very issue, with several conjecturing that, although the power to regulate abortion would originally revert to the states, Congress might ultimately take control.<sup>5</sup> This Note explores whether, under the Supreme Court’s

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\* J.D. Candidate, 2007, Fordham University School of Law. I would like to thank Professor Tracy Higgins for her guidance. I would also like to thank my mother for her help, my family for their support, and Eric Kim for his support and unending patience.

1. Sally Kalson, Op-Ed., *Nader Willing to Sell Out Reproductive Rights*, Pittsburgh Post-Gazette, Nov. 1, 2000, at D1.

2. *Id.*

3. See Melinda Henneberger, *The Green Party: Nader Sees a Bright Side to a Bush Victory*, N.Y. Times, Nov. 1, 2000, at A29; Ralph Nader, Letter to the Editor, *Nader on Abortion*, N.Y. Times, Oct. 26, 2002, at A20.

4. See Kalson, *supra* note 1; Bruce Ramsey, Op-Ed., *Messages in the Vote: Money, Lies, Social Security*, Seattle Times, Nov. 8, 2000, at B12; see also Lindsay Kastner, *Not Too Young to Take Part: They Can’t Vote, but Young Activists Keenly Interested in Election*, Richmond Times Dispatch, Oct. 29, 2004 (quoting young organizer telling voters that “You know, if George Bush was re-elected, he wouldn’t be able to make abortion illegal. . . . If *Roe v. Wade* was overturned, it would go back to the states”).

5. See Michael McGough, *Commerce Clause Conundrum: Liberals Want Judge Roberts to Take an Expansive View of Congress’ Power to Regulate Non-Economic Activity—But Should They?*, Pittsburgh Post-Gazette, Aug. 22, 2005, at B7 (discussing Harvard Professor Laurence Tribe’s recent speech warning that Congress could ban abortion

current jurisprudence, Congress can regulate abortion nationally using its power under the Commerce Clause, which grants Congress the ability to “regulate Commerce . . . among the several States,”<sup>6</sup> and describes the confusion that currently exists in this area of the law.

Commerce Clause jurisprudence has been surprisingly inconsistent over the last ten years. Between 1937 and 1995, not one statute was struck down on the grounds that it exceeded Congress’s Commerce power.<sup>7</sup> Then, in *United States v. Lopez*, the Court appeared to put new limitations on the Commerce Clause, striking down the Guns-Free School Zone Act, which prohibited possession of a gun within 1000 feet of a school, as being outside Congress’s Commerce power.<sup>8</sup> The Court followed *Lopez* a few years later with *United States v. Morrison*,<sup>9</sup> where it struck down a section of the Violence Against Women Act (VAWA) that allowed victims of gender-motivated violence to sue in federal court, even though Congress had solved some of the problems the Court had identified in the Guns-Free School Zone Act.<sup>10</sup> These two cases appeared to indicate a federalist revolution in Commerce Clause jurisprudence, in which the Court seemed to be drawing lines around the types of areas that Congress can regulate.<sup>11</sup> While some commentators proclaimed the revival of a pre-New Deal Commerce Clause jurisprudence,<sup>12</sup> the revolution appears to have been short-lived,<sup>13</sup> based on the Court’s decision last term in *Gonzales v. Raich*.<sup>14</sup> In *Raich*, the Court held that the Controlled Substance Abuse Act, which prohibits the manufacture, distribution, or possession of a number of drugs, including marijuana, was constitutional even as applied to marijuana that is legally grown for medical use only and has never been, and never will be, in the stream of commerce.<sup>15</sup> *Raich* appears to mark a move back toward the post-New Deal method of interpreting the Commerce Clause, with a heavy emphasis on deference to congressional judgment, paired with an expansive understanding of the Commerce power and the national market economy.

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if *Roe* were overturned); Jeffrey Rosen, *The Day After Roe*, Atlantic Monthly, June 2006, at 56, 62-64.

6. U.S. Const. art. I, § 8, cl. 3.

7. See Sylvia A. Law, *In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights*, 70 U. Cin. L. Rev. 367, 368 & n.7 (2002).

8. *United States v. Lopez*, 514 U.S. 549 (1995).

9. *United States v. Morrison*, 529 U.S. 598 (2000).

10. *Id.* See *infra* Part I.B for further discussion of the *Morrison* decision.

11. Stephen G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 Mich. L. Rev. 752, 752 (1995).

12. *Id.*

13. See Herman Schwartz, *A Deeply Rooted Revolution*, 181 N.J. L.J. 329 (2005) (quoting Michael Greve from the conservative American Enterprise Institute, who said that “what seemed to be a revolution was only a ‘boomlet [that] has fizzled,’” and quoting the conservative Cato Institute’s Roger Pilon calling *Raich* a “disaster”).

14. 125 S. Ct. 2195 (2005).

15. *Id.* at 2215.

Although the *Raich* Court claimed that its decision was consistent with *Lopez*, *Morrison*, and fifty years of post-New Deal Commerce Clause jurisprudence, it appears impossible to reconcile these competing understandings of the Commerce Clause.<sup>16</sup> Since *Raich*, commentators have diverged on whether *Raich* was a return to the New Deal era analysis,<sup>17</sup> a blip on the federalist revolution radar,<sup>18</sup> or a clear sign that federalist jurisprudence is just political expedience disguised as structural analysis.<sup>19</sup>

The next time the Court addresses this issue, it may indicate which of these conclusions is correct, either by veering back toward the narrow interpretation of the Commerce Clause put forth in *Lopez* and *Morrison*, or by returning to an interpretation of the Clause that gives Congress the almost-plenary authority it had before *Lopez*. In the meantime, the Court's confusing jurisprudence in this area leaves important questions about state sovereignty and the limits of congressional power in areas traditionally regulated by states, such as abortion law, unanswered. Without clear direction from the Supreme Court, lower courts will have to choose for themselves which of these cases provides the most guidance in particular circumstances.<sup>20</sup>

Progressives have generally favored a broad interpretation of the Commerce Clause and have defended legislation as varied as the Endangered Species Act and the Freedom of Access to Clinic Entrances Act on Commerce Clause grounds.<sup>21</sup> However, given the fact that both the

16. Linda Greenhouse, *The Nation: The Rehnquist Court and Its Imperiled States' Rights Legacy*, N.Y. Times, June 12, 2005, at WK3 (asking, "Was the federalism revolution ever real and, if so, what happened to it?").

17. See Douglas W. Kmiec, *Gonzales v. Raich: Wickard v. Filburn Displaced*, 2005 Cato Sup. Ct. Rev. 71, 71, available at <http://www.cato.org/pubs/scr/2005/gonzalesdecision.pdf>; John T. Parry, "Society Must Be [Regulated]": *Biopolitics and the Commerce Clause in Gonzales v. Raich*, 9 Lewis & Clark L. Rev. 853, 862 (2005).

18. See Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 Lewis & Clark L. Rev. 879, 908 (2005).

19. See Ryan Grim, *A Guide to Gonzales v. Raich*, Salon.com, June 7, 2005, [http://www.salon.com/news/feature/2005/06/07/supreme\\_court\\_and\\_pot](http://www.salon.com/news/feature/2005/06/07/supreme_court_and_pot) (referring to several law professors railing against Justice Antonin Scalia's vote for the majority opinion in *Raich* as a purely political move).

20. However, it has been noted by one commentator that most lower courts have already been construing *Lopez* and *Morrison* as narrowly as possible in order to avoid striking down congressional statutes. See Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 Wis. L. Rev. 369, 371. *Raich* may provide these lower courts with the excuse they need to continue to broadly understand the Commerce Clause despite the "revolution" which may have come and gone at the U.S. Supreme Court. *Id.*

21. See, e.g., Brief of Amici Curiae American College of Obstetricians & Gynecologists et al. at 4, *United States v. Bird*, 124 F.3d 667 (5th Cir. 1997) (No. 95-20792), 1996 WL 33473351 ("Congress had ample authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act."); Brief of Environmental Defense et al. as amici curiae in Support of respondents at 18, *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (No. 99-1178), 2000 WL 1369436 ("Congress has

White House and Congress are currently under conservative, Republican control, some pro-choice advocates and other progressives might now prefer courts to adopt a narrower view of the Commerce Clause as the lesser of two evils, considering that at least some states will most likely keep abortion legal if left to themselves to decide.<sup>22</sup> The present composition of the Court presents a conundrum to pro-choice advocates: Since the retirement of moderate conservative Justice Sandra Day O'Connor, there appears to be a five to four majority willing to uphold *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the case that upheld but weakened *Roe v. Wade*.<sup>23</sup> However, the solidity of that majority is open to question,<sup>24</sup> and at least two of the five votes to uphold are held by Justices who may retire within the next few years.<sup>25</sup>

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Commerce Clause power to regulate construction and operation of a solid waste landfill that would pollute intrastate surface waters used as habitat by migratory birds.”). The Supreme Court did not actually reach the Commerce Clause issue in *Solid Waste Agency*, 531 U.S. at 162.

22. See Wendy Kaminer, *Sexual Congress*, Am. Prospect, Feb. 14, 2000, at 8; see also Rosen, *supra* note 5, at 58-62. Similar arguments have been made more often by those defending gay rights and same-sex marriage. See Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 Alb. L. Rev. 719, 741-43 (2003) (arguing that federalism may not be attractive to progressives with certain cultural agendas, such as ending racism or protecting the environment, but that it is or could be a valuable restraint when it comes to the issue of gay rights); Paul D. Moreno, “So Long As Our System Shall Exist”: *Myth, History, and the New Federalism*, 14 Wm. & Mary Bill Rts. J. 711, 742-43 (2005) (pointing to various times in history when federalism has been embraced by either liberals or conservatives to argue that federalism is a “content neutral” principle and mentioning gay marriage and abortion as two issues on which liberals are currently, or are likely to start, using federalism arguments). In fact, several commentators have argued that federalism concerns should cause the Defense of Marriage Act to be unconstitutional. See John Bash, *Abandoning Bedrock Principles?: The Musgrave Amendment and Federalism*, 27 Harv. J. L. & Pub. Pol’y 985, 987 (2004); Melissa Rothstein, *The Defense of Marriage Act and Federalism: A States’ Rights Argument in Defense of Same-Sex Marriages*, 31 Fam. L.Q. 571, 573 (1997); see also Martin Schram, *A Year of Flip-Flops*, Naples Daily News, Dec. 29, 2004, [http://www.naplesnews.com/news/2004/dec/29/ndn\\_martin\\_schram\\_a\\_year\\_of\\_flip\\_flops/](http://www.naplesnews.com/news/2004/dec/29/ndn_martin_schram_a_year_of_flip_flops/) (“In 2004, ‘states’ rights’ was the rallying cry sounded mainly by liberals who were pushing their favorite solution for legal same-sex marriages. . . . But in the 1950s and 1960s, cries of ‘states’ rights’ were played on the flip side. It was the conservatives who made ‘states’ rights’ their mantra. . .”).

23. See Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, New Yorker, Sept. 12, 2005, at 42.

24. Recently, commentators and journalists have begun discussing Justice Anthony Kennedy’s position on abortion, and there is at least some concern that his position is no longer strongly in favor of upholding *Roe*. A recent *New Yorker* profile noted Justice Kennedy’s strong dissent from the Court’s decision in *Stenberg v. Carhart*, in which he described so-called “partial-birth” abortion as “a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life.” *Id.* at 51 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 979 (2000) (Kennedy, J., dissenting)). He also dissented in a case that challenged the use of RICO to prosecute abortion clinic protestors, writing that “in the face of what they consider to be one of life’s gravest moral crises, [the Court is denying them] even the opportunity to try to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law.” *Id.* When asked if he would be the one vote keeping *Roe* intact, Justice Kennedy answered, “Perhaps, perhaps not.” *Id.*

25. In 2005, Justice John Paul Stevens was eighty-five years old, and Justice Ruth Bader Ginsberg was seventy-two, which facts alone could mean that one or both will retire within

However, several of the justices who firmly oppose abortion also strongly endorse state sovereignty and oppose a broad view of congressional power.<sup>26</sup> If a conservative Supreme Court overturns *Roe*, reproductive rights advocates will try to prevent a national abortion ban, and some commentators have suggested that one strategy could be to challenge federal abortion laws as violations of the Commerce Clause.<sup>27</sup> While that legal argument might be effective, pursuing this strategy in court could set precedent foreclosing important protections for women's reproductive rights, such as protections for clinics,<sup>28</sup> as well as other important social legislation enacted by Congress, including environmental<sup>29</sup> and civil rights legislation,<sup>30</sup> by constricting congressional power to address national problems.<sup>31</sup>

Part I of this Note discusses the trajectory of Commerce Clause jurisprudence from the Founding until today, including a discussion of the fundamental inconsistencies in *Lopez*, *Morrison*, *Raich* and the post-New Deal Commerce Clause jurisprudence. Part I also describes how the Commerce Clause has been used in the past to legislate on national issues such as race discrimination, environmental protections, and most recently, abortion. Finally, Part I describes the opposing views about what level of power the Commerce Clause gives Congress and whether Congress can legitimately regulate abortion under the Commerce Clause.

Part II of this Note compares how courts adopting divergent views about the Commerce Clause might rule on federal abortion legislation. This section uses the Freedom of Choice Act, the Freedom of Access to Clinic Entrances Act, the Partial-Birth Abortion Ban Act of 2003, and a hypothetical "national abortion ban," which could be passed if *Roe* were

the next five to ten years. See David D. Kirkpatrick, *Alito Sworn in as Justice After Senate Gives Approval*, N.Y. Times, Feb. 1, 2006, at A21.

26. See Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 Harv. J. on Legis. 319, 321 (2005) (noting that the "same Justices who have spearheaded the restraints on the Commerce Clause . . . are also the most adamantly opposed to abortion").

27. See, e.g., Anne C. Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787, 1789 (1995); Phillip Hankersley, *United States v. Morrison: Sex, Violence, and the Reach of Federal Power*, 14 J. Contemp. Legal Issues 21, 21 (2004); Allan Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 Const. Comment. 441, 461-462 (2004); Alissa Schecter, Note, *Choosing Balance: Congressional Powers and the Partial-Birth Abortion Ban Act of 2003*, 73 Fordham L. Rev. 1987, 1989 (2005).

28. Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248 (2000).

29. Endangered Species Act, 16 U.S.C. §§ 1531-44 (2000).

30. Civil Rights Act, 42 U.S.C. § 2000a (2000).

31. See Michael C. Blumm & George A. Kimbrell, *Clear the Air: Gonzalez v. Raich, the "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act*, 35 Env'tl. L. 491, 491 (2005) (discussing the relief with which *Raich* was greeted by environmentalists); Elizabeth S. Saylor, *Federalism and the Family After Morrison: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 Harv. Women's L.J. 57 (2002) (discussing the repercussions of *Morrison* and how important legislation could be struck down based on *Morrison* and *Lopez*, arguing that *Morrison* was wrongly decided).

overturned, as examples of the kinds of legislation that Congress has, or could, enact based on the Commerce Clause.<sup>32</sup>

Part III argues first that there is no way to interpret *Lopez*, *Morrison*, *Raich* and the post-New Deal Commerce Clause jurisprudence consistently, and second, that there should be a resolution of this inconsistency that returns to a broad interpretation of Congress's Commerce power. This argument will make clear that a broad construction must be adopted in order to allow Congress to solve national problems in the most efficacious way; as a collateral result, abortion must be considered regulable in most cases by Congress within the constitutional bounds defined by the Supreme Court.<sup>33</sup> Therefore, in order to protect the right to choose today, and in the future if *Roe* is limited or overturned, this Note argues that the pro-choice movement must pursue political solutions, rather than a Commerce Clause judicial solution. Congress may have a great deal of power over abortion in a post-*Roe* world, and this Note argues that if pro-choice advocates want to protect choice, they must fight to protect *Roe*, find other constitutional protections for abortion, and lastly, make sure that the elected officials in Congress are pro-choice.

The first section of Part I describes the basic uses of the Commerce Clause and sets out the doctrinal conflict that exists among the Court's decisions in *Lopez*, *Morrison*, and *Raich*.

### I. THE COMMERCE CLAUSE AND ABORTION

The United States Constitution grants limited and enumerated powers to the federal government, leaving all other powers to the states and the people.<sup>34</sup> One of the primary sources of congressional power is the Commerce Clause, which was included in the Constitution primarily because the conflicting, protectionist policies adopted by individual states under the Articles of Confederation were destroying America's ability to become an economic power.<sup>35</sup> During the last century, the Commerce Clause has become one of Congress's most significant sources of power, and the foundation for federal regulation of activities ranging from

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32. McGough, *supra* note 5 (quoting Harvard Professor Laurence Tribe's recent speech warning that Congress could ban abortion if *Roe* were overturned).

33. Even with a broad interpretation of the Commerce Clause, however, certain types of legislation may remain off-limits to Congress. For example, a proposed law dubbed the Parental Notification and Intervention Act would impose a national parental consent requirement on minors seeking abortions. Parental Notification and Intervention Act, H.R. 2971, 109th Cong. (2005). Under any interpretation of the Commerce Clause, this sort of domestic-relations-type law might be considered beyond the scope of congressional powers. See *infra* Part II.A-B. For a brief further discussion of this law and one other proposed abortion law, see *infra* note 183.

34. See U.S. Const. amend. IX, X (granting all powers not specifically given to Congress to the states and the people).

35. See Robert Pushaw, Jr. & Grant Nelson, Essay, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 Nw. U. L. Rev. 695, 704 (2002).

interstate shipping rates<sup>36</sup> to restaurants<sup>37</sup> to employment contracts.<sup>38</sup> Although the Framers of the Constitution may not have foreseen these particular uses of the Clause,<sup>39</sup> much of our modern day legislation relies on the Commerce Clause for its authority.<sup>40</sup>

An ongoing debate exists about whether the expansion of the Commerce Clause for social and economic national legislation, as opposed to being used for directly regulating trade between the states, oversteps the grant of power given by the Constitution to Congress. The first phase of this debate occurred in the 1920s, when the Supreme Court invalidated attempts by Congress to expand the reach of the Commerce power.<sup>41</sup> However, this strict approach changed in 1937,<sup>42</sup> and for almost fifty years afterwards, the Court did not restrict the Commerce power. The third phase of this debate began after the *Lopez* decision, which revitalized the limits on the Commerce power and began a new discussion of the value of dividing and policing federal versus state powers.

The Supreme Court decided *Lopez* while it was in the process of revisiting the legal landscape of federal and state power. In the few years before and after *Lopez*, the Court drew new lines and emphasized old lines between federal and state power, strengthening state immunity and sovereignty and limiting federal power to force states to act.<sup>43</sup> For example, just two years before *Lopez*, in *New York v. United States*, the Court held that Congress did not have the power to force states to take title to nuclear waste within their own states.<sup>44</sup> This new attention to the division of power between the federal and state government prompted confusion among the lower courts<sup>45</sup> and heated commentary in legal

36. *Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342 (1914).

37. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

38. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

39. See Pushaw & Nelson, *supra* note 35, at 705.

40. Bill Adair, *Roberts Faces New Challenge: A Clause*, *St. Petersburg Times*, Aug. 2, 2005, at A1 (quoting Sen. Charles Schumer, Democrat from New York, saying that “[t]he whole foundation of federal regulation since the early 1900s has been on the basis of the Commerce Clause”).

41. See *infra* notes 52-53 and accompanying text.

42. See *infra* notes 53-66 and accompanying text.

43. See Lars Noah, *Ambivalent Commitments to Federalism in Controlling the Practice of Medicine*, 53 U. Kan. L. Rev. 149, 155 nn.23-25 (2004) (discussing the Court’s decisions that, among other holdings, invalidated part of the Americans with Disabilities Act as applied to state employers, invalidated the Religious Freedom Restoration Act, and held that the federal government cannot “commandeer” state officials to implement federal legislation).

44. *New York v. United States*, 505 U.S. 144, 149 (1992).

45. See, e.g., *United States v. Jeronimo-Bautista*, 319 F. Supp. 2d 1272 (D. Utah 2004) (holding that a statute that prohibited sexual exploitation of children was unconstitutional as applied to the defendant because it exceeded congressional power under the Commerce Clause); *United States v. Parker*, 911 F. Supp. 830 (E.D. Pa. 1995) (holding that the Child Support Recovery Act exceeded Congress’s power under the Commerce Clause); *United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis. 1995) (holding that Congress exceeded its Commerce power in enacting FACE).

periodicals.<sup>46</sup> The new debate surrounding the Commerce Clause focused first on whether the fundamental limitation was based on whether the regulated activity was “economic” in nature, or only whether it had an “economic” effect on commerce; and second, it focused on whether there were some areas that were so traditionally regulated by states, such as family law or education, that states were to be considered sovereign in those areas regardless of their economic implications.<sup>47</sup>

The questions left open after *Lopez*, *Morrison*, and *Raich* are how to divide state and federal authority and whether that boundary is judicially enforceable. The majority opinion in *Raich* leaves the impression that that boundary is generally not judicially enforceable,<sup>48</sup> whereas *Lopez* and *Morrison* clearly held that it was.<sup>49</sup>

The next section lays out the Commerce Clause jurisprudence as it stood before *Lopez*, beginning with the first major Commerce Clause decision in 1887 and continuing through the New Deal and the Civil Rights movement.

#### A. The “Old” Commerce Clause: The Categorical Approach to Commerce, the New Deal Revolution, and Civil Rights

Between 1787 and the early 1900s, the Commerce Clause was interpreted fairly narrowly. The first important case to address the Commerce Clause was *Gibbons v. Ogden*, where federal legislation prohibiting monopolies clashed with a New York law that permitted a boat owner to have a monopoly over a particular area of the Hudson River.<sup>50</sup> The Court held that the federal legislation was a legitimate use of the Commerce Clause, and therefore overrode New York’s law, because transporting people from New

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46. See Calabresi, *supra* note 11; David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 Conn L. Rev. 59, 111 (1997) (noting that “federalism makes a substantial contribution to domestic tranquility in the United States by assuring that many contentious, divisive moral issues may have a multiplicity of resolutions, rather than a winner-take-all decision at the national level”); Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 Marq. L. Rev. 693 (2005) (defending the wisdom of *Lopez* and *Morrison* and arguing the benefits of dual federalism); see also Pushaw & Nelson, *supra* note 35, at 716-19 (arguing against restriction of the federal government’s power and the use of the Commerce Clause).

47. See Dailey, *supra* note 27, at 1790 (“States enjoy exclusive authority over family law, not because families are in some sense noncommercial, as the *Lopez* majority suggested, but instead because of the fundamental role of localism in the federal design.” (footnote omitted)).

48. See Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 Lewis & Clark L. Rev. 915, 932-33 (2005) (discussing the possible meanings of *Raich* for Commerce Clause jurisprudence and the effects of *Raich* on the standards created in *Lopez* and *Morrison*).

49. See *United States v. Morrison*, 529 U.S. 598, 614 (2000) (“[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”); *United States v. Lopez*, 514 U.S. 549, 558 (1995).

50. *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 74-75 (1824).

York to New Jersey involved interstate commerce.<sup>51</sup> However, the early Court distinguished “commerce” between states from manufacturing or other kinds of activities where some activity happened intrastate and was then sent or brought into interstate commerce.<sup>52</sup> This distinction between manufacturing and commerce caused the Court to firmly reject Congress’s efforts to legislate for broader national purposes, particularly in the area of labor and employment.<sup>53</sup>

A massive about-face occurred in 1937, substantially changing the purpose and use of the Commerce Clause. In response to the New Deal, the Court redefined Congress’s power to regulate some commerce that began with intrastate activity.<sup>54</sup>

The first case to develop this new jurisprudence was *NLRB v. Jones & Laughlin Steel Corp.*<sup>55</sup> The National Labor Relations Act created a right for employees across the nation to bargain collectively and also established

51. *Id.*

52. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 14 (1895) (holding that manufacturing is a precursor to commerce and not part of commerce).

53. See *Hammer v. Dagenhart*, 247 U.S. 251, 274-76 (1918) (striking down a statute prohibiting interstate commerce of goods made with child labor); see also *Carter v. Carter Coal Co.*, 298 U.S. 238, 316-17 (1936) (holding that Congress could not set up boards across the country to set minimum prices for coal); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530, 551 (1935) (holding that the National Industrial Recovery Act, which authorized the President to “approve codes of fair competition,” was unconstitutional); *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (striking down a minimum wage statute as exceeding Congress’s Commerce power). Two exceptions developed to the otherwise strict understanding of “interstate commerce” as trade between and among states. The first was where the item to be brought into interstate commerce was “immoral” on its own, such as lottery tickets or women who were intending to prostitute themselves in other states, in which case Congress was found to have the power to prevent the item from traveling through interstate commerce. *Caminetti v. United States*, 242 U.S. 470 (1917); *Champion v. Ames*, 188 U.S. 321, 356 (1903) (upholding congressional legislation prohibiting the shipment of lottery tickets across state lines because lottery tickets were “pestilential” and “evil”). The second involved activity that affected the stream of commerce, such as situations where intrastate regulation negatively affected the flow of interstate activity. See *Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342 (1914); see also *United States v. Swift & Co.*, 286 U.S. 106 (1932). For example, in the *Shreveport Rate Cases*, where carriers in Texas set shipping rates very low for shipments in-state and very high for shipments from out-of-state into Texas seeking to promote intrastate activity, the Court found that this protectionist kind of activity had “a close and substantial relation to interstate traffic” and thus could be regulated by the Interstate Commerce Commission. *Shreveport Rate Cases*, 234 U.S. at 351.

54. In *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), the Supreme Court reversed its direction from the previous era of Commerce Clause jurisprudence, which had limited congressional power. Many have theorized that this was in response to a threat by President Roosevelt to “pack the court” with judges who would be more receptive to the New Deal agenda. See, e.g., William E. Leuchtenburg, *Charles Evans Hughes: The Center Holds*, 83 N.C. L. Rev. 1187, 1201 (2005) (noting that the Court’s shift to the center is supposed to have saved the Court at that time). This is often called “the switch in time [that] saved nine.” *Id.* *West Coast Hotel* upheld the constitutionality of Washington State’s minimum wage laws, which protected women and minors and overturned *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), which had struck down a minimum wage law in the District of Columbia. *West Coast Hotel*, 300 U.S. at 400.

55. 301 U.S. 1 (1937).

the National Labor Relations Board (NLRB) to supervise and enforce the Act's prohibition of unfair labor practices.<sup>56</sup> In the Act's "findings" section, Congress had outlined the negative national economic effects of local unfair labor practices, including obstructing the flow of commerce and hampering efficient market competition.<sup>57</sup> The Court upheld the Act, recognizing that while some of the activities reached by the Act were intrastate, their effects on interstate commerce were so substantial as to allow Congress to reach them as well.<sup>58</sup> This decision opened the door to a line of cases that gradually increased Congress's power under the Commerce Clause until it appeared to be plenary.<sup>59</sup>

The highwater mark of this expansionist reading was *Wickard v. Filburn*, where the Court held that the "aggregation principle" allowed Congress to reach any activity that itself was completely local but that, when aggregated with all other similar activity, had an effect on interstate commerce.<sup>60</sup> In *Wickard*, a single farmer was fined for growing wheat in excess of the amount permitted by the Agricultural Adjustment Act and defended himself by claiming that his wheat was grown solely for personal use and not to enter the market in any capacity.<sup>61</sup> The Court upheld the legislation, reasoning that while Wickard himself did not necessarily affect interstate commerce, if all single farmers were to grow wheat for themselves, the aggregation of this activity would have an effect on the whole market.<sup>62</sup>

After the New Deal, Congress began legislating against social evils, such as discrimination, under the guise of the Commerce power.<sup>63</sup> In *Heart of Atlanta Motel v. United States*, the Court upheld the Civil Rights Act of 1964, which prohibited restaurants and hotels that operated "in interstate commerce" from discriminating based on race, as a valid exercise of the power to regulate interstate commerce.<sup>64</sup> The Court held that because millions of people of all races travel across the United States and the congressional findings in the Act indicated "a qualitative as well as quantitative effect on interstate travel by Negroes . . . racial discrimination

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56. *Id.* at 24.

57. *Id.* at 23-24. Congress generally includes a "findings" section in its Acts that explains the reasons behind its actions and sometimes the constitutional basis for the Act. Although Congress has generally included such findings, their significance has increased since *Lopez*. See *infra* Part I.B.

58. *Jones & Laughlin Steel Corp.*, 301 U.S. at 41-42.

59. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act, which prohibited the shipment in interstate commerce of goods manufactured by employees who were paid less than a prescribed minimum wage or who worked less than a prescribed maximum number of hours, thereby overturning *Hammer v. Dagenhardt*, 247 U.S. 251 (1918)).

60. *Wickard v. Filburn*, 317 U.S. 111 (1942).

61. *Id.* at 119.

62. *Id.* at 127-28.

63. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §2000e (2000)).

64. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964).

had the effect of discouraging travel.”<sup>65</sup> The Court also held that the power to regulate interstate commerce includes the power to regulate “local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”<sup>66</sup>

After the Court established the aggregation principle and upheld the Civil Rights Act, it seemed as if the Commerce Clause granted Congress practically plenary authority, and this understanding stood unchallenged for the next thirty years. The following section describes “new” federalism, which is a jurisprudence that harkens back to some extent to the pre-New Deal philosophy of the Commerce power. The following section then discusses the three cases that form the basis of the Commerce Clause confusion that now exists: *Lopez*, *Morrison*, and *Raich*.

### B. *Federalism and the “New” Commerce Clause Jurisprudence*

The expansion of federal power during the second half of the twentieth century has not been without its detractors.<sup>67</sup> These detractors have pushed for a “new” federalism, or rather a return to what they believe are the federalist principles of the Founding.<sup>68</sup> Proponents of the “new” federalism have emphasized the fact that the federal government is one of limited and enumerated powers and that the federal government can only regulate in areas that are expressly delineated in the Constitution.<sup>69</sup> Many commentators have written in support of this enforcement of the “vertical” separation of powers in the United States federalist system.<sup>70</sup> Professor Stephen Calabresi, for example, extols the virtues of the federalist system, in which fifty states with competing and differing priorities and moralities can resolve most issues in their own ways, leaving only those problems in

65. *Id.*

66. *Id.* at 258. The companion case to *Heart of Atlanta Motel* was *Katzenbach v. McClung*, which concerned a restaurant in Alabama that served mostly local people, although it was located eleven blocks from an interstate highway and got most of its food from an intermediary that bought its supplies from out-of-state. *Katzenbach*, 379 U.S. 294, 296 (1964). The Court relied on congressional testimony demonstrating that discrimination in restaurants had a direct and highly restrictive effect on interstate travel by blacks, noting that “one can hardly travel without eating.” *Id.* at 300. The Court found that “[h]ere, as [in *Darby*], Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally.” *Id.* at 303.

67. See Stuart Taylor, Jr., *Newest Judicial Activists Come from the Right*, N.Y. Times, Feb. 8, 1987, at E24 (discussing the rise of the Federalist Society and then-Judge Scalia’s part in it).

68. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001).

69. See Westover, *supra* note 46, at 695.

70. John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 Nw. U. L. Rev. 89, 110-12 (2004); see also Calabresi, *supra* note 11, at 752; Hankersley, *supra* note 27, at 21; Westover, *supra* note 46, at 748.

need of a federal solution to the federal government.<sup>71</sup> Others have pointed out that by allowing states to resolve important moral issues on their own, the United States avoids governing by “congressional fiat,”<sup>72</sup> and states are able to experiment and respond to problems within their own borders in unique ways.<sup>73</sup> Furthermore, keeping the lines between federal and state governmental powers clear can be seen as a way to protect areas of law, such as family law, which could be disserved by being placed under federal jurisdiction.<sup>74</sup>

On the other hand, over the last forty years, national problems have increasingly been solved on a national level by using Congress’s enumerated powers in new ways that are responsive to the changing economy and infrastructure of the country.<sup>75</sup> The Civil Rights Act,<sup>76</sup> the Endangered Species Act,<sup>77</sup> and the Clean Water Act<sup>78</sup> are all examples of how the expansive interpretation of enumerated congressional powers has enabled Congress to legislate to address national problems that it has considered ineffectively addressed on the local level.<sup>79</sup>

While no court or commentator seems to argue that Congress should be considered to have the broad police powers possessed by states,<sup>80</sup> a more expansive understanding of congressional powers doubtless allows Congress to enter areas of the law that have been considered the domain of the states.<sup>81</sup> Some commentators have argued that judicial review of these decisions sometimes puts the judiciary in the awkward position of prohibiting elected branches of government from acting in the ways that are best suited for their constituencies.<sup>82</sup> Rather than inserting themselves into these intergovernmental power shifts, these commentators argue that courts should leave these issues to be fought in the political realm by officials who are accountable to each other and to voters.<sup>83</sup>

Through discussion of *Lopez* and *Morrison*, the next section shows how the direction of the Court in recent years has tended to reflect this criticism,

71. Calabresi, *supra* note 11, at 774-79.

72. Comment, *The Pain Relief Promotion Act of 1999 and Physician-Assisted Suicide: A Call for Congressional Self-Restraint*, 38 San Diego L. Rev. 297, 310 (2001).

73. See Calabresi, *supra* note 11, at 777.

74. See Hankersley, *supra* note 27, at 21-22.

75. See Law, *supra* note 7, at 371; see also *United States v. Morrison*, 529 U.S. 598, 660 (Breyer, J., dissenting).

76. 42 U.S.C. § 2000e (2000).

77. 16 U.S.C. §§ 1251-1387 (2000).

78. 33 U.S.C. §§ 1281a, 1294-97 (2000).

79. See Pushaw, *supra* note 18, at 860.

80. State police powers are generally described as encompassing the states’ ability to “define criminal law and to protect the health, safety, and welfare of their citizens.” *Gonzales v. Raich*, 125 S. Ct. 2195, 2221 (2005) (O’Connor, J., dissenting).

81. See Law, *supra* note 7, at 376; see also Mark R. Killenbeck, *In(Re)Dignity: The New Federalism in Perspective*, 57 Ark. L. Rev. 1, 39 (2004).

82. See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 64-65 (2005); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215, 287-89, 289 n.283 (2000).

83. Kramer, *supra* note 82, at 217-20.

emphasizing the limitations of federal power even in situations where state governments have welcomed the federal government's action in an area of the law that had previously been left to the states.<sup>84</sup> The section concludes by discussing *Raich* and the reversal that appears to have taken place.

1. A Return to Limited Commerce Power? *United States v. Lopez* and *United States v. Morrison*

In *Lopez*, the Court addressed the validity of the Guns-Free School Zone Act, which made it a federal crime for a person knowingly to possess a firearm in a school zone.<sup>85</sup> The legislation did not contain a "jurisdictional element," meaning that the statute did not require that the firearm have a relationship to interstate commerce; nor did it include any "findings" to explain how the activity to be regulated fell within Congress's authority by impacting interstate commerce.<sup>86</sup> In discussing this statute, the *Lopez* majority identified a new framework under which to analyze legislation, pointing to three areas in which Congress can legislate under the Commerce Clause:

Congress may regulate the use of the channels of interstate commerce. . . . Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.<sup>87</sup>

The Court stated that while Congress "normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," the fact that the activity in question had "no . . . substantial effect [on commerce that] was visible to the naked eye" made it more difficult for the Court to find that Congress had a rational basis for believing the activity to be connected to interstate commerce.<sup>88</sup> The Court also appeared to add an additional consideration, holding that because "[t]he possession of a gun in a local school zone is in no sense an economic activity," it therefore could not be held to substantially affect interstate commerce,<sup>89</sup> even though the post-New Deal Commerce Clause cases had

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84. For example, thirty-five states and the Commonwealth of Puerto Rico filed an amicus brief defending Congress's power to enact the Violence Against Women Act (VAWA), part of which was struck down on Commerce Clause grounds in *United States v. Morrison*. See Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners' Brief on the Merits at 1, *United States v. Morrison*, 529 U.S. 598 (2000) (No. 99-5) (petitioning the Supreme Court to grant certiorari to reverse the lower court's decision to strike down parts of VAWA "[b]ecause the amici agree with Congress that gender-based violence substantially affects interstate commerce and the States cannot address this problem adequately by themselves").

85. *United States v. Lopez*, 514 U.S. 549 (1995).

86. *Id.* at 561.

87. *Id.* at 558-59 (citations omitted).

88. *Id.* at 562-63.

89. *Id.* at 567.

upheld statutes because the activity had an “economic” effect regardless of whether the activity itself was “economic.”<sup>90</sup>

Justice Anthony Kennedy and Justice O’Connor concurred in the *Lopez* decision, writing a far more states’ rights-centered opinion than the majority. Whereas the majority focused on the constitutional limitations of congressional power regardless of the general subject matter being regulated, the concurring opinion emphasized the importance of preserving traditional areas of state regulation.<sup>91</sup> Justice Kennedy’s concurrence noted that there is a need for stability in Commerce Clause jurisprudence,<sup>92</sup> but also stated that “[i]t does not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance.”<sup>93</sup> The concurrence also repeatedly stated that where Congress sought to regulate in an area of “traditional state concern,”<sup>94</sup> the Court had a responsibility to “preserv[e] the federal balance.”<sup>95</sup>

A few years later, the Court clarified and broadened this “new” federalist direction in *Morrison*, addressing a challenge to VAWA, which “provide[d] a federal civil remedy for the victims of gender-motivated violence.”<sup>96</sup> In this Act, unlike the Gun-Free School Zone Act, Congress had provided substantial findings, linking gender-motivated violence to economic effects on employment and travel across states, and finding that nationally “we spend \$5 to \$10 billion a year on health care, criminal justice, and other social costs of domestic violence.”<sup>97</sup>

Despite these findings, the Court found that this statute, too, was an invalid exercise of the Commerce power.<sup>98</sup> The Court held that “even under our modern, expansive interpretation of the Commerce Clause, Congress’s regulatory authority is not without effective bounds.”<sup>99</sup> Analyzing VAWA under the third category of congressional power identified in *Lopez*, those activities having a substantial relation to interstate commerce, the Court stated that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”<sup>100</sup> Similar to the statute in *Lopez*, VAWA dealt with “noneconomic, criminal” activity, and, as in *Lopez*, the justification for the statute was based on “costs of crime” and

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90. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that “if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce”); see also *infra* note 132.

91. See *Lopez*, 514 U.S. at 569 (Kennedy, J., concurring).

92. *Id.* at 574.

93. *Id.* at 575.

94. *Id.* at 580.

95. *Id.* at 575.

96. *United States v. Morrison*, 529 U.S. 598, 601-02 (2000).

97. *Id.* at 632 (Souter, J., dissenting) (internal quotations omitted).

98. *Id.* at 617 (majority opinion).

99. *Id.* at 608.

100. *Id.* at 613.

“national productivity” arguments.<sup>101</sup> Even though this statute had both a jurisdictional element and substantial congressional findings, two statutory elements that were not present in the firearm law in *Lopez*, the Court reiterated its statement from *Lopez* that “‘simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.’”<sup>102</sup> The Court again emphasized its concern that these types of arguments could extend congressional powers beyond any limits, “since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.”<sup>103</sup> Ultimately, *Morrison* clarified the concept of the “non-infinity” principle only alluded to in *Lopez*, emphasizing that no congressional findings or jurisdictional element would be valid if such findings or rationale could logically be extended to any or every other type of activity.<sup>104</sup>

Justices David Souter, John Paul Stevens, Ruth Bader Ginsberg, and Stephen Breyer dissented in both *Lopez* and *Morrison*.<sup>105</sup> Justice Souter argued that these decisions flew in the face of fifty years of pro-federal government Commerce Clause precedent, despite the majority’s contention that these cases were compatible with the earlier cases.<sup>106</sup> Further, Souter argued that the role of the Court was not to decide whether the activities in question had a substantial effect on interstate commerce, but rather whether Congress had a rational basis for so concluding.<sup>107</sup> Justice Breyer agreed that the decision was inapposite to the post-New Deal Commerce Clause jurisprudence, arguing that the economic/noneconomic distinction identified by the majority in *Lopez* and *Morrison* was inconsistent with previous holdings, and that the majority was wrong in focusing on the source of any interstate effect, pointing out that the “Court has long held that only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant.”<sup>108</sup> Justice Breyer pushed for a return to the plenary view of the Commerce power, arguing that it is impossible for courts to draw meaningful lines in a country knit together by economic and

101. *Id.* at 611-14 (discussing *United States v. Lopez*, 514 U.S. 549, 564 (1995)). The arguments raised in defense of the Guns-Free School Zone Act and VAWA were very similar. In *Lopez*, the government argued that guns in a school zone deterred learning, which affected the performance of those students later in life in their careers and therefore affected their productivity and the economy. 514 U.S. at 564. In *Morrison*, Congress had made extensive findings that violence against women caused those women to be unable to go to work, to travel across state lines, and otherwise to contribute to the economy, and thus violence against women affected the national economy by limiting productivity of women workers and causing their travel and other commercial activity to be limited. 529 U.S. at 615.

102. *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557).

103. *Id.* at 615-16.

104. *Id.* at 608; see also Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark. L. Rev. 1253, 1260 (2003).

105. *Morrison*, 529 U.S. at 628 (Souter, J., dissenting); *id.* at 655 (Breyer, J., dissenting); *Lopez*, 514 U.S. at 602 (Stevens, J., dissenting); *id.* at 603 (Souter, J., dissenting).

106. *Morrison*, 529 U.S. at 628 (Souter, J., dissenting).

107. *Id.* at 634.

108. *Id.* at 657 (Breyer, J., dissenting).

technological progress, and that the challenge of balancing federal and state authority should therefore be left to the political, rather than judicial, arena.<sup>109</sup>

## 2. Backing up Again: *United States v. Raich*

After *Lopez* and *Morrison*, lower courts addressed over 200 challenges to statutes under the Commerce Clause, including the Freedom of Access to Clinic Entrances Act,<sup>110</sup> the Hobbs Act,<sup>111</sup> the Electronic Communications Privacy Act,<sup>112</sup> Protection of Children Against Sexual Exploitation Act,<sup>113</sup> the Endangered Species Act,<sup>114</sup> and others. Although a few district courts have invalidated federal statutes under the *Lopez* and *Morrison* reasoning, circuit courts have generally upheld these statutes.<sup>115</sup>

The Court's decision in *Raich* had been anticipated as the Court's opportunity to answer some of the lingering questions left by *Lopez* and *Morrison*. Although these decisions set forth the three categories of activity that can be regulated by Congress, they left open important questions for future Commerce Clause cases, including whether the aggregation principle had been completely abandoned, how important it would be that a particular area of the law had traditionally been regulated by the states if Congress chose to regulate in that area, and exactly what it means to be part of a "broader regulatory scheme."<sup>116</sup>

*Raich* arose from a conflict between a California law that legalized marijuana for use by severely and terminally ill patients and the Controlled Substance Act (CSA), which prohibits the sale or use of marijuana.<sup>117</sup> Angel Raich and several other petitioners attempted to have a federal district court enjoin the Drug Enforcement Agency from enforcing the CSA

109. *Id.*

110. 18 U.S.C. § 248 (2000).

111. 18 U.S.C. § 1951 (2000).

112. 18 U.S.C. § 2510 (2000).

113. 18 U.S.C. § 2251 (2000).

114. 16 U.S.C. §§ 1531-1544 (2000).

115. See Denning & Reynolds, *supra* note 104, at 1266-97 (discussing district court decisions that struck down convictions for simple gun possession, felony gun possession, machine gun possession, Hobbs Act violations, and violations of the Child Support Recovery Act, based on *Lopez* and *Morrison*, and discussing how circuit courts have uniformly reversed those decisions). A small number of courts have held that some of these laws are unconstitutional as applied to particular defendants. See *United States v. Smith*, 402 F.3d 1303, 1327 (11th Cir. 2005) (holding that as applied to the defendant, 18 U.S.C. § 2251(a), prohibiting the production of child pornography, was unconstitutional); *United States v. Maxwell*, 386 F.3d 1042, 1068-70 (11th Cir. 2004) (holding that the same law was unconstitutional as applied to this defendant); *United States v. Matthews*, 300 F. Supp. 2d 1220, 1232 (N.D. Ala. 2004) (holding that parts of the Protection of Children Against Sexual Exploitation Act were unconstitutional under the Commerce Clause as applied to intrastate production and possession of child pornography).

116. Alex Kreit & Aaron Marcus, Raich, *Health Care, and the Commerce Clause*, 31 Wm. Mitchell L. Rev. 957, 966, 969 (2005).

117. *Gonzales v. Raich*, 125 S. Ct. 2195, 2198-2201 (2005).

against their legal home use of marijuana in California.<sup>118</sup> The U.S. Court of Appeals for the Ninth Circuit found that it was likely that the respondents would succeed with their Commerce Clause challenge to the CSA, and reversed the district court's decision to deny the injunction.<sup>119</sup> However, the Supreme Court held, in a six to three decision, that the CSA was a valid use of the Commerce power even as applied to medical marijuana patients in California.<sup>120</sup>

a. *The Majority Opinion*

The *Raich* Court emphasized that neither *Morrison* nor *Lopez* had overruled any of the Court's earlier Commerce Clause precedent, and therefore any decision would have to be consistent both with these two decisions and the cases from the last fifty years.<sup>121</sup> The Court summarized its jurisprudence as standing for the proposition that Congress has the power to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."<sup>122</sup> The majority then applied the three-category framework from *Lopez*,<sup>123</sup> assessing the CSA under the third *Lopez* category.<sup>124</sup>

The Court included a lengthy comparison of the CSA to the Agricultural Adjustment Act challenged in *Wickard*.<sup>125</sup> The Court wrote that, like wheat, small personal crops of marijuana could be aggregated, even if, as in *Wickard*, they were not intended for commerce, and therefore the court concluded that Congress could regulate even noncommercial marijuana.<sup>126</sup> Despite the emphasis on congressional findings in both *Lopez* and *Morrison* (and, in fact, in *Wickard*<sup>127</sup>), the Court rejected the necessity for such

118. *Id.* at 2200. *Raich* began with a stand-off between agents of the Drug Enforcement Agency (DEA) and local officials in California, who spent three hours arguing at a co-defendant's home before the DEA agents seized and destroyed the co-defendant's six cannabis plants. *Id.* The local California officials had determined that she possessed the plants in accordance with the requirements of local law and had attempted to keep the DEA agents from seizing them, but were unsuccessful. *Id.*

119. *Id.* at 2200-01.

120. *Id.* at 2201.

121. *See id.* at 2209.

122. *Id.* at 2205.

123. *See supra* note 87 and accompanying text.

124. *Raich*, 125 S. Ct. at 2205.

125. *See supra* notes 60-62 and accompanying text. The Court quoted the *Wickard* opinion, which held that the fact that "'appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.'" *Raich*, 125 S. Ct. at 2206 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)).

126. *Id.* at 2205-06. The Court stated that "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id.* at 2206.

127. *Wickard*, 317 U.S. at 127 (discussing in detail the impact of homegrown wheat on the wheat trade in the country, noting that "[t]he effect of consumption of homegrown wheat

findings, stating that the Court “ha[s] never required Congress to make particularized findings in order to legislate,” and that it was not significant that the CSA contained no findings at all about the impact of medical marijuana on the market.<sup>128</sup> The majority opinion echoed the dissents in *Morrison* and *Lopez*,<sup>129</sup> summing up by noting that the “task before [the Court] is a modest one,” emphasizing that the Court’s role is to analyze only whether Congress could have rationally concluded that the activity in question substantially affects interstate commerce, and holding that in this situation, Congress could have done so.<sup>130</sup>

Although the majority in *Raich* seems to agree more with the dissents than majority opinions in *Lopez* and *Morrison*, the opinion kept the three-category framework of *Lopez* as well as the focus on the economic nature of the activity being regulated, rather than the economic effect of the activity being regulated.<sup>131</sup> This distinction remains a difference between the “new” Commerce Clause jurisprudence and the post-New Deal jurisprudence.<sup>132</sup> However, as discussed below, Justice Scalia, at least,

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on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop”).

128. *Raich*, 125 S. Ct. at 2208. *Contra* United States v. *Lopez*, 514 U.S. 549, 560 (1995). In addition, the Court discussed other, related congressional findings about the harm caused by marijuana, as the reason Congress passed the legislation. *Raich*, 125 S. Ct. at 2211. The Court noted that despite the fact that the findings on which Congress had based this legislation—that marijuana had no “effective medical use”—were most likely wrong, Congress still deserved deference and that Congress could always go back and change the law if they became convinced that their findings were inaccurate. *Id.* at 2211 n.37.

129. *See supra* notes 105-09 and accompanying text.

130. *Raich*, 125 S. Ct. at 2198. Another important aspect of the decision in *Raich* was that the Court appeared to foreclose any further possibility of as-applied Commerce Clause challenges. *Id.* at 2209 (“[W]e have often reiterated that [w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.” (internal quotations omitted)).

131. *Id.* at 2210-12.

132. While the *Raich* majority claims to be relying on longstanding Commerce Clause jurisprudence for the idea that the activity to be regulated should be economic in nature, even the case quoted for support does not actually stand for that proposition: While *Raich* states that “[o]ur case law firmly establishes Congress’ power to regulate . . . activities . . . that are part of an economic ‘class of activities[,]” the Court quotes *Wickard*’s holding that an activity “whatever its nature, [may] be reached by Congress if it exerts a substantial economic effect on interstate commerce.” *Id.* at 2205-06 (internal citations omitted). This distinction is slight but important. For example, in *Heart of Atlanta Motel*, the Court discussed at length the economic effects that the racial discrimination being regulated had upon interstate commerce but never once mentioned the economic nature of racial discrimination or whether this was a necessary element. 379 U.S. 241, 258 (1964). It does not seem plausible that the Court at that point required such an element because racial discrimination in and of itself is not an “economic” activity, even under the definition used by the majority in *Raich*, 125 S. Ct. at 2211 (stating that “[e]conomics’ refers to the production, distribution, and consumption of commodities” (internal quotations omitted)). Instead, the Court in *Heart of Atlanta Motel* stated that “the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce,” leaving aside completely the issue of whether those “local activities” were economic or not. 379 U.S. at 258.

does not believe that this distinction is generally necessary,<sup>133</sup> and since the Court concludes that personal possession of a small amount of marijuana intended for medical use fits within a class of activities that are “economic,”<sup>134</sup> this distinction may be meaningless.

b. *The Concurrence in Judgment*

Justice Kennedy and Justice Scalia both joined the majority opinions in *Lopez* and *Morrison*, and were then part of the six-vote majority to uphold the CSA.<sup>135</sup> Justice Scalia, however, concurred only in the judgment in *Raich*.<sup>136</sup> Justice Scalia found that the CSA was not simply a constitutional use of the Commerce power, but rather, was constitutional only because of the way that Congress may use the Necessary and Proper Clause to effectively regulate with the Commerce Clause.<sup>137</sup> Scalia stated that “Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause”<sup>138</sup> and further that “the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective.”<sup>139</sup> In particular, Justice Scalia emphasized that “[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce” and that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”<sup>140</sup> The emphasis on the Necessary and Proper Clause in *Raich* is interesting since the Clause was mentioned only in the concurring and dissenting opinions in *Lopez* and *Morrison*, where Justice Scalia was part of the majority.<sup>141</sup>

133. See *infra* note 140 and accompanying text.

134. *Raich*, 125 S. Ct. at 2205-07 (noting that it does not matter if individual instances of an activity are not economic if the class of activities as a whole can be considered economic).

135. *Id.* at 2198, 2215; *United States v. Morrison*, 529 U.S. 598, 600 (2000); *United States v. Lopez*, 514 U.S. 549, 550 (1995).

136. *Raich*, 125 S. Ct. at 2215.

137. See *id.* at 2215-20. The Necessary and Proper Clause gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” its enumerated powers. U.S. Const. art. I, § 7, cl. 18.

138. *Raich*, 125 S. Ct. at 2216.

139. *Id.* at 2218 (Scalia, J., concurring).

140. *Id.* at 2216-17.

141. In his concurring opinion in *Lopez*, Justice Clarence Thomas argued that the framers of the Constitution could not have intended the Commerce Clause to include the power to regulate activities that substantially affected interstate commerce because they would not have needed to specify a variety of other congressional powers, including Congress’s power under the Necessary and Proper Clause, if they had so understood the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 587-88 (1995). In his dissent in *Morrison*, Justice

In arguing that *Raich* does not depart from *Lopez* or *Morrison*, Justice Scalia appeared to reconceptualize the main stumbling block of the statute in *Lopez* as being that the gun statute was not part of a broader regulatory scheme.<sup>142</sup> Justice Scalia argued that *Lopez* and *Morrison* stand for the proposition that “Congress may not regulate certain ‘purely local’ activity within the States based solely on the attenuated effect that such activity may have in the interstate market,” and therefore that the majority decision here did not depart from those cases.<sup>143</sup>

c. *The Dissent*<sup>144</sup>

Justices O’Connor and Thomas, along with then-Chief Justice Rehnquist, dissented because they believed that the decision in *Raich* ran counter to the decisions in *Lopez* and *Morrison*. Writing for the three Justices, O’Connor argued that in light of the majority’s opinion, *Lopez* no longer provided meaningful limits on congressional power, but was left as “nothing more than a drafting guide” for Congress.<sup>145</sup> The dissent stressed that the fundamental purpose of policing the limitations of the Commerce Clause, which the Court did in *Lopez* and *Morrison*, is to “protect historic spheres of state sovereignty” and “maintain the distribution of power fundamental to our federalist system of government.”<sup>146</sup> Further, the dissent argued that the Founders had intended the states to be able to “try novel social and economic experiments without risk to the rest of the country,” and that this decision gives Congress the ability to broadly regulate in areas that should be left to the states.<sup>147</sup>

C. *The Tenth Amendment and the Traditional Areas of State Regulation*

The words of Justice O’Connor in the *Raich* dissent echo the concerns stated in Justice Kennedy’s concurrence in *Lopez*—specifically, that there are traditional areas of state regulation that Congress should not be permitted to intrude upon<sup>148</sup>—and both opinions seem to be based on the

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David Souter wrote that the Commerce Clause could not be limited in its reach so that it never could reach noneconomic activity because of the Necessary and Proper Clause. *United States v. Morrison*, 529 U.S. 598, 640 (2000).

142. *Raich*, 125 S. Ct. at 2217-20 (Scalia, J., concurring).

143. *Id.* at 2218.

144. Justice Thomas wrote a separate dissent in which he discussed his own theory of the Commerce Clause, essentially that it should be interpreted as it had been before the New Deal cases, limiting its power so that it could not reach, for example, manufacturing or employment law. *Id.* at 2229 (Thomas, J., dissenting). This dissent echoes Justice Thomas’s concurrences in both *Lopez* and *Morrison*. See *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *Lopez*, 514 U.S. at 584 (Thomas, J., concurring). However, since Justice Thomas’s philosophy has never gained support from any other member of the Court, this Note does not provide any discussion of his separate opinions.

145. *Raich*, 125 S. Ct. at 2223 (O’Connor, J., dissenting).

146. *Id.* at 2220.

147. *Id.*

148. See *supra* notes 91-95, 146, and accompanying text.

concerns that underlie Tenth Amendment jurisprudence. The Tenth Amendment states that “[t]he 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.”<sup>149</sup> This has been interpreted as giving states a general police power that the federal government does not possess.<sup>150</sup> Recently, the Tenth Amendment has garnered increased attention as the Court has restricted federal authority in favor of state sovereignty.<sup>151</sup> The Court stated in *Garcia v. San Antonio Metropolitan Transit Authority* that “undoubtedly” there are “limits on the Federal Government’s power to interfere with state functions.”<sup>152</sup> However, the Court has not gone much further in fleshing out the Tenth Amendment restriction other than citing the Tenth Amendment as the reason Congress cannot force states to treat their nuclear waste in any particular way,<sup>153</sup> or “commandeer” state or local government officials to carry out federal programs.<sup>154</sup>

While neither *Morrison* nor *Lopez* explicitly describes the Tenth Amendment as placing limitations on the Commerce Clause, Justice Kennedy’s concurrence in *Lopez* indirectly implicates the Tenth Amendment in referring to “traditional areas” of state concern.<sup>155</sup> Moreover, at least one commentator has argued that both *Lopez* and *Morrison* effectively use the Tenth Amendment to limit congressional power.<sup>156</sup> One commentator pointed out that Kennedy’s concurring opinion in *Lopez* is consistent with an earlier Supreme Court case, holding that “an

149. U.S. Const. amend. X.

150. See *Bute v. Illinois*, 333 U.S. 640, 649-53 (1948) (upholding a conviction under a state law, discussing at length the importance of the Ninth and Tenth Amendments).

151. See, e.g., *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that Congress cannot impose wage and hours requirements on state employers under the Fair Labor Standards Act); see also Daan Braveman et. al., *Constitutional Law: Structure and Rights in Our Federal System* 435 (2005); *supra* note 43 and accompanying text. In *National League of Cities*, the Court held that although the federal government has the power to enact wage and hours standards, the Tenth Amendment limits the federal government’s ability to override state sovereignty to do so. 426 U.S. at 843-47. This standard is based on the idea that states were immune from federal power in areas where states had traditionally been sovereign and was overturned nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 547 (1985).

152. *Garcia*, 469 U.S. at 547.

153. *New York v. United States*, 505 U.S. 144, 149 (1992).

154. *Printz v. United States*, 521 U.S. 898, 935 (1997).

155. Kopel & Reynolds, *supra* note 46, at 61 n.9. Some commentators have noted this language and theorized that Justice Kennedy and Justice Sandra Day O’Connor, who joined in this concurrence, hoped to return to the rejected standard in *National League of Cities*. See, e.g., Kevin T. Streit, *Can Congress Regulate Firearms?: Printz v. United States and the Intersection of the Commerce Clause, the Tenth Amendment, and the Second Amendment*, 7 Wm. & Mary Bill Rts. J. 645, 652 n.62 (1999) (noting that the “traditional areas of state regulation” language in *Lopez* echoed *National League of Cities*).

156. See Stanley Fields, Student Article, *Leaving Wildlife Out of National Wildlife Refuges: The Irony of Wyoming v. United States*, 44 Nat. Resources J. 1211, 1217 (2004) (“[I]n *United States v. Lopez* and *United States v. Morrison*, the Supreme Court recognized that the Tenth Amendment and principles of federalism require earnest analysis to ensure that Congress does not exceed its limitations and intrude upon authority retained by states.”).

otherwise valid exercise of federal power is void under the Tenth Amendment if it intrudes into an area of traditional state concern."<sup>157</sup>

Although *Morrison* and *Lopez* appear to hold that it is important to keep Congress from regulating in areas where states have traditionally been sovereign, under *Raich*, the question of whether a congressional statute intrudes into a traditional area of state concern does not appear to be important.<sup>158</sup> However, Justice O'Connor's *Raich* dissent discusses the Tenth Amendment at length, arguing that "Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment," and noting that Tenth Amendment-type concerns were alluded to in *Lopez* and *Morrison*.<sup>159</sup> Therefore, questions have been raised with respect to the lengths to which Congress may go in regulating these types of traditionally state-governed areas, including health, education, and general public welfare.<sup>160</sup>

Before *Lopez* and *Morrison*, the line of cases upholding the Civil Rights Act appeared to grant Congress broad power to regulate what could be considered "social" problems.<sup>161</sup> Congress has used, or attempted to use, the Commerce Clause to legislate in areas that appear to be only tenuously connected with interstate commerce, such as racial discrimination, environmental protection, and violence against women.<sup>162</sup> Over the last fifteen years, Congress has included abortion regulation in this use of its powers.<sup>163</sup> Under a theory of state sovereignty over traditional areas of state regulation, derived from the Tenth Amendment, these regulations could be problematic.

The next section of this Note describes the various ways in which Congress has legislated, or has proposed to legislate, with regard to abortion. This section describes how Congress first began to legislate in the area of abortion with a non-Commerce Clause approach and then describes the new direction Congress appears to be pursuing in using the Commerce Clause to regulate abortion.

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157. Kopel & Reynolds, *supra* note 46, at 71 n.54 (citing *United States v. Butler*, 297 U.S. 1 (1936)); *see also* *United States v. Lopez*, 514 U.S. 549, 582-84 (1995) (Kennedy, J., concurring).

158. The majority in *Raich* rejected without discussion the respondents' argument that the Tenth Amendment prevents the federal government from regulating in the area of health care as a traditional area of state control. *Gonzales v. Raich*, 125 S. Ct. 2195, 2200 (2005).

159. *Id.* at 2226 (O'Connor, J., dissenting).

160. *Id.* at 2221 (arguing that the police powers of defining criminal law and "protect[ing] the health, safety, and welfare of their citizens" have always been considered to be solely within the purview of the states).

161. *See supra* notes 63-66 and accompanying text.

162. *See supra* notes 76-78 and accompanying text; *see also* VAWA, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

163. *See, e.g.*, FACE, 18 U.S.C. § 248 (2000); Partial-Birth Abortion Ban Act of 2003 (PBABA), Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (Supp. III 2003)).

## 1. The Commerce Clause and Abortion Regulation

a. *Congress's First Attempts to Reach Abortion Using the Congressional Spending Power*

Before *Roe*,<sup>164</sup> Congress had never directly regulated abortion. However, immediately afterward, the first of a number of laws, in the guise of an amendment to an appropriations bill, was proposed by Senator Henry Hyde of Illinois, “limit[ing] federal funding for abortions through Medicaid and all other HHS programs to those necessary to save a woman’s life and . . . in cases of rape and incest, or where the pregnancy would cause ‘severe and long-lasting physical health damage’ to the woman.”<sup>165</sup> A line of Supreme Court cases upheld the constitutionality of federal and state statutes, as well as executive orders and regulations, that refused to fund abortion services for non-medically necessary abortions and prohibited government workers from providing information or referrals regarding abortion.<sup>166</sup>

b. *Congress's New Direction: Regulating Abortion Under the Commerce Clause*

Until 1993, the only abortion regulations enacted by Congress involved the use or withholding of federal funding, and were therefore enacted under the congressional Spending Power.<sup>167</sup> These bills were also generally introduced by Republican Congress members.<sup>168</sup> However, in 1993, after many investigative hearings, pro-choice members of Congress found that there was an ongoing concerted national effort to protest, accost, and otherwise prevent patients from accessing abortion clinics, sometimes

164. 410 U.S. 113 (1973).

165. Ctr. for Reprod. Rights, A Timeline of Supreme Court Decisions Protecting Privacy, [http://www.crlp.org/crt\\_roe\\_timeline.html](http://www.crlp.org/crt_roe_timeline.html) (last visited July 23, 2006).

166. See *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

167. U.S. Const. art I, § 8, cl. 1. Generally, the spending power has been construed to allow Congress to appropriate funds for whatever purpose it chooses and to restrict both the use of the funds and to some extent the activities of the states or parties receiving the funds. See, e.g., *Sabri v. United States*, 541 U.S. 600, 605 (2004) (“Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare, and it has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare.”); *Rust*, 500 U.S. at 177 (upholding a statute which prohibited recipients of Title X funding, doctors and health clinics, from counseling patients about abortion, as a valid use of the spending power); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that it was constitutional for Congress to condition the receipt of federal highway funds on the state-recipient’s passing a law raising the minimum age for alcohol purchase to twenty-one years of age).

168. See Alison Mitchell, *Senate Votes to Ban a Controversial Abortion Procedure*, N.Y. Times, Oct. 22, 1999, at A20.

leading to violence and often to the closure of the clinics.<sup>169</sup> In response, Congress passed the Freedom of Access to Clinic Entrances Act (FACE).<sup>170</sup> Rather than regulate abortion, FACE regulated the actions of protestors outside abortion clinics and reproductive health facilities, and was intended to protect clinics that the states were unable or unwilling to protect.<sup>171</sup>

Two years earlier, Democrats in Congress had proposed the Freedom of Choice Act (FOCA), and in 1993 they introduced it again.<sup>172</sup> FOCA was also based on Congress's Commerce power and was intended to preserve the original holding of *Roe*, specifically that states could not interfere with a woman's choice to terminate a pregnancy before viability,<sup>173</sup> at a time when many in Congress believed that the Court was close to overruling the case.<sup>174</sup> Although the bill originally garnered a great deal of support and attention, the election of William J. Clinton in 1992 as well as a backlash from conservative politicians in Washington shifted the focus away from protecting the right to abortion toward widening access to reproductive health services.<sup>175</sup> FOCA was reintroduced in 1995 but failed to garner any

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169. See *Providing for Consideration of S. 636, Freedom of Access to Clinic Entrances Act of 1993, and Motion to Substitute H.R. 796*, 140 Cong. Rec. H1498 (1994) (statement of Rep. Charles Schumer).

170. FACE, Pub. L. No. 103-259, 108 Stat. 694 (codified at 18 U.S.C. § 248 (2000)). Among other purposes, the Act was intended to

promote the public safety and health activities affecting interstate commerce by establishing federal criminal penalties and civil remedies for certain violent, threatening and destructive conduct intended to injure, intimidate or interfere with a person seeking to obtain or provide reproductive health services.

*Id.* FACE subjects violators to civil and criminal activities when they do the following: (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 at a place of religious 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 . . . .

*Id.*

171. See 140 Cong. Rec. H1498 (1994) (statement of Rep. Charles Schumer).

172. See Freedom of Choice Act (FOCA), S. 25, H.R. 25, 102d Cong. (1991); FOCA, S. 25, H.R. 1068, 103d Cong. (1993).

173. *Roe v. Wade*, 410 U.S. 113 (1973).

174. In 1992, the Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), affirming the central holding in *Roe*. However, the *Casey* Court allowed many new restrictions on abortion services to remain in place. *Id.* Consequently, many activists and members of Congress were concerned that the broad fundamental right recognized in *Roe* was being chipped away and wanted to ensure that, no matter the composition of the Court, the right to choose would remain. See Gloria Feldt, *Twenty Years Later Future Is Up to Voters*, *Ariz. Republic/Gazette*, Jan. 24, 1993, at C5.

175. Kevin Merida, *Abortion Bill Overtaken by Health Reform; Rights Groups Focus on Ensuring Access*, *Wash. Post*, Mar. 21, 1994, at A1.

serious attention.<sup>176</sup> In 2006, FOCA was again reintroduced, and currently has eleven co-sponsors in the Senate and fifty-five co-sponsors in the House.<sup>177</sup> FOCA is attracting new attention as it has become clear that *Roe* is in jeopardy, due to the appointments of Chief Justice John Roberts and Justice Samuel Alito to the Supreme Court, as well as a law passed in South Dakota outlawing abortion that is intended to provoke a court battle to challenge *Roe*.<sup>178</sup>

Both FACE and FOCA were legislative initiatives pushed by Democrats and pro-choice advocacy groups. In contrast, between 1993 and 2003, the most significant piece of abortion legislation on the Republican and conservative agenda was the Partial-Birth Abortion Ban Act of 2003 (PBABA).<sup>179</sup> The PBABA was introduced and passed by Congress in 1995, 1997, 2000, and 2003.<sup>180</sup> On each of the first three occasions, President Clinton vetoed the Act because it lacked a health exception.<sup>181</sup> In

176. FOCA, H.R. 776, 104th Cong. (1995). FOCA was also introduced in 2004 and gained slightly more support. FOCA, S. 2020, H.R. 3719, 108th Cong. (2004).

177. FOCA, S. 2593, H.R. 5151, 109th Cong. (2006).

178. Jeremy Alford, *Louisiana Governor Plans to Sign Anti-abortion Law*, N.Y. Times, June 7, 2006, at A18; Douglas McCollam, *Can "Roe" Survive the Arrival of Alito?*, Legal Times, Dec. 7, 2005, <http://www.law.com/jsp/article.jsp?id=1133863511391>.

179. See David Firestone & Sheryl Gay Stolberg, *The Majority Starts a Step Behind*, N.Y. Times, Jan. 7, 2003, at A17; Todd S. Purdum, *Elizabeth Dole Is Shunning 'Dead End' Abortion Fight*, N.Y. Times, Apr. 10, 1999, at A10. Currently, there are two other pieces of legislation dealing with abortion that have been proposed by conservatives and are being considered by Congress. The first, the Child Custody Protection Act as it is known in the Senate (also known, with some major differences, as the Child Interstate Abortion Notification Act in the House), would make it a federal crime to "transport a minor" across state lines in order to help the minor seek out an abortion in a state that does not require parental consent, if her home state requires such consent. Child Custody Protection Act, S. 396, 109th Cong. (2005); Child Interstate Abortion Notification Act, H.R. 748, 109th Cong. (2005). This proposed law suffers from a variety of constitutional infirmities, which are beyond the scope of this Note. See Joanna S. Liebman, Note, *The Underage, the "Unborn," and the Unconstitutional: An Analysis of the Child Custody Protection Act*, 11 Colum. J. Gender & L. 407 (2003). The second piece of legislation is the Parental Notification and Intervention Act of 2005, which proposes a national parental consent law. H.R. 2971, 109th Cong. (2005). This bill has no jurisdictional element, findings, or apparent connection to interstate commerce, nor does it mention the Commerce Clause as its locus of authority. *Id.* While all of those features might raise significant issues under a *Lopez* or possibly even *Raich* view, since this legislation is in the very early stages of discussion in Congress, this Note does not speculate further about its constitutionality.

180. PBABA, S. 939, H.R. 1833, 104th Cong. (1995); PBABA, S. 6, H.R. 1122, 105th Cong. (1997); PBABA, S. 1692, H.R. 3660, 107th Cong. (2000); PBABA, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (Supp. III 2003)).

181. Brian Knowlton, *Gay and Abortion Rulings Underscore Stakes of Presidential Race*, Int'l Herald Trib., June 30, 2000, at 3. In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Supreme Court struck down a state "partial-birth" abortion ban that was almost identical to the one passed in 1995, 1997, 2000, and 2003. See *id.* at 929-30. The state statute also banned so-called "partial-birth" abortions and contained an exception in cases where it is necessary to save the life of the mother. *Id.* at 921. However, the law did not provide an exception for cases in which it is necessary to save the health of the mother, and the Supreme Court held that this was an undue burden on a woman's right to choose to terminate a pregnancy. *Id.* at 929-30.

2003, President Bush signed the Act into law.<sup>182</sup> The PBABA, like FACE and FOCA, grounds congressional authority in the Commerce Clause, by stating that the law applies to doctors who perform abortions “in or affecting interstate . . . commerce.”<sup>183</sup>

Beyond the statutes already proposed or passed, other possibilities exist should *Roe* be overturned. Congress could propose a ban on abortion nationwide, or pass other restrictions on abortion provisions such as parental involvement statutes or national waiting periods.<sup>184</sup>

### E. Multiple Methodologies

The question of whether abortion can be regulated is not as straightforward as it may first appear. Just as guns can be regulated in a variety of ways that may or may not be allowed under the Commerce Clause,<sup>185</sup> abortion can also be regulated in a variety of ways. The constitutionality of federal laws regulating abortion may depend upon whether Congress attempts to regulate the procedures for providing abortions, access to abortion services, or the type of person who is able to provide or receive abortions. Whether Congress can regulate abortion in any particular way will depend on how a court analyzes any law in light of Commerce Clause precedent.<sup>186</sup>

As discussed above, the Court in *Lopez* identified three categories of activity that can be regulated by Congress under the Commerce Clause.<sup>187</sup> While it appears to be difficult, if not impossible, to resolve the rationales of *Lopez*, *Morrison*, and *Raich*, *Raich* claimed to adhere to these three categories of regulable activity and thus any inquiry about abortion must

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182. PBABA, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (Supp. III 2003)); Richard Stevenson, *Bush Signs Ban on a Procedure for Abortions*, N.Y. Times, Nov. 6, 2003, at A1. Although *Stenberg* is still good law, congressional supporters of the PBABA argued that the Court's finding that the procedure may be necessary in some cases to save the health of the mother was inaccurate and urged that Congress need not adhere to it. See *Stenberg*, 530 U.S. at 934; *Carhart v. Gonzales*, 413 F.3d 791, 793 (8th Cir. 2005) (quoting congressional findings from the PBABA as saying that a “moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited”).

183. PBABA, 18 U.S.C. § 1531 (Supp. III 2003).

184. McCollam, *supra* note 178 (noting that if *Roe* were overturned, “[i]t is . . . possible that Congress could set a national abortion policy, as legislators did on a smaller scale when they banned so-called ‘partial-birth’ abortion in 2003”); see also Rosen, *supra* note 5, at 65 (theorizing that if *Roe* were overturned, there would be a group of hard-line conservative senators who would likely introduce some kind of “draconian abortion ban,” and discussing the likelihood, or unlikelihood, of such a ban reaching the Senate floor).

185. *Compare* United States v. *Lopez*, 514 U.S. 549 (1995) (holding that a statute regulating simple possession of a handgun within a school zone is unconstitutional), *with* United States v. *Franklyn*, 157 F.3d 90 (2d Cir. 1998) (holding that regulating simple possession of machine guns is constitutional because the regulation was part of a broader scheme regulating machine guns).

186. See Law, *supra* note 7, at 409-17.

187. See *supra* note 87 and accompanying text.

still be conducted within this framework. If abortion or abortion services are to be regulated under the Commerce Clause, they would have to be understood to fit within one of the last two categories, as “commerce” that can be regulated “even though the threat may come only from intrastate activities”<sup>188</sup> or as activities that can be regulated even though they are not themselves interstate commerce because they have “a substantial relation to interstate commerce.”<sup>189</sup> *Lopez* laid out important factors that should be present for something to be regulable under the third category: There should be a jurisdictional element, making it clear to courts how to determine whether a particular action falls within the statute by laying out the necessary connection between the item regulated and interstate commerce (i.e., that a gun has traveled in interstate commerce); congressional findings as to how the activity affects interstate commerce are helpful, especially when “no such substantial effect [is] visible to the naked eye”;<sup>190</sup> the activity itself must be economic in nature; and the regulation should be part of a comprehensive regulatory scheme for which regulating this particular intrastate activity is necessary to make the scheme workable.<sup>191</sup>

In *Morrison*, the Court added to these considerations what was later termed the “non-infinity” principle<sup>192</sup> and then clarified the concept—that the link between the activity and commerce must not be too “attenuated.”<sup>193</sup> Together, *Lopez* and *Morrison* can be read to present a heavy burden for Congress to meet in order to regulate intrastate activity. These decisions also appear to call into question a number of decisions made by the Court after the New Deal where the Court had deferred to congressional findings and intent.<sup>194</sup>

In *Raich*, the Court backed away from the *Lopez* and *Morrison* factors. While maintaining that *Lopez* and *Morrison* were still good law, the Court emphasized that *Lopez* and *Morrison* must be read in context with all the post-New Deal Commerce Clause jurisprudence.<sup>195</sup> The *Raich* Court gave

188. *Lopez*, 514 U.S. at 558.

189. *Id.* at 559.

190. *Id.* at 563.

191. *See id.* at 559-68.

192. *See supra* note 104 and accompanying text.

193. *United States v. Morrison*, 529 U.S. 598, 610-14 (2000). For example, in *Morrison*, the Court found that the connection between commerce and violence against women was too “attenuated.” *Id.* at 615.

194. The categories and requirements laid out in *Lopez* and *Morrison* were not discussed in earlier Commerce Clause cases, and in fact, earlier cases were based on an understanding of the Commerce Clause which now seems in doubt. For example, the Court’s decision in *Katzenbach v. McClung* held that “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” 379 U.S. 294, 302 (1964). For further discussion of the economic/noneconomic distinctions between the post-New Deal Commerce Clause cases and the post-*Lopez* Commerce Clause cases, see *supra* note 132 and the accompanying text.

195. *Gonzales v. Raich*, 125 S. Ct. 2195, 2209 (2005).

great deference to Congress, holding that Congress need have only a rational basis for believing that an activity has a substantial effect on interstate commerce and noting that in cases where the activity is "economic,"<sup>196</sup> no particularized findings are necessary. Justice Scalia's *Raich* concurrence went further, stating that the regulation of noneconomic intrastate activity is also constitutional if the activity is reached as part of a broader regulatory scheme.<sup>197</sup>

Essentially, the conclusion a court reaches will be guided by whether it adopts a *Lopez/Morrison* or *Raich* methodology. Abortion appears to fall within the categories mentioned in Justice Kennedy's *Lopez* concurrence and Justice O'Connor's *Raich* dissent in that it has traditionally been regulated by the states, not by the federal government,<sup>198</sup> both because it is a part of the practice of medicine and because it is a social issue often thought best left to the states.<sup>199</sup> In addition, the question of whether an abortion procedure itself is commerce has yet to be entirely settled: although some circuit courts have concluded that abortion is commerce,<sup>200</sup> dissenting judges on these circuits have disagreed,<sup>201</sup> and the Supreme Court has never addressed this issue. Depending on how a court wanted to address the question of "economic" activity, the choice to perform an abortion or to dispense a particular drug that will cause an abortion may not be an economic decision, even though there are economic effects. Even the fact that an abortion generally has to be paid for is not necessarily conclusive; as Justice Stevens pointed out in *Lopez*, a gun, too, at some point must have been bought and sold in order to end up in someone's hands near a school,<sup>202</sup> but that was not enough for the majority in *Lopez*.<sup>203</sup>

After *Lopez* and *Morrison*, the lack of clarity around the Commerce Clause led a number of commentators to propose their own solutions. Some commentators believe that *Lopez* and *Morrison* signaled a willingness to return to the strict analysis of the pre-New Deal era and actively supported such a move.<sup>204</sup> Other commentators, including Justice Breyer, seem to believe that a new kind of "hard look" or "clear statement" test would have better results, whereby the Court could essentially ask Congress for a clearly explained, well-thought-out justification for legislation, and in return, the Court would give that explanation due deference.<sup>205</sup> Still other

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196. *Id.* at 2211 (noting that "[e]conomics" refers to the production, distribution, and consumption of commodities" (internal quotations omitted), as defined in a dictionary published in 1966).

197. *Id.* at 2217 (Scalia, J., concurring).

198. *See supra* notes 91-95, 145-47 and accompanying text; *see also infra* note 326 and accompanying text (discussing early state and federal abortion laws).

199. *See supra* notes 91-95, 146 and accompanying text.

200. *See infra* notes 229-31 and accompanying text.

201. *See infra* notes 285-96 and accompanying text.

202. *United States v. Lopez*, 514 U.S. 549, 602 (1995) (Stevens, J., dissenting).

203. *Id.* at 565.

204. *See McGinnis & Somin, supra* note 70, at 113-14; Barnett, *supra* note 68, at 146.

205. *See Breyer, supra* note 82, at 65 (arguing that these types of doctrines would "require Congress to look hard at and speak clearly on a matter, but they rarely would create

commentators advocate a complete return to the more plenary view of the post-New Deal era.<sup>206</sup> Two others, commentators Robert Pushaw and Grant Nelson, have suggested a test they have dubbed “neo-federalism,” which involves a two-part test: First, the activity must be “commerce,” meaning “the voluntary sale of property or services and all accompanying activities intended for the marketplace”; and “[s]econd, the commerce regulated must be ‘among the several states,’” meaning commerce between two or more states or commerce occurring in one state but affecting others.<sup>207</sup> One thing all the commentators seemed to agree upon even before *Raich* is that the Court has entered an area that had been considered clear, albeit one in which little judicial review seemed to take place, and has made it cloudy.<sup>208</sup> Without a clear indication from the Court about how it intends to proceed, lower courts will have a great deal of leeway to make these kinds of important decisions.

Ultimately, it could be that a court viewing abortion through the *Lopez/Morrison* lens would find that this was not an area that Congress could legitimately reach, because it is an area traditionally regulated by states and because an abortion is not necessarily an “economic activity,” whereas a Court viewing abortion through a *Raich* lens would probably disagree, because congressional decision making and findings would be given deference and because abortion would probably be found to have an effect on commerce even if it were not commerce itself. However, the lines are not fixed, and since the guidance from the Court is so nebulous, it is possible that a court applying either theory could find abortion regulable or non-regulable, depending on which elements of either methodology they utilized, and on how the statute was drafted. In predicting how a court would resolve these issues, a primary consideration will be the court’s attitude toward federalism, respect for traditional areas of state sovereignty, and deference for the political process.<sup>209</sup>

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an absolute ‘federalism-based’ bar to legislation”); Killenbeck, *supra* note 81, at 49 (arguing for a new standard that “resembles but does not mirror the ‘hard look’ approach taken by the Court . . . in particular in certain administrative law matters . . . it is a standard Congress itself has imposed on executive agencies, where, for example, it believes it necessary to guarantee that the agency has taken a ‘hard look’ at the environmental consequences of proposed federal action” (internal quotations omitted)).

206. See Lynn A. Baker, *Lochner’s Legacy for Modern Federalism: Pierce County v. Guillen as a Case Study*, 85 B.U. L. Rev. 727, 735 (2005); Law, *supra* note 7, at 396.

207. Pushaw, *supra* note 26, at 345-46; see also Grant S. Nelson, *A Commerce Clause Standard for the New Millennium: “Yes” to Broad Congressional Control over Commercial Transactions; “No” to Federal Legislation on Social and Cultural Issues*, 55 Ark. L. Rev. 1213, 1215-18 (2003).

208. See Killenbeck, *supra* note 81, at 58.

209. Denning & Reynolds, *supra* note 104, at 1253, 1263 (discussing the lower courts’ responses to *Lopez* and *Morrison*, and noting that the courts for the most part have tended to limit those cases to their facts rather than follow them to their logical conclusions); see also Pushaw, *supra* note 26, at 321 (“[C]urrent Commerce Clause jurisprudence depends largely on federal judges’ instinctive assessments about whether a particular activity is ‘commercial,’ affects interstate commerce ‘substantially,’ or trenches upon a matter of historical state control.”).

Part II of this Note discusses the different ways in which courts could apply *Lopez*, *Morrison*, and *Raich* to congressional legislation regulating abortion. Part II first lays out the variety of ways in which Congress could or has regulated abortion. It then discusses the different considerations presented by each of the three cases and describes how a lower court could choose to follow either the *Lopez/Morrison* type of analysis or the *Raich* type of analysis to reach differing conclusions on the constitutionality of legislation. Following that overview, Part II explores in detail the two different approaches, *Lopez/Morrison* and *Raich*, and the potential results if those approaches were to be applied to federal abortion laws, both those expanding and restricting access to abortion.

## II. DOES CONGRESS HAVE THE POWER TO REGULATE ABORTION UNDER THE COMMERCE CLAUSE?

The recent Commerce Clause cases present Congress with a challenge: will the laws it passes with the Commerce power be upheld as valid or struck down as overreaching? The restrictions that *Lopez* seemed to place upon congressional authority angered many Congress members who believe that Congress, and not the Court, has the power to determine how to use the Commerce and other constitutionally granted powers.<sup>210</sup> After *Raich*, it is possible that the concerns raised by Congress members will be alleviated.<sup>211</sup> However, it is not clear whether *Raich* is truly the last word in this debate because of the Court's assertion that both *Lopez* and *Morrison* remain good law;<sup>212</sup> in the meantime, Congress has continued to pass and consider legislation based on the Commerce power, including regulations dealing with abortion.<sup>213</sup> Since the Court left both *Lopez* and *Morrison* intact and yet reached what appears to be a contradictory opinion in *Raich*,

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210. Congressional response to the Supreme Court's "new" Commerce Clause jurisprudence became very clear during the confirmation hearings of Chief Justice John Roberts and Justice Samuel Alito. During both sets of hearings, several senators commented about their disagreement with the restriction of congressional power resulting from these decisions and asked then-nominees Roberts and Alito whether they also believed that the Commerce power was thus limited. See Linda Greenhouse, *Judge Roberts, the Committee Is Interested in Your View on . . .*, N.Y. Times, Sept. 11, 2005, at A1 (quoting from a letter written by Sen. Arlen Specter, Republican from Pennsylvania, to then-Supreme Court nominee Judge Roberts stating that many in Congress "are irate about the court's denigrating and, really, disrespectful statements about Congress's competence" in *Lopez* and *Morrison*); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States, Hearing Before the Committee on the Judiciary*, 109th Cong. 277 (2006) (statement of Sen. Dianne Feinstein, Member, S. Comm. on the Judiciary) (stating in her opening remarks that "I have very deep concern about the legacy of the Rehnquist court and its efforts to restrict congressional authority to enact legislation by adopting a very narrow view of several provisions of the Constitution, including the Commerce Clause and the 14th Amendment").

211. See *supra* notes 128-30 and accompanying text.

212. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2209-11 (2005).

213. See *supra* notes 170, 176, 183 and accompanying text.

without further guidance lower courts will likely be able to support conclusions relying on any or all of the cases.<sup>214</sup>

The next two sections of this Note explore what would happen to federal abortion laws if lower courts chose to follow the deferential logic of *Raich*, or determined that, since *Raich* left *Lopez* and *Morrison* intact, those cases provide more important guidance in Commerce Clause cases. The first section discusses how a lower court might find that most congressional abortion laws would be legitimate after *Raich*, and the second section discusses how it is equally plausible that lower courts would find that federal abortion laws were overreaching by Congress.

#### A. *After Raich, It Is Possible that Congress Could Widely Regulate Abortion*

Congress could choose to regulate abortion in a number of different ways, either by passing laws intended to expand access and ensure its legality nationwide, or to restrict access, or possibly even trying to ban it altogether if *Roe* were overturned. With any such legislation, there would be a question about whether the statute would be upheld as a constitutional exercise of the Commerce power, or struck down as an overreaching of Congress's power.

There are two current examples of legislation intended to expand access to abortion. The proposed FOCA<sup>215</sup> purports to ensure access to abortion by making it illegal for states to ban abortion before viability, or after viability in cases where necessary to save the life or health of the mother.<sup>216</sup> FOCA would roll back the restrictions that many states have put in place since *Planned Parenthood v. Casey*, such as waiting periods, parental consent laws, and "informed consent" laws; if *Roe* were overturned, FOCA would ensure that the right to abortion was still protected. FACE, passed in 1994, is intended to ensure access to abortion by making it illegal to prevent

214. See Pushaw, *supra* note 18, at 884 ("Just as many scholars prematurely heralded *Lopez* as the beginning of a Commerce Clause revolution, others now may be too quick to characterize *Raich* as the end." (footnote omitted)); Reynolds & Denning, *supra* note 48, at 932-33.

215. See *supra* notes 172-78 and accompanying text.

216. FOCA, S. 2593, H.R. 5151, 109th Cong. (2006). The prohibitions in section 4 of the Act read as follows:

- (b) Prohibition of Interference—A government may not—
  - (1) deny or interfere with a woman's right to choose—
    - (A) to bear a child;
    - (B) to terminate a pregnancy prior to viability; or
    - (C) to terminate a pregnancy after viability where termination is necessary to protect the life or health of the woman; or
  - (2) discriminate against the exercise of the rights set forth in paragraph (1) in the regulation or provision of benefits, facilities, services, or information.
- (c) Civil Action—An individual aggrieved by a violation of this section may obtain appropriate relief (including relief against a government) in a civil action.

*Id.*

patients or staff from entering clinics where reproductive health services are provided, or to damage those clinics.<sup>217</sup>

As for legislation restricting or banning abortion, there is an important constitutional consideration: *Roe v. Wade*,<sup>218</sup> as modified by *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>219</sup> protects the right of women to obtain abortions until viability without an undue burden placed on that right by the government; therefore, it is unconstitutional for Congress to enact a country-wide ban. However, Congress has passed one piece of legislation that has banned certain abortion procedures, specifically so-called “partial-birth” abortion.<sup>220</sup> Presumably, if the PBABA is constitutional, Congress has the ability to regulate other abortion procedures as well, or, in the absence of constitutional protections for abortion rights, to ban it altogether.

### 1. Expanding and Protecting Access to Abortion

A court might approach the question of the Commerce Clause’s range by concluding that *Raich* was the most relevant precedent and that *Morrison* and *Lopez* had been, as Justice O’Connor suggested in the *Raich* dissent, mere “drafting guides” for a Congress that needed a reminder of its limitations.<sup>221</sup> From that perspective, the inquiry shifts slightly but significantly, away from the legitimacy of the jurisdictional elements and findings and toward whether Congress could have rationally concluded that the activity being regulated substantially affects interstate commerce, and possibly to some extent whether the activity is economic or is part of a larger regulatory package.<sup>222</sup> Any regulation by Congress seeking to expand access to a particular kind of paid-for service would seem to fulfill these basic requirements, especially if Congress makes findings indicating that the practice has a substantial effect on interstate commerce. The following section will discuss the decisions upholding FACE, as a prime example of how the *Raich* perspective would probably find abortion regulation to be constitutional.

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217. FACE, 18 U.S.C. § 248 (2000). See *supra* note 170 for relevant statutory language.

218. 410 U.S. 113 (1973).

219. 505 U.S. 833 (1992).

220. PBABA, 18 U.S.C. § 1531 (Supp. III 2003). There is no specific procedure called “partial-birth” abortion; the term was created by Republican activists to refer to a procedure sometimes known to doctors as “intact dilation and extraction.” Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything to Lose*, Harpers, Nov. 1, 2004, at 33, available at <http://www.harpers.org/GamblingWithAbortion.html>. For a brief discussion of other proposed legislation which attempts to limit access to abortion, see *supra* note 183.

221. *Gonzales v. Raich*, 125 S. Ct. 2195, 2221 (2005) (O’Connor, J., dissenting).

222. *Id.* at 2205-15.

a. *The Freedom of Access to Clinic Entrances Act, Upheld as Constitutional*

Because FACE has been challenged and upheld so many times,<sup>223</sup> it provides ample evidence of how a court could uphold an abortion-related statute, especially after *Raich*. As of 2005, eight circuit courts have upheld FACE on the grounds that abortion services substantially affect interstate commerce and therefore that obstructing the entrance to a clinic is an obstruction of commerce that can be reached under the Commerce power.<sup>224</sup> These circuits appear to be employing a *Raich*-like methodology, which tends to lead to the conclusion that Congress can ensure access to abortion in a number of different ways.

All of the cases in which FACE has been challenged arose under circumstances in which protestors were accused of physically obstructing abortion services facilities.<sup>225</sup> For example, the Seventh Circuit upheld FACE in *United States v. Wilson*, where protestors were charged with violating FACE by blockading the Wisconsin Women's Health Care Center by welding themselves into cars and then wedging those cars into the clinic's doors.<sup>226</sup>

Before *Lopez* was decided, the Fourth Circuit upheld the Act because "interstate commerce was threatened" by the fact that the protestors were obstructing clinics that employed at least some doctors who had practices in multiple states, purchased medical supplies and office supplies that move in interstate commerce, and attracted a clientele from multiple states.<sup>227</sup> Even after *Lopez* and *Morrison*, every circuit to address FACE has upheld it.<sup>228</sup> The courts have emphasized, despite strong dissents, that their role is to "decide whether a rational basis exists for concluding that [the] regulated activity substantially affects interstate commerce" and have held that such a basis exists.<sup>229</sup> For example, in *United States v. Gregg*, the Third Circuit found that, unlike the gender-motivated crimes targeted by the statute struck down in *Morrison*, "the activity regulated by FACE . . . is activity with an

223. See, e.g., *United States v. Bird*, 401 F.3d 633 (5th Cir. 2005); *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002); *United States v. Gregg*, 226 F.3d 253 (3d Cir. 2000); *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997); *United States v. Bird*, 124 F.3d 667 (5th Cir. 1997); *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996); *United States v. Unterburger*, 97 F.3d 1413 (11th Cir. 1996); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996); *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995).

224. See *supra* note 223.

225. See, e.g., *Wilson*, 73 F.3d 675; *United States v. Operation Rescue Nat'l*, 111 F. Supp. 2d 948 (S.D. Ohio 1999).

226. *Wilson*, 73 F.3d at 677.

227. *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 647 (4th Cir. 1995).

228. See *Saylor*, *supra* note 31, at 112; see also *supra* note 224.

229. *Wilson*, 73 F.3d at 680; see also *Cheffer v. Reno*, 55 F.3d 1517, 1520 (11th Cir. 1995) (upholding FACE because "the provision of reproductive health services" is "commercial activity," and because there is an interstate market for these services, and clinics "receive supplies through interstate commerce").

effect that is economic in nature.”<sup>230</sup> *Gregg* held that Congress “had a rational basis upon which to conclude that the activities governed by FACE had a substantial effect on interstate commerce,” based on extensive findings showing that “a national market for abortion-related services exists . . . and that reproductive health clinics are directly engaged in interstate commerce.”<sup>231</sup>

It seems that the courts upholding FACE were almost prescient in predicting that the Supreme Court really did intend to give deference to Congress’s rational basis, as the Supreme Court ultimately did in *Raich*.<sup>232</sup> These courts have even seemed to go beyond *Raich*, relying heavily on the line of cases starting with *Heart of Atlanta Motel*,<sup>233</sup> which all focus on the fact that interstate commerce is affected when private parties obstruct or fail to serve those engaged in commerce, essentially accepting that as long as there is an economic effect it does not matter if the activity itself is economic.<sup>234</sup> One commentator pointed out that the *Gregg* Court recognized the similarity between FACE and the Civil Rights Act of 1964, upheld in *Heart of Atlanta Motel* because the discrimination targeted by the Civil Rights Act similarly resulted in fewer customers or fewer people being able to participate in commerce.<sup>235</sup>

Circuit courts upholding FACE have focused on the economic nature of the activity being protected.<sup>236</sup> Since *Lopez* and later *Morrison* emphasized that the reason the two laws were struck down was because they both regulated “non-economic” activity, courts defending FACE had to hold that even though the activity being regulated—protesting at clinics—is not inherently economic, the fact that the activity was aimed at preventing or threatening commerce made the statute sufficiently related to “economic activity” to fall within Congress’s power.<sup>237</sup> Before *Morrison* was decided, one commentator noted that “FACE has a stronger commercial flavor than does VAWA” and thus surmised that it was likely that even if VAWA was struck down, FACE would continue to be upheld.<sup>238</sup> A court following *Raich* would likely agree with this commentator, but there are still some lingering questions. As mentioned earlier, while the New Deal decisions

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230. *United States v. Gregg*, 226 F.3d 253, 262 (3d Cir. 2000). In *Gregg*, the United States sought a permanent injunction and damages against a group of thirty people who “were an ongoing threat” to a clinic in Englewood, New Jersey. *Id.* at 256.

231. *Id.* at 263.

232. See *supra* notes 107, 130 and accompanying text (discussing the dissents in *Lopez* and *Morrison*, and majority opinion in *Raich*).

233. 379 U.S. 241 (1964)

234. See, e.g., *Gregg*, 226 F.3d at 270; *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998); *Terry v. Reno*, 101 F.3d 1412, 1417 (D.C. Cir. 1996); *United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir. 1996); see also Nicole Huberford, Note, *The Commerce Clause Post-Lopez: It’s Not Dead Yet*, 28 Seton Hall L. Rev. 182 (1997); *supra* note 132.

235. Saylor, *supra* note 31, at 115.

236. See *supra* notes 227-35 and accompanying text.

237. See *supra* notes 227-35 and accompanying text.

238. Huberford, *supra* note 234, at 205.

and those afterward focused on the effect of the activity to be regulated, *Raich*, like *Lopez* and *Morrison*, remained focused on the nature of the activity to be regulated.<sup>239</sup> Though *Raich* defines “economic” very broadly, it is still possible to view criminal activity obstructing commerce as noneconomic itself. However, if *Raich* indicated the beginning of a return to the post-New Deal jurisprudence, then the fact that the activity has a substantial economic effect on interstate commerce will be sufficient for Congress to be able to regulate it, despite the fact that the regulated activity itself does not appear to be economic.

b. *The Freedom of Choice Act, Other Protections for Abortion Rights, and Raich*

FOCA, the proposed legislation intended to ensure the legality of abortion nationwide, provides a concrete example of how an Act expanding or protecting access to abortion services could be crafted.<sup>240</sup> FOCA contains findings indicating that reproductive health services are commonly sought by women who travel from state to state to obtain them, and are provided by physicians and staff who travel from state to state in order to provide them.<sup>241</sup> In the same way that the Civil Rights Act addresses the way that discrimination limits commerce by making it illegal to discriminate if a business engages in interstate commerce,<sup>242</sup> FOCA seeks to end the prohibition of particular kinds of abortion or abortion services by making it illegal to ban that kind of activity because those bans limit commerce in abortion services. Based on the holdings of the circuit courts with reference to FACE, it seems that under a *Raich* perspective, courts would hold that Congress could rationally conclude that “purely local activities” such as the provision of abortions in one state, are part of a class of economic activities that have a substantial effect on interstate commerce when aggregated.<sup>243</sup> In addition, as these courts have recognized,<sup>244</sup> there is a similarity to the Civil Rights Act’s attempt to stop racial discrimination

239. *Gonzales v. Raich*, 125 S. Ct. 2195, 2198 (2005).

240. See *supra* notes 172-77, 215 and accompanying text.

241. See FOCA, S. 2593, H.R. 5151, 109th Cong. § 2 (2006).

242. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

243. See *Raich*, 125 S. Ct. at 2205. The Alan Guttmacher Institute estimates that there are approximately 1.4 million abortions performed in the United States each year. Stanley K. Henshaw, Susheela Singh & Taylor Haas, *The Incidence of Abortion Worldwide*, 25 *Fam. Plan. Persp. Supp.* S30, S34 (1999), available at <http://www.guttmacher.org/pubs/journals/25s3099.html>. If one state limited abortion only to the first three months, for example, the effect on interstate commerce, as seen by women from that state going to other states to obtain abortions, would be substantial. See Lilo T. Strauss et al., Nat’l Ctr. for Chronic Disease Prevention & Health Promotion, *Abortion Surveillance—United States, 2001*, Surveillance Summaries, Nov. 26, 2004, at 31, available at <http://www.cdc.gov/mmwr/PDF/ss/ss5309.pdf>. According to a report published by the Centers for Disease Control and Prevention, 88.1% of abortions occur in the first trimester. *Id.* at 5.

244. See *supra* notes 225-35 and accompanying text.

from impacting interstate commerce and FOCA and FACE's attempt to stop states and private persons from keeping women from obtaining abortions. One commentator noted that "the movement of women between states in order to obtain legal and safe abortions constitutes interstate commerce [and] burden[s] placed on these women become[] a burden on interstate commerce."<sup>245</sup> That same commentator, writing before *Lopez* and *Morrison*, theorized that FOCA would be constitutional under the Commerce Clause because of the great deference given to legislative findings about "burdens on what [Congress itself] defines as interstate commerce."<sup>246</sup> While that might not be so under a *Lopez/Morrison* analysis, *Raich* seems to revive that deference, and therefore FOCA would probably be considered constitutional under a *Raich* analysis.

Under a *Raich* analysis, with the deference to congressional findings and intent and broader definition of economic activity, seemingly most attempts by Congress to ensure or increase access to reproductive health services would therefore be constitutional. The next section discusses how a *Raich* analysis might similarly find that efforts of Congress to restrict access to abortion were constitutional as well.

## 2. Restricting or Banning Abortion

A *Raich* approach to the Commerce Clause would probably permit Congress to regulate abortion activity in opposing ways: While this approach may let Congress expand access to abortion, it may also allow Congress to restrict it. The limitation under this view, again, is whether Congress could have rationally concluded that the activity being regulated substantially affects interstate commerce and, to some extent, whether the activity is economic. In *Raich*, the Court was influenced by the long history and complex legislative decision making involved in the CSA.<sup>247</sup> The CSA intentionally reached intrastate possession of marijuana because Congress had made a determination that marijuana was essentially a "bad" drug with no useful medical purpose, and that therefore its use or sale should be prevented in the United States except in certain carefully controlled experiments.<sup>248</sup> The Court deferred absolutely to this legislative decision, despite recognizing that Congress's determination was wrong or, at best, faulty.<sup>249</sup> The decision to ban a particular drug that has recreational and possible medical uses does not appear to be significantly different from banning a particular procedure: Both bans take power away from individual doctors, who are generally permitted to decide which drugs to

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245. Peggy S. McClard, *The Freedom of Choice Act: Will the Constitution Allow It?*, 30 Hous. L. Rev. 2041, 2062-63 (1994).

246. *Id.* at 2063.

247. *Raich*, 125 S. Ct. at 2203-09.

248. *See id.* at 2210-13.

249. *See id.* at 2212 n.37; *see also supra* note 128.

prescribe and which procedures to use, and away from states, which are generally able to decide how to regulate the practice of medicine.<sup>250</sup>

a. *The Partial-Birth Abortion Ban Act and Raich*

While Congress can ban drugs with its Commerce power, Congress can not simply ban abortion with its Commerce power—constitutional protections prevent an abortion ban structured the same way as the CSA.<sup>251</sup> The CSA regulates numerous drugs, many if not most of which travel across states lines in interstate commerce and is therefore a “broad regulatory scheme” that reaches both inter- and intrastate activity.<sup>252</sup> The PBABA, on the other hand, regulates a single form of abortion, and its connection to interstate commerce is more attenuated than the sale of a particular commodity which is usually sold on the market.<sup>253</sup> In contrast to a saleable good in the stream of commerce, a so-called “partial-birth” abortion is never sold from one state to another and can never itself travel between states.<sup>254</sup>

However, at least one commentator has argued that the PBABA is a constitutional use of the Commerce Clause because “[p]artial birth abortion falls squarely within the . . . definition of ‘commerce’”;<sup>255</sup> thus courts would sustain the PBABA on Commerce Clause grounds because so-called “partial-birth” abortions are “‘commerce’—the voluntary [sale] of a service . . . in a market-based enterprise” that has an effect “‘among the states.’”<sup>256</sup> Although the PBABA does not have findings,<sup>257</sup> the reasoning that so-called “partial-birth” abortions can be considered commerce is based on the fact that when women and physicians travel from state to state specifically

250. See Kreit & Marcus, *supra* note 116, at 965-88 (discussing extensively the history of state involvement in the regulation of medicine).

251. See *Roe v. Wade*, 410 U.S. 113 (1973).

252. *Raich*, 125 S. Ct. at 2203-05.

253. *Id.* at 2208-10 (discussing how the Controlled Substance Act (CSA) regulates both the legal and illegal markets for drugs, including marijuana).

254. Kopel & Reynolds, *supra* note 46, at 87.

255. Pushaw, *supra* note 26, at 349.

256. *Id.* at 319.

257. While the PBABA lacked findings on the connection between so-called “partial-birth” abortions and interstate commerce, the Act was accompanied by many findings on the morality of the procedure itself. See *id.* at 325. However, the motivation behind the Act does not limit Congress’s ability to use its Commerce power to reach this activity, as Congress’s power to reach activity for any purpose, moral or otherwise, so long as the power is derived from the Constitution, has been affirmed by the Court. See *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); see also *United States v. Soderna*, 82 F.3d 1370, 1374 (7th Cir. 1996) (upholding FACE, noting that “Congress can regulate interstate commerce for any lawful motive”). As the cases after the Civil Rights Act demonstrated, the appropriate inquiry is whether the regulated activity has a substantial effect on interstate commerce, not why the Congress wants to reach that activity in the first place.

to obtain or provide this procedure, they are engaging in commerce that has an effect on the interstate market.<sup>258</sup>

Under a *Raich* analysis, with its great deference to Congress, these arguments might be sufficient to uphold the PBABA against a Commerce Clause challenge. However, while the more plenary view of the Commerce Clause may not prevent Congress from banning particular abortion procedures, the PBABA itself may suffer from fatal drafting flaws since its jurisdictional element does not seem possible to apply.<sup>259</sup>

b. *Further Congressional Efforts to Restrict Abortion and Raich*

If *Roe* were overturned, a *Raich* analysis might find that an all-out ban on abortion is constitutional. In the post-New Deal, pre-*Lopez* era, Congress passed a number of bans on activities that were not necessarily commercial but that Congress believed were sufficiently immoral or dangerous to be banned throughout the country instead of leaving the decision to the states.<sup>260</sup> For example, Congress has at various times banned the shipping of lottery tickets between states, prohibited transporting women across state lines for immoral purposes, and prohibited the sale of machine guns to individuals across the country.<sup>261</sup> These Acts have been upheld by Courts in the face of Commerce Clause challenges, and under a *Raich* view would probably continue to be upheld.<sup>262</sup> Similarly, if Congress could rationally conclude that an entire kind of activity should be prohibited, such as the manufacture and possession of medical marijuana,<sup>263</sup> then in a world without *Roe*, Congress may be able to conclude that abortion should also be banned.

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258. See John Leland, *Inside an Abortion Clinic: Under Din of Abortion Debate, an Experience Shared Quietly*, N.Y. Times, Sept. 18, 2005, at A1 (“A late-term procedure called intact dilation and extraction, sometimes known as partial-birth abortion, accounted for less than two-tenths of 1 percent of all abortions in 2000, according to the Guttmacher Institute. Fewer than one in 50 providers performed those.”); Tamar Lewin, *Study on a Late Term Abortion Finds Procedure Is Little Used*, N.Y. Times, Dec. 11, 1998, at A12 (noting that in 1998, there were only fourteen hospitals or clinics that performed late-term abortions using the intact dilation and extraction procedure, meaning that women who need such abortions must go to one of these fourteen locations).

259. See *infra* note 319 and accompanying text.

260. See, e.g., White-Slave Traffic (Mann) Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)) (making illegal the transportation across state lines of “any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose”); Assault Weapons Ban, 18 U.S.C. §§ 921(a)(30)-(31), 922(v)-(w) (2000) (repealed 2004) (prohibiting the manufacture, transfer, or possession of a semiautomatic assault weapon).

261. See *supra* notes 259-60.

262. See, e.g., *Caminetti v. United States*, 242 U.S. 470, 482-83 (1917) (upholding the Mann Act as constitutional under the Commerce Clause); *United States v. Franklyn*, 157 F.3d 90 (2d Cir. 1998) (holding that regulating simple possession of machine guns is constitutional because the regulation was part of a broader scheme regulating machine guns); *United States v. Rybar*, 103 F.3d 273 (1996) (upholding a conviction for selling a machine gun and rejecting a Commerce Clause challenge to the underlying law).

263. *Gonzales v. Raich*, 125 S. Ct. 2195, 2203, 2207-10 (2005).

As has been discussed in this section, under a *Raich*-type analysis, many if not all congressional acts intended either to expand or restrict access to abortion would likely be upheld as constitutional. The following section discusses how a court using a *Lopez/Morrison* analysis might reach different and even contradictory conclusions, based on the stricter elements of that analysis and apparent lack of deference to congressional findings.<sup>264</sup>

B. *With Lopez and Morrison Still Good Law, a Court Could Find that Congress Does Not Have the Power to Reach Abortion*

Just as it would be possible for a court to broadly interpret *Raich* and decide that *Lopez* and *Morrison* were essentially aberrations in the history of the Commerce Clause,<sup>265</sup> it would be equally possible for a lower court to rely on the parts of *Raich* that emphasize that *Lopez* and *Morrison* are still good law, and to use the framework of those cases to address the issue before the court in a specific case. Commentators have pointed out that, just as *Lopez* and *Morrison* created standards that courts have found difficult to apply,<sup>266</sup> *Raich* does not fully clarify the Court's standards, leaving *Lopez/Morrison* as viable analyses.<sup>267</sup> Therefore, a lower court could decide that *Raich* does not apply in a particular circumstance, perhaps in a situation where the law before the court is not part of a broad regulatory scheme,<sup>268</sup> and could instead follow *Lopez* and *Morrison*. As mentioned earlier, a court following the *Lopez* and *Morrison* line would focus on the importance of traditional areas of state regulation and the importance of a strong connection between the activity regulated and interstate commerce, and could find that certain abortion statutes, or in fact all abortion laws, go beyond Congress's enumerated powers.<sup>269</sup> A court that took this perspective would concentrate on whether legislation is within the scope of Congress's limited and enumerated powers as granted by the Constitution.<sup>270</sup> This perspective would assign prime importance to the elements identified in *Lopez* and *Morrison*: a jurisdictional element, congressional findings, the economic nature of the activity, and the overall

264. See *supra* notes 85-104 and accompanying text (discussing the holdings in *Lopez* and *Morrison*).

265. See *supra* note 20 and accompanying text.

266. See Reynolds & Denning, *supra* note 20, at 371.

267. See Pushaw, *supra* note 18, at 908 (“[I]t is premature to pronounce *Raich* the death knell of [*Lopez* and *Morrison*] because of the supposed defections of Justices Scalia and Kennedy . . . . [T]he majority and concurring opinions reaffirmed rather than overruled *Lopez* and *Morrison*, and those cases invite discretionary applications of imprecise standards on a case-by-case basis.”); Reynolds & Denning, *supra* note 48, at 933.

268. See *United States v. Morrison*, 529 U.S. 598, 610 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (“[The Guns-Free School Zone Act] is not an essential part of a larger regulation of economic activity.”); cf. *Raich*, 125 S. Ct. at 2198 (“Congress clearly acted rationally in determining that this subdivided class of activities is an essential part of the larger regulatory scheme.”).

269. See *supra* notes 203-09 and accompanying text.

270. *Lopez*, 514 U.S. at 554.

regulatory scheme.<sup>271</sup> Under *Lopez*, a court may not view abortion as an “economic activity” and therefore would not necessarily agree that the activity can be aggregated.<sup>272</sup> This question of whether abortion or the abortion-related activity is “economic” would be the key to almost any abortion regulation, but the answer is not necessarily clear. The next section discusses how a court applying these elements and considering abortion as “economic” or not “economic” would view laws intended to expand and protect access to abortion.

### 1. Expanding and Protecting Access to Abortion

As mentioned above, Congress has in the past and may in the future pass legislation intended to expand and protect access to abortion services.<sup>273</sup> Thus far, Congress has passed FACE, prohibiting protestors from obstructing abortion clinics, and is considering FOCA, which would prevent states from imposing burdens upon women’s ability to choose to terminate their pregnancies.<sup>274</sup> This section describes how a *Lopez/Morrison* court might view those Acts and other possible expansions to reproductive healthcare and reproductive rights.

FOCA, the proposed legislation that would prevent states from interfering with a woman’s choice to terminate a pregnancy before viability, could be in a unique position in the Commerce Clause debate, since it appears to be aimed at protecting access to a market, but lacks many of the elements identified by the Court as important in sustaining congressional action. First, the purpose of FOCA, to protect abortion rights and the holding of *Roe*, appears to be unrelated to interstate commerce.<sup>275</sup> Second, the Act lacks a jurisdictional element connected with commerce—instead, the Act targets government action, whether over its own citizens or citizens of other states, which raises other federalism issues aside from the Commerce Clause dilemma.<sup>276</sup> However, FOCA does include congressional findings linking abortion to interstate commerce, specifically, findings that women often cross state lines to obtain abortions and that

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271. See *supra* notes 86-103 and accompanying text.

272. *Morrison*, 529 U.S. at 613 (“While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”).

273. See *supra* notes 215-17 and accompanying text.

274. *Id.*

275. The primary purpose of FOCA is “[t]o protect, consistent with *Roe v. Wade*, a woman’s freedom to choose to bear a child or terminate a pregnancy, and for other purposes.” FOCA, S. 2593, H.R. 5151, 109th Cong. (2006).

276. See *supra* notes 44-46. FOCA may also implicate Tenth Amendment concerns. Under the *Lopez/Morrison* view, this may be of importance, since the traditional area of state regulation concern motivated at least two of the Justices who made up the *Lopez* majority. See *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., joined by O’Connor, J., concurring).

abortion clinics are commercial businesses.<sup>277</sup> In addition, the fact that FOCA targets a national market in abortion services could be viewed as a broad regulatory scheme, which would mean that individual cases in which a state tried to ban abortion only for its own citizens could be preempted by federal legislation if viewed as essential to the broader regulatory goal.<sup>278</sup> In fact, FOCA has been compared by one commentator to the Pure Food and Drug Act, which “provide[s] consumers with a uniformly safe service throughout the nation.”<sup>279</sup> If a court were to agree that the provision of abortions is “economic activity,” which does not seem unlikely given that abortions are typically paid for in the course of commercial interactions,<sup>280</sup> some kind of national legalization of abortion could be constitutional, even if FOCA itself is struck down because of its purpose and the lack of a jurisdictional element. On the other hand, some judges have held, generally

277. Among the findings in FOCA are these relevant subsections:

(13) Congress has the affirmative power under section 8 of article I of the Constitution and section 5 of the 14th amendment to the Constitution to enact legislation to facilitate interstate commerce and to prevent State interference with interstate commerce, liberty, or equal protection of the laws.

(14) Federal protection of a woman’s right to choose to prevent or terminate a pregnancy falls within this affirmative power of Congress, in part, because—

(A) many women cross State lines to obtain abortions and many more would be forced to do so absent a constitutional right or Federal protection;

(B) reproductive health clinics are commercial actors that regularly purchase medicine, medical equipment, and other necessary supplies from out-of-State suppliers; and

(C) reproductive health clinics employ doctors, nurses, and other personnel who travel across State lines in order to provide reproductive health services to patients.

FOCA, S. 2593, H.R. 5151 § 2.

278. See McClard, *supra* note 245, at 2064. In fact, FOCA has been reintroduced in 2006 partly in response to the fact that South Dakota recently passed a total ban on abortion in that state. See Press Release, Rep. Jerrold Nadler, Nadler Introduces Freedom of Choice Act (Apr. 7, 2006), available at [http://www.house.gov/list/press/ny08\\_nadler/FreeofChoiAct040706.html](http://www.house.gov/list/press/ny08_nadler/FreeofChoiAct040706.html). Rep. Jerrold Nadler issued this press release, stating, “In the states, attacks on the right to choose have accelerated, including an outright ban in South Dakota . . . . For many years, people have been saying that the pro-choice movement has been crying wolf. Well, today, the wolf is at the door. We have to do something, and we have to do it now.” *Id.* Although the South Dakota ban is clearly unconstitutional under *Roe*, anti-choice activists in that state are hoping to prompt a fight that will take the issue to the Supreme Court and cause *Roe* to be overturned. Pro-choice congressional leaders have responded by redoubling their efforts to get FOCA passed. See Press Release, Sen. Barbara Boxer, Boxer Introduces Legislation to Guarantee a Woman’s Right to Choose (Apr. 7, 2006), available at <http://boxer.senate.gov/news/releases/record.cfm?id=253685&&> (issued by Sen. Barbara Boxer upon introducing FOCA in 2006); Press Release, Rep. Christopher Shays, As South Dakota Attacks *Roe v. Wade*, Shays Defends Choice (Mar. 7, 2006), available at <http://www.house.gov/shays/news/2006/march/marsouthdakota.htm> (issued by Rep. Christopher Shays to protest the passage of the South Dakota ban and affirm his strong support for abortion rights as a co-sponsor of FOCA).

279. McClard, *supra* note 245, at 2064.

280. See *supra* notes 227-35 and accompanying text (discussing commercial nature of abortion services).

in dissents, that abortion services are not “economic activity,” so even that conclusion is uncertain.<sup>281</sup>

FACE may be more difficult to uphold under the *Lopez/Morrison* view, because the activities specifically regulated by the Act are similar to those regulated by the legislation struck down in both previous cases: criminal, noncommercial actions.<sup>282</sup> FACE was the first legislation passed that based abortion-related regulation on the Commerce power.<sup>283</sup> While the circuit courts that addressed FACE thus far have upheld the Act, they have generally done so using an analysis that more strongly resembles *Raich* than *Lopez* or *Morrison*, and several did so despite strong dissents.<sup>284</sup> These dissents clearly lay out the *Lopez/Morrison* view and conclude that FACE cannot be constitutional under this kind of analysis.<sup>285</sup>

In *Gregg*, the Third Circuit upheld FACE after a Commerce Clause challenge.<sup>286</sup> However, Judge Joseph Francis Weiss filed a lengthy dissent, arguing that the holding in *Morrison* was “expansive” and that *Lopez* and *Morrison* effectively foreclose the ability of Congress to “federaliz[e] . . . local crime.”<sup>287</sup> Judge Weiss conceded that abortion services are commercial, but focused instead on the fact that FACE targets the activities of protestors outside clinics, which, he argued, are not commercial activities.<sup>288</sup> Judge Weiss acknowledged that many courts have found support for FACE by citing to *Heart of Atlanta Motel* and *Katzenbach v. McClung*,<sup>289</sup> but distinguished those cases because the Civil Rights Act of 1964, at issue in both *Heart of Atlanta* and *Katzenbach*, governed the actions of those who were engaged in the business of motel and restaurant operation, not third parties.<sup>290</sup> Further, Judge Weiss found the lack of a jurisdictional element in FACE to be a “fatal flaw.”<sup>291</sup>

In *United States v. Bird*, Judge Harold DeMoss dissented from a decision upholding FACE as a valid use of the Commerce power.<sup>292</sup> Judge DeMoss was primarily concerned with the fact that the activity regulated by FACE, protesting and obstructing abortion clinics, was “intrastate and

281. See *infra* note 296 and accompanying text.

282. *United States v. Morrison*, 529 U.S. 598, 613 (2000) (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (“Section 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise . . .”).

283. See *supra* notes 167-71 and accompanying text.

284. See *supra* notes 224-38 and accompanying text.

285. See *United States v. Gregg*, 226 F.3d 253, 268-75 (3d Cir. 2000) (Weiss, J., dissenting); *United States v. Bird*, 124 F.3d 667, 687-92 (5th Cir. 1997) (DeMoss, J., concurring in part, dissenting in part); *United States v. Wilson*, 73 F.3d 675, 689-702 (7th Cir. 1995) (Coffey, J., dissenting).

286. *Gregg*, 226 F.3d 253.

287. *Id.* at 268 (Weiss, J., dissenting).

288. *Id.*

289. See *supra* notes 65-66 for a discussion of *Katzenbach* and *Heart of Atlanta Motel*.

290. *Gregg*, 226 F.3d at 268 (Weiss, J., dissenting).

291. *Id.* at 271.

292. *United States v. Bird*, 124 F.3d 667, 685 (5th Cir. 1997) (DeMoss, J., concurring in part, dissenting in part).

noncommercial conduct,” and that in order for this kind of activity to be reached under the Commerce Clause, *Lopez* had held that it must be an integral part of a larger regulatory scheme regulating an economic activity.<sup>293</sup> DeMoss emphasized that FACE was not part of a larger regulatory scheme and that no other congressional legislation would be “undercut” if Congress were not able to reach this kind of criminal activity.<sup>294</sup> Judge DeMoss argued that FACE failed to meet any of the considerations laid out in *Lopez*, such as having a jurisdictional element or regulating commercial activity, and therefore could not be considered constitutional.<sup>295</sup> Judge DeMoss also argued that there could be no national market in “abortion-related services,” and that abortions could not be viewed as commerce or trade.<sup>296</sup> Judge DeMoss’s critique is a paradigmatic example of a *Lopez/Morrison* analysis that could be used in analyzing FOCA or any other broadly drafted abortion regulation.

Some commentators have also argued that FACE involves several traditional areas of state sovereignty, such as family law and criminal law.<sup>297</sup> Professors David Kopel and Glenn Reynolds, who have written extensively in support of the “new” federalism,<sup>298</sup> have pointed out that “federalism makes a substantial contribution to domestic tranquility in the United States” by allowing states to come to their own conclusions about

293. *Id.* at 685-86.

294. *Id.*

295. Judge Harold DeMoss argued as follows:

First, FACE is a criminal statute that by its terms has nothing to do with commerce. Second, FACE is not an essential part of any larger regulation of economic activity, in which that larger regulatory scheme could be undercut unless the intrastate activity were regulated. Third, FACE contains no jurisdictional element which would ensure through case-by-case inquiry that the conduct prohibited therein affects interstate commerce. Finally, FACE exercises general police powers by creating criminal sanctions in an area where the states have historically been recognized to be sovereign.

*Id.* at 687 (citations omitted).

296. *Id.* Judge DeMoss argued against understanding FACE as a regulation of commerce involved in the “national market,” arguing that the “national market” concept has been used where goods are fungible and tradeable upon the market, such as shares of stock or bushels of wheat. *Id.* Judge DeMoss does not view abortion as an exchange of goods or services in the marketplace or as any other kind of commerce:

There is nothing in the *Congressional Record* that establishes that one abortion procedure is just like every other abortion procedure. To the contrary, an abortion is a unique, personal, and highly individualized procedure. . . . An abortion is a medical/surgical procedure performed in a hospital or clinic by a provider on a pregnant woman. There is no product or commodity which results from this procedure. When a woman arranges to have an abortion performed, the subject of the arrangement is a personal service that is to be provided. When the service is rendered and the fee is paid, the abortion has no ongoing value or marketability.

*Id.* at 686-87.

297. See, e.g., Saylor, *supra* note 31, at 123.

298. See Kopel & Reynolds, *supra* note 46; Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 *Hastings Const. L.Q.* 511 (2000); see also Denning & Reynolds, *supra* note 104; Reynolds & Denning, *supra* note 20.

important moral issues, including the “hottest of hot buttons in American politics,” abortion.<sup>299</sup> Kopel and Reynolds argue for the “non-infinity” principle in analyzing the Commerce Clause: Statutes based on generic rationales that could easily be extended to any area of the law should not be upheld.<sup>300</sup> These commentators agreed with Judge Coffey’s dissent in *Wilson*, which argued that FACE is unconstitutional because FACE “offered nothing to distinguish abortion clinics from schools, churches, houses of prostitution and private homes, all of which purchase goods that were once sold across state lines.”<sup>301</sup> These two commentators as well as others argue that ultimately, creating the possibility of broader access to rights—an expansive vision of the Commerce Clause that would allow FACE, and probably FOCA or other broad legalizations, to be constitutional—would not protect freedom as well as the “limited federal power [that] is an important part of our constitutional scheme.”<sup>302</sup>

## 2. Restricting or Banning Abortion

The same considerations that apply to the issue of expanding access to abortion would apply to the issue of restricting access to abortion. In addition, of course, the constitutional right to privacy further limits the ability of Congress or any legislature to restrict abortion.<sup>303</sup> The best examples of existing or potential congressional restrictions on abortion are the PBABA and a hypothetical complete ban on abortion if *Roe* were overturned.

The PBABA was not accompanied by congressional findings on the connection between the procedure to be regulated and commerce between the states.<sup>304</sup> However, the PBABA does contain a jurisdictional element, ostensibly limiting its coverage to those abortions that affect interstate commerce,<sup>305</sup> and the House Judiciary Committee noted that Congress derived its power to pass this legislation because so-called “partial-birth” abortion is “an economic transaction in which a service is performed for a fee.”<sup>306</sup>

With respect to a blanket ban on abortion activity, any federal ban might mirror some of the bans that are already on the books around the country. For instance, Michigan has an unconstitutional ban on the books that essentially makes performing an abortion a felony unless the life of the

299. Kopel & Reynolds, *supra* note 46, at 111.

300. *Id.* at 98.

301. *Id.*

302. *Id.* at 116; *see supra* notes 22, 46 and accompanying text; *see also* Neal Devins, *The Judicial Safeguards of Federalism*, 99 Nw. U. L. Rev. 131, 133 (2004).

303. *See supra* notes 218-20 and accompanying text.

304. *See* Pushaw, *supra* note 26, at 325.

305. “Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion . . . shall be fined under this title or imprisoned not more than 2 years, or both.” PBABA, 18 U.S.C. § 1531(a) (Supp. III 2003).

306. Pushaw, *supra* note 26, at 326 (internal quotations omitted).

pregnant woman is in danger.<sup>307</sup> A congressional ban would likely contain some kind of jurisdictional element, perhaps stating that any person who performs an abortion using an object or drug that has traveled in interstate commerce would be guilty of a crime. In assessing such a law, a *Lopez/Morrison* court would attempt to determine whether this ban was closely related to interstate commerce or whether the jurisdictional element was merely an attempt to bring a noneconomic event into the power of Congress, as VAWA did.<sup>308</sup>

Under *Lopez* and *Morrison*, the definition of “economic activity” appears to be quite limited. As Justice Stevens’s *Lopez* dissent recognizes, a gun is an “article[] of commerce,” in that it must have been generated in commerce and can easily return into commerce.<sup>309</sup> However, the *Lopez* majority held that “[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce”<sup>310</sup> and focused on the precise source of the effect, rather than the practical connection to commerce that may exist because of the law’s effect.<sup>311</sup> Therefore, any *Lopez/Morrison* analysis would appear to require a close reading of a statute to determine precisely what activity is being regulated and whether that activity itself is economic in nature. The next section will discuss how these standards might be applied to the PBABA or to any kind of ban on abortion services or abortion in general.

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307. Mich. Comp. Laws Ann. § 750.14 (West 2004). The Michigan statute states as follows:

Any person who shall willfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

*Id.*

308. As mentioned above, Congress has frequently banned activities that it has determined are immoral or dangerous to the country at large. *See supra* note 260 and accompanying text. Although these statutes have generally been upheld, *see supra* note 262 and accompanying text, some judges have found these laws to be unconstitutional after *Lopez*. For example, in *United States v. Rybar*, then-Judge Alito filed a strong dissent, arguing that the statute was “the closest extant relative of the statute struck down in *Lopez*,” and that because this statute similarly contained no jurisdictional element or congressional findings, it too should be struck down. 103 F.3d 273, 286-88 (3d Cir. 1996) (Alito, J., dissenting).

309. *United States v. Lopez*, 514 U.S. 549, 602 (1995) (Stevens, J., dissenting).

310. *Id.* at 567 (majority opinion).

311. *See id.* at 618-24 (Breyer, J., dissenting).

a. *The Partial-Birth Abortion Ban Act, Abortion Restrictions, and Lopez/Morrison*

The PBABA regulates the actions of a physician by prohibiting any physician from performing a so-called “partial-birth” abortion.<sup>312</sup> This activity could be considered economic in that the abortion being performed is something for which the physician will be paid, an exchange of services for money. However, it could just as easily be considered not economic because the PBABA only prohibits the physician from performing a particular kind of abortion, regulating only his or her choice of procedure and not whether the procedure is going to be performed at all.<sup>313</sup> One commentator has argued that “[t]he performance of a partial-birth abortion bears a close resemblance to the noneconomic possession of a gun,” because neither one requires commerce to take place in order for the activity—possessing a gun or performing an abortion procedure—to occur.<sup>314</sup> This problem with the PBABA was discussed even during its drafting, when Georgetown Law Professor Louis Seidman testified before the Senate Committee on the Judiciary that “as in *Lopez*, [this] regulated activity is not economic. . . . Just as Congress can regulate the interstate purchase of guns but not their intrastate possession, so it would seem it can regulate the interstate purchase of abortions but not the intrastate procedure itself.”<sup>315</sup>

*Lopez* and *Morrison* also focus on the non-infinity principle, meaning that Congress should not base a law on a rationale that would provide justification for any type of law with no limitations.<sup>316</sup> Indeed, commentators have argued that if the PBABA is upheld, then any congressional ban on any other type of medical procedure would also be upheld; therefore the PBABA exceeds the bounds of the “non-infinity” principle.<sup>317</sup> A ban on abortion would similarly pose the problem that Congress could then theoretically reach any activity that could possibly be paid for, which is potentially any activity at all.<sup>318</sup>

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312. PBABA, 18 U.S.C. § 1531 (Supp. III 2003).

313. *Id.*

314. Ides, *supra* note 27, at 446 (arguing that the procedure itself is noneconomic the same way that gun possession is noneconomic, since guns generally travel in commerce but on their own are not economic, and abortions may be paid for but on their own are not inherently economic).

315. *The Partial Birth Abortion Ban Act of 1995: Hearings Before the S. Comm. on the Judiciary*, 104th Cong. 260 (1995) (testimony of Professor of Law Louis Michael Seidman).

316. Kopel and Reynolds, *supra* note 46, at 70.

317. *Id.*

318. See Saylor, *supra* note 31, at 134. In fact, Justice O’Connor raised a similar concern in her dissent in *Raich*, criticizing the Court for finding that personal, medical use of marijuana at home substantially affected the market for marijuana. *Gonzales v. Raich*, 125 S. Ct. 2195, 2225 (2005) (O’Connor, J., dissenting) (“Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic.”).

Commentators have pointed out that the PBABA, although it contains a jurisdictional element, does not link the statute to particular abortions performed by physicians who have traveled across state lines or where the patients have traveled across state lines, and thus is too broad to be sufficiently linked to interstate commerce.<sup>319</sup> Commentators have also noted that there are in fact very few so-called “partial-birth” abortions performed each year, and thus even if they are considered to be economic activity, even when aggregated, there is no substantial effect on interstate commerce.<sup>320</sup> On the other hand, if an across-the-board ban on all abortions were someday enacted, it would doubtless encompass sufficient numbers of abortions to be considered enough to aggregate.<sup>321</sup>

A *Lopez/Morrison* analysis also focuses on whether the activity is one that is traditionally regulated by states.<sup>322</sup> In terms of banning a particular abortion procedure, a court with this perspective would likely recognize that Congress has never before regulated or banned a specific medical procedure,<sup>323</sup> and that the practice of medicine has traditionally been regulated by the states.<sup>324</sup> Abortion is also generally considered part of family law, another area traditionally regulated by states.<sup>325</sup> Both before and after *Roe*, the only regulatory schemes covering abortion were imposed by the states, as part of the regulation of the practice of medicine.<sup>326</sup>

319. Kopel & Reynolds, *supra* note 46, at 105. In challenging the PBABA, the plaintiffs have also argued that the jurisdictional element is “impermissibly vague” and therefore unconstitutional, but as yet this argument has not been reached by a court. *See* Planned Parenthood Fed’n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 975 n.15 (N.D. Cal. 2004). Professors Kopel and Reynolds joked that the only way the jurisdictional element in the PBABA could really be applied is if “a physician . . . operat[ed] a mobile abortion clinic on the Metroliner.” Kopel & Reynolds, *supra* note 46, at 111.

320. Kopel & Reynolds, *supra* note 46, at 105.

321. The Alan Guttmacher Institute estimates that there are approximately 1.4 million abortions performed in the United States each year. Henshaw et. al., *supra* note 243.

322. *See* United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., joined by O’Connor, J., concurring); *see also* Kreit and Marcus, *supra* note 116, at 967-71.

323. *See* Schechter, *supra* note 27, at 2019 (noting that this is the first “legislation criminalizing a medical procedure” and citing Sen. Dianne Feinstein’s comments during debate on the bill).

324. Kreit & Marcus, *supra* note 116, at 977-92; *see also* Noah, *supra* note 43, at 158-65 (discussing how states are generally considered to have “primacy” in regulating the practice of medicine, including licensing of physicians).

325. Kopel & Reynolds, *supra* note 46, at 72.

326. Although Congress did get involved in this area early on with the Comstock Laws in 1873, banning the sending of information about sexuality, birth control and abortion through the mails, states have always been the primary regulators in this area of the law. Alexander Sanger, *Beyond Choice* 28 (2004). State laws modeled on the Comstock Laws went further than the federal law (arguably the federal law went as far as it could) and banned the distribution of contraceptives and provision of abortions. *Id.* at 34. Between 1873 and 1973, when *Roe* was decided, states had vastly different laws governing abortion, and that is still true now, as all fifty states have a variety of different regulations, including waiting periods, “informed consent” laws, parental consent or notification laws, and other types of restrictions. *See* Felicia H. Stewart & Philip D. Darney, *Abortion: Teaching Why as Well as How*, 35 *Persp. on Sexual & Reprod. Health* 1 (2003), available at <http://www.guttmacher.org/pubs/journals/3503703.pdf>.

Several commentators have argued that under the *Lopez/Morrison* analysis, abortion is an activity that “has traditionally been left to the states,” being part of family law and healthcare, and thus would not be found within the reach of the Commerce Clause under this analysis.<sup>327</sup> These commentators have also noted that the PBABA purports to regulate violent crime by criminalizing an abortion procedure, and that both *Lopez* and *Morrison* described prosecuting violent crime as being within the purview of the states.<sup>328</sup>

While the PBABA, for example, does not have identical flaws to either the gun law in *Lopez* or the VAWA in *Morrison*,<sup>329</sup> it has a combination of flaws, including a difficult-to-apply jurisdictional element<sup>330</sup> and findings that are unrelated to commerce, which might make a *Lopez* court think twice before upholding it.<sup>331</sup> Using a *Lopez/Morrison* methodology, it would seem that a court would have serious trouble hurdling the twin barriers of traditional state regulation and the non-infinity principle. With both the PBABA and some kind of across-the-board ban, the logic behind the laws could certainly lead to a far more expansive interpretation of the Commerce Clause than the Court appeared willing to countenance in *Lopez* and *Morrison*.<sup>332</sup>

### III. THE COMMERCE CLAUSE CANNOT BOTH ALLOW PROTECTION OF ABORTION RIGHTS AND PREVENT RESTRICTION OF THEM: PRO-CHOICE ADVOCATES MUST USE THE POLITICAL PROCESS AND NOT THE COMMERCE CLAUSE TO COMBAT CONGRESSIONAL REGULATION OF ABORTION

As described in Part II, there are strong arguments on both sides of the federalism debate for limiting or broadening the reach of the Commerce Clause. Traditionally, the debate has broken down along political lines: Liberals tend to advocate for a broader understanding of the Commerce Clause because it enables Congress to legislate in areas where states have

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327. *Ides, supra* note 27, at 452-55; *see also* Schecter, *supra* note 27, at 2019.

328. *See* *United States v. Morrison*, 529 U.S. 598, 611-14 (2000); *United States v. Lopez*, 514 U.S. 549, 564-66 (1995); *Ides, supra* note 27, at 452-55; Schecter, *supra* note 27, at 2019.

329. *See supra* notes 86-104 and accompanying text.

330. *See supra* note 319.

331. *See supra* note 305 for the relevant statutory language.

332. The PBABA has been challenged on constitutional grounds, and three circuit courts have already struck it down based on *Stenberg v. Carhart*. *See* *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 287 (2d Cir. 2006); *Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d 1163, 1172 (9th Cir. 2006); *Carhart v. Gonzales*, 413 F.3d 791, 794-95 (8th Cir. 2005). The Supreme Court has granted certiorari in an appeal from two of these decisions and will be hearing these cases in the 2006-2007 Term. *Gonzales v. Planned Parenthood*, 126 S. Ct. 2901 (2006); *Gonzales v. Carhart*, 126 S. Ct. 1314 (2006). None of the parties have challenged the Act as an unconstitutional use of the Commerce Clause, and the Court is unlikely to raise the issue of the Commerce Clause *sua sponte*, but it is possible that it will be raised in briefs supporting the appeal.

tended to be less responsive,<sup>333</sup> while conservatives embrace a narrower understanding of the Commerce Clause as granting more power to the states.<sup>334</sup> Before *Lopez* and the rest of the “federalist revolution,” both Congress and the Court had been increasing federal powers, creating and upholding national solutions for national problems.<sup>335</sup> Until the current Congress and President were elected, this approach was preferred by progressives and liberals, who have defended everything from the Endangered Species Act to the proposed Freedom of Choice Act and the Freedom to Access Clinic Entrances Act, as valid uses of the Commerce Clause.<sup>336</sup>

However, the new conservative leadership in Washington has made states’ rights arguments attractive to progressives, especially in the areas of same-sex marriage and abortion.<sup>337</sup> The current state of politics has caused progressives to look for solutions in new places, and that has coincided with the two “new” federalist Commerce Clause cases, giving abortion advocates and others another avenue from which to approach unfavorable congressional legislation. However, this part argues that creating national solutions to national problems was and is the best approach to ensuring rights for Americans, from the Civil Rights Act of 1964 to the Clean Water Act to FACE.

If current Congress members, with their admittedly broad Commerce power, are likely to pass legislation that threatens the rights of individuals, there are two solutions. First, fight the legislation on other grounds, including fighting to protect the important constitutional rights that have already been established, and second, replace the members of Congress.

#### A. *The Problem of Progressive (and Conservative) Flip-Flopping*

As some commentators have recognized, there is a temptation to switch sides, so to speak, when legal arguments that were used successfully by one side of an ideological debate suddenly become useable to defend the other side.<sup>338</sup> This kind of legal “flip-flopping” has been true not just of progressives in recent years, but of conservatives as well.<sup>339</sup> The PBABA, while it may fit within Congress’s Commerce power, seems to violate the

333. See Law, *supra* note 7, at 372, 408.

334. See Schwartz, *supra* note 13; Kmiec, *supra* note 17.

335. See, e.g., *Hodel v. Virginia Surface Min. and Reclamation Ass’n*, 452 U.S. 264 (1981) (upholding the Surface Mining Control and Reclamation Act against a Commerce Clause challenge); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the Civil Rights Act of 1964 against a Commerce Clause challenge).

336. See *supra* note 21 and accompanying text.

337. See *supra* note 22 and accompanying text.

338. See Law, *supra* note 7, at 372; Devins, *supra* note 302, at 131-37; Moreno, *supra* note 22, at 742-43.

339. See Schram, *supra* note 22 (“Conservatives who . . . [were] opposed to legalizing any homosexual marriages argued that this was a matter of national values that must be governed by one national policy that defines a marriage as only a union of male and female couples.”).

commitment to states' rights that many of its proponents generally espouse.<sup>340</sup> Some critics allege that the Defense of Marriage Act shares the same flaws.<sup>341</sup> According to one commentator, this kind of federalism "flip-flopping" has occurred throughout history and has depended chiefly on which party controlled the national government and which controlled more of the state governments.<sup>342</sup> At times when a party controls the national government, that party tends to favor federal controls, while the party out of power prefers leaving major issues to the states.<sup>343</sup>

While advocates, lawmakers, and lawyers can afford to take divergent positions in different cases or on different pieces of legislation, the Supreme Court cannot. Once the Court has decided on a particular position, the doctrine of *stare decisis* dictates that that position will probably remain constant. Advocates and lawyers who push for change should be aware that their advocacy has far-reaching consequences, and if they manage to convince the Court or lower courts that, for example, the PBABA is an unconstitutional use of the Commerce power, they will have helped to create precedent that could and probably would be used to strike down legislation that is as important to reproductive rights as the PBABA is damaging.<sup>344</sup> There is some evidence that advocates in the pro-choice movement, at least, are already aware of this danger, based on the fact that the cases challenging the PBABA have not raised the Commerce Clause as a grounds for striking down the Act,<sup>345</sup> and have used the Commerce Clause to defend FACE.<sup>346</sup> While several commentators have urged progressive advocates to adopt the *Lopez/Morrison* strategy<sup>347</sup> the fall-out from such an approach could be monumentally damaging to some of the most important gains made by civil rights groups and progressive causes in the last fifty years.<sup>348</sup>

### B. The "Neutral Approach" to the Commerce Clause

The problem with inserting ideology into jurisprudence is that it seems to lead to messy and "unworkable" results.<sup>349</sup> By overlaying a strict belief in federalism over seventy years of reliance on Commerce Clause

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340. See Devins, *supra* note 302, at 133-34; Moreno, *supra* note 22, at 742-43.

341. See Rothstein, *supra* note 22, at 578; Bash, *supra* note 22, at 985.

342. Devins, *supra* note 302, at 134-35 (pointing to, among other issues, the states' rights attitude of abolitionists at the time when slave interests controlled federal power, as in the case of the Fugitive Slave Act, and the reversal of these positions after the Civil War).

343. *Id.*

344. See Law, *supra* note 7, at 421-23.

345. See *supra* note 332.

346. See *supra* note 21 and accompanying text.

347. See Dailey, *supra* note 27, at 1888; Hankersley, *supra* note 27, at 21; Schecter, *supra* note 27, at 2024-25.

348. See Batt, *supra* note 72, at 318-39 ("Should Congress be permitted to extend its Commerce Clause authority to preempt state laws for moral and social preferences? The answer is a bittersweet 'Yes.' . . . Without [the New Deal Commerce Clause interpretations] much of our federal civil rights legislation would be unconstitutional. . .").

349. See Law, *supra* note 7, at 372; Saylor, *supra* note 31, at 58-59.

jurisprudence, the Supreme Court caused serious confusion, or what some have alleged may be all-out rebellion, in the lower courts.<sup>350</sup> Even *Raich*, which appears to be a retreat from the hard line taken in *Lopez* and *Morrison*, has raised more questions than it has answered in terms of what Congress can permissibly accomplish with its Commerce power.<sup>351</sup> The dissent's complaint that after *Raich*, *Lopez* no longer provides meaningful limits on congressional power but has become a mere "drafting guide," appears to be a fair criticism, since one of the only significant differences between the cases is that the statute in *Raich* is part of a broader regulatory package.<sup>352</sup> Otherwise, it might be difficult to determine why a statute making it illegal to possess a firearm in a particular place is unconstitutional,<sup>353</sup> whereas a statute making it illegal to possess marijuana is constitutional.<sup>354</sup>

The Court will have to provide further clarification at some point. A number of possibilities exist: The Court could return to the strict and difficult-to-apply tests created in *Lopez* and *Morrison*; it could return to the pre-*Lopez* view of the Commerce Clause, which gave great deference to Congress; or it could adopt one of the suggested standards discussed in Part I, such as a "hard look" type of standard.<sup>355</sup> Whatever test the Court decides to apply next, it must make clear that while the Commerce Clause is not all-powerful, it is sufficient to reach those activities that affect the evolving national economy. The *Lopez/Morrison* shift toward looking at the nature of the regulated activity rather than at its effect was untrue to the precedent of the post-New Deal cases,<sup>356</sup> and appeared to limit Congress's power to regulate a national economy that is increasingly interconnected with many seemingly "noneconomic" activities.<sup>357</sup>

For example, although VAWA did not regulate strictly commercial activity, congressional findings indicated that because violence against women impacts the national economy by keeping women workers at home and out of interstate travel, violence against women does have an effect on the national economy.<sup>358</sup> Conversely, in the text and legislative findings of CSA, there was no showing that personal, medicinal use of marijuana has

350. See generally Denning & Reynolds, *supra* note 104; Reynolds & Denning, *supra* note 20.

351. See Parry, *supra* note 17, at 862; Pushaw, *supra* note 18, at 884; Reynolds & Denning, *supra* note 48, at 916.

352. See *supra* notes 110-43 and accompanying text.

353. United States v. Lopez, 514 U.S. 549, 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

354. Gonzales v. Raich, 125 S. Ct. 2195, 2210 (2005).

355. See *supra* notes 204-06 and accompanying text.

356. See *supra* notes 90, 132 and accompanying text.

357. See *supra* notes 109, 132 and accompanying text.

358. Saylor, *supra* note 31, at 71 (noting that the *Morrison* dissent argued that "Congress assembled a 'mountain of data' showing the effects of violence against women on interstate commerce").

any effect on the national economy.<sup>359</sup> It seems clear that a post-New Deal “rational basis” review would have upheld both VAWA and CSA. However, it is possible that a “hard look” Commerce Clause test<sup>360</sup> that did not try to incorporate the *Lopez/Morrison* factors at all would have struck down CSA as applied to the respondents in *Raich*, but would have upheld the civil lawsuit provision in VAWA because Congress had given it serious attention and deliberation.

The difficulty in creating a workable test should signal that this is not an area that lends itself well to judicial solutions. However, now that the Court has reentered the field, it is important that it create “a better and more honest explanation” for rejecting some part of the post-New Deal Commerce Clause jurisprudence.<sup>361</sup> Even before *Raich*, the lower courts, which are the day-to-day decision makers as to the limits of the Commerce Clause, seemed to not be applying *Lopez* or *Morrison* at all because of the absence of a clear test.<sup>362</sup> After *Raich*, it will probably be even more difficult to apply the Court’s jurisprudence, and while lower courts are waiting for more guidance, they will likely end up having to choose which case they agree with more.<sup>363</sup>

Whatever this Court may believe, it is fairly clear that having federal judges create their own standard in each Commerce Clause case is not the best solution. Rather than leave this problem to the judges, this is an area best left, except in extreme circumstances, to the political branches of government.<sup>364</sup> The balance between state and federal authority can be reached through the political process, as elected officials and those who elect them make their voices heard. As the dissenters in *Morrison* stated,

Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. The fact of such substantial effect is not an issue for the courts in the first instance, but for Congress, whose institutional capacity for gathering evidence . . . far exceeds ours.<sup>365</sup>

A court’s role is to assess whether the conclusion reached by Congress that there is a jurisdictional basis for the legislation is “rational.”<sup>366</sup> While the majority of the Court in *Lopez* and *Morrison* disagreed with that

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359. *Raich*, 125 S. Ct. at 2224 (O’Connor, J., dissenting) (“Even if intrastate cultivation and possession of marijuana for one’s own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects interstate commerce. Similarly, it is neither self-evident nor demonstrated that regulating such activity is necessary to the interstate drug control scheme.”).

360. Breyer, *supra* note 82, at 64-65.

361. Killenbeck, *supra* note 81, at 58.

362. See generally Denning & Reynolds, *supra* note 104; Reynolds & Denning, *supra* note 20.

363. See Reynolds & Denning, *supra* note 48, at 917-20.

364. See Saylor, *supra* note 31, at 58-61.

365. *United States v. Morrison*, 529 U.S. 598, 628-29 (2000) (Souter, J., dissenting).

366. *Id.*

conception of the Court's role, *Raich* reaffirms the idea that the Court should not be in the position of second-guessing every aspect of congressional use of the Commerce power: "In assessing the scope of Congress's authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."<sup>367</sup>

The "rational basis" test may lead to upholding legislation that appears to blur the lines between federal and state authority, but it also allows Congress and the states to come to a natural balance where national issues can be addressed through national action; a "hard look" doctrine would likely reach the same result.<sup>368</sup> As demonstrated by *Morrison*, where thirty-five states petitioned the Court to uphold Congress's ability to create a civil remedy for gender-motivated violence, and *New York v. United States*,<sup>369</sup> where the states fought against federal intrusion into their sovereignty, states and Congress are capable of deciding for themselves when the lines of power are crossed.<sup>370</sup> If Congress gives the issue serious deliberative thought, Congress deserves deference to its role in the democratic process.<sup>371</sup>

In terms of national abortion legislation, while it may be unpalatable to either or both sides of the debate, abortion services fit most definitions of commerce, and the patchwork of abortion statutes at the state level makes it the kind of commerce that is more likely than most to encourage interstate activity.<sup>372</sup> However, the fact that Congress may have the power to regulate abortion does not necessarily mean that it should use it. As several commentators who support a narrower reading of the Commerce Clause have pointed out, one of the things that keeps our nation whole is allowing different states to resolve moral and social issues on their own.<sup>373</sup> There are those in Congress who believe in a limited role for the federal government, especially in areas where states are generally considered to be sovereign.<sup>374</sup> At the same time, there are those in Congress who believe that abortion rights should be protected.<sup>375</sup> The existence of these two, generally distinct, groups provides reason to hope that Congress would not use the Commerce power to ban abortion even if it was constitutionally permitted to do so.

367. *Gonzales v. Raich*, 125 S. Ct. 2195, 2208 (2005).

368. *See supra* note 205 and accompanying text.

369. 505 U.S. 144 (1992).

370. *See supra* note 205 and accompanying text.

371. *Id.*

372. *See Sanger, supra* note 326, at 51; *see also* FOCA, S. 2593, H.R. 5151, 109th Cong. § 2 (2006).

373. *See supra* note 71 and accompanying text.

374. *See* Editorial, *The Contract, Partly Fulfilled*, N.Y. Times, Aug. 20, 1995, at A12 (discussing how the Republican majority won Congress in 1994 based on a "Contract with America" that focused on giving power back to the states).

375. *See* S. 2593, H.R. 5151.

## CONCLUSION

*Raich* by no means signals the total demise of the “new” federalist approach to the Commerce Clause, but it does indicate that the Court is retreating from its decade-old Commerce Clause jurisprudence.<sup>376</sup> While the Commerce Clause does not give Congress police powers, it does empower Congress to regulate our increasingly interconnected and interdependent national economy.<sup>377</sup> Lower courts should follow the Supreme Court’s lead and not strike down valid congressional statutes based on the *Lopez* and *Morrison* decisions. In addition, as the pro-choice community looks for solutions to the possibility of a post-*Roe* world, changing the balance of power in Congress, rather than preventing it from acting on some of the other important issues facing our nation, should be the first priority.

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376. See *supra* note 79 and accompanying text; see also *supra* Part I.B.2.

377. *Gonzales v. Raich*, 125 S. Ct. 2195, 2211 (2005).