University of Florida Journal of Law & Public Policy

Volume 8 | Issue 1 Article 7

1996

Constitutional Law: The Reach of the Commerce Power Over Noncommercial Acts (Cheffer v. Reno, 55 F.2d 1517 (11th Cir. 1995))

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CONSTITUTIONAL LAW: THE REACH OF THE COMMERCE POWER OVER NONCOMMERCIAL ACTS

Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995)

*Nina Smith***

Appellants are pro-life activists contesting Congress authority under the Commerce Clause[1] to enact the Freedom of Access to Clinic Entrances Act of 1990 (Access Act).[2] Although the Access Act has not been enforced against Appellants, they assert that their First Amendment rights have been chilled by potential enforcement of the Act against their anti-abortion demonstrations.[3] Appellants' foremost claim is that the Access Act is an excessive congressional enactment that infringes upon the sovereignty preserved for the states under the Tenth Amendment.[4] The U.S. District Court for the Middle District of Florida dismissed Appellants' claims.[5] On appeal, the Court of Appeals for the Eleventh Circuit affirmed and HELD, the Access Act is sustainable under the Commerce Clause.[6]

Congress commerce powers have long been regarded as plenary, limited only by the Constitution.[7] During the first third of this century, however, these powers were truncated under a narrow conception of "commerce."[8]

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* *Editor's Note:* This case comment received the *Huber C. Hurst Award* for the outstanding case comment for Spring 1996.

** B.A., University of Florida, 1991. This comment is dedicated to Peter D. Smith, my father.

1. U.S. CONST. art. I, § 8, cl. 3 (empowering Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

2. Cheffer v. Reno, 55 F.3d 1517, 1518-19 (11th Cir. 1995). Under the relevant provisions of 18 U.S.C. § 248(a) (1995), any person who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with" a person who is or has been obtaining or providing "reproductive health services" is subject to civil fines or criminal penalties.

3. *Cheffer*, 55 F.3d at 1519. Appellants advance several grounds for facially invalidating the Access Act as an infringement on their First Amendment free-speech and free-exercise rights. *Id.* at 1518-19. The district court's dismissal of these constitutional challenges, along with the claim of cruel and unusual punishment under the Eighth Amendment for the imposition of excessive fines, was affirmed by the appellate court. *Id.* at 1518-19.

4. *Id.* at 1519. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

5. *Cheffer*, 55 F.3d at 1519.

6. *Id.* at 1519-20.

7. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 271 (1964) (Black, J., concurring) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 3 (1824)).

8. United States v. Lopez, 115 S. Ct. 1624, 1651-53 (1995) (Souter, J., dissenting).

Specifically, the U.S. Supreme Court's formalistic commerce-clause analysis required that an activity have a direct effect on interstate commerce to be regulable.[9] Further, activities like production and manufacturing were regarded as too local for federal regulation.[10] These direct/indirect or local/national distinctions were eliminated in a judicial era granting more deference to congressional policy[11] and focusing on the practical, often cumulative, effects of a regulated activity on interstate commerce.[12] In the Court's ensuing commerce-clause jurisprudence, three categories of regulable activity were generated. Congress may regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) those activities that have a substantial effect on interstate commerce.[13] It is in this last category, when analyzed in conjunction with the Necessary and Proper Clause,[14] that Congress has come to enjoy expansive authority over local activities.[15]

Among those cases departing from the early formalistic approach to sustain regulation of intrastate activities is *Wickard v. Filburn*.[16] Faced with a decline in U.S. wheat export, Congress passed the Agricultural Adjustment Act of 1938 empowering the Secretary of Agriculture to control wheat surplusage by establishing maximum yields for individual farms.[17] The Secretary enforced these allotments by imposing marketing penalties on excess bushels.[18] When appellee produced an excess of wheat for home consumption, a penalty was imposed on that portion of his crop.[19] Appellee unsuccessfully enjoined imposition of the penalty when the Court held that

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9. *Id.* at 1652-53.

10. *Id.* at 1627, 1653.

11. *Id.* at 1653. In its cases upholding the Civil Rights Act of 1964, the Court articulated a rational basis test for challenges to Congress commerce authority. *See* Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."); *Heart of Atlanta*, 379 U.S. at 262 ("[T]he means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.").

12. *Lopez*, 115 S. Ct. at 1653 (Souter, J., dissenting) (discussing the cumulative-effects doctrine of Wickard v. Filburn, 317 U.S. 11 (1942)).

13. *Id.* at 1629-30. Under the second category, Congress may "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." *Id.*

14. U.S. CONST. art. I, § 8, cl. 18 (empowering Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

15. *Heart of Atlanta*, 379 U.S. at 271-72 (Black, J., concurring).

16. 317 U.S. 111 (1942).

17. *Id.* at 115, 125.

18. *See id.* at 114-15.

19. *Id.*

it was within Congress commerce powers to regulate the production of home-grown wheat not bound for the interstate market.[20]

Because appellee's excess production reduced his need to purchase wheat from the interstate market, the Court reasoned, that much less wheat would be sold in commerce.[21] Focusing solely on the economic effects of an intrastate act, the Court stated that although "[the act] 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."[22] The Court then emphasized that it was of no moment that the effect on commerce was indirect.[23] Moreover, no matter how trivial the amount of wheat produced by appellee or how local its production, the practical effect of appellee's private act on interstate commerce, in view of possible repetition among like farmers, was held to be a substantial one.[24]

Twenty years later, the Court employed its reasoning in *Wickard* to uphold Congress regulation of private acts of racial discrimination by local restauranteurs in *Katzenbach v. McClung*.[25] Pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendments and of the Commerce Clause,[26] and Congress' authority to make laws necessary and proper to carry out these constitutional powers,[27] Congress enacted Title II of the Civil Rights Act of 1964 to provide injunctive relief from discrimination at public accommodations.[28] This Act was enforced against appellees for refusing dining-room service to African Americans.[29] Because appellees made substantial purchases in interstate commerce of food products used in the restaurant's operation, the restaurant was within the statutory category of

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20. *Id.* at 125. Appellee also was denied a declaratory judgment that the Agricultural Adjustment Act, as amended, violated his Due Process rights. *Id.* at 129-33.

21. *Id.* at 128.

22. *Id.* at 125.

23. *Id.* Earlier in its decision, the Court stated that "questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." *Id.* at 120.

24. *Id.* at 127.

25. 379 U.S. at 302. *McClung* was argued with *Heart of Atlanta*, *id.* at 295, in which the Court upheld the constitutionality of Title II of the Civil Rights Act of 1964 § 201 (b)(1), 42 U.S.C. § 2000a (1964), which created a per se category of lodging establishments that affected interstate commerce because they hosted transient guests. *Heart of Atlanta*, 379 U.S. at 247-48, 258.

26. U.S. CONST. art. I, § 8, cl. 3.

27. U.S. CONST. art. I, § 8, cl. 18.

28. *Heart of Atlanta*, 379 U.S. at 245, 248. The relevant portions are § 201(b)(2), pertaining to restaurants that "affect commerce," and § 201(c), defining "affect commerce" in relation to those restaurants that serve interstate travelers or that make substantial interstate purchases that are used in the restaurant's operation. *McClung*, 379 U.S. at 298.

29. *McClung*, 379 U.S. at 297.

accommodations "affecting commerce."[30] As part of their claim that these provisions were outside Congress authority under the Commerce Clause, appellees contended that the provisions created a presumptive category of restaurants that "affect commerce," depriving them of a case-by-case determination on that issue.[31] The Court then looked to the facts before Congress to determine whether such a regulatory scheme was rational.[32]

In the absence of formal legislative findings, the Court considered the abundant testimony presented at congressional hearings.[33] The record showed that discrimination by restauranteurs reflexively reduced their per capita sales and interstate purchases.[34] Additionally, discrimination hindered the mobility of African Americans who would need to eat on their interstate travels.[35] The Court thus held that the economic effects resulting from this intrastate activity, when viewed in the aggregate, were substantial enough to sustain Title II of the Civil Rights Act of 1964 as a valid exercise of Congress commerce power.[36] Further, it was no bar to its authority that Congress, from proffered testimony concerning the national scope of discrimination, expounded that local acts might be repeated elsewhere to the detriment of commerce.[37] Citing both *Wickard* and the Necessary and Proper Clause, the Court thus held that Congress rationally concluded that the cumulative effects of local discriminatory acts meeting the statutory conditions interfered with interstate commerce.[38]

The Court's focus, however, on the practical economic effects of local activities, like the home consumption of wheat or private acts of racial discrimination, has shifted. In *United States v. Lopez*, a 12th-grade student was charged with violating the Gun-Free School Zones Act of 1990, which

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30. *Id.* at 298, 304.

31. *Id.* at 302-03 (citing a similar challenge brought in United States v. Darby, 312 U.S. 100 (1941)), where the Court upheld Congress "determin[ation] that the payment of substandard wages to employees engaged in the production of goods for commerce, while not itself commerce, so inhibited it as to be subject to federal regulation" under the Commerce Clause).

32. *Id.* at 299-301.

33. *Id.* (citing S. REP. NO. 872, 88th Cong., 2d Sess., at 19; Senate Commerce Committee Hearings, at 207).

34. *Id.* at 299-300.

35. *Id.* The Court also noted that racially discriminatory communities deterred new businesses from establishing there. *Id.* at 300.

36. *Id.* at 300-01.

37. *Id.* at 301. According to the Court, "[w]ith this situation spreading as the record shows, Congress was not required to await the total dislocation of commerce." *Id.* Additionally, in the companion case *Heart of Atlanta*, the Court stated that "Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong." *Heart of Atlanta*, 379 U.S. at 257. Thus, Congress appropriately considered the national scope of discrimination in connection with the cumulative effect of local discriminatory acts. *See McClung*, 379 U.S. at 301.

38. *McClung*, 379 U.S. at 302-04.

criminalized gun possession within a 1000-foot radius of a school.[39] Faced with a constitutional challenge to a federal criminal statute, the Court struck down the Act as an excessive exercise of Congress commerce power.[40] The first decision invalidating a federal statute under the Tenth Amendment in sixty years,[41] *Lopez* also is remarkable for its limitation on those acts previously within Congress regulatory reach as substantially affecting interstate commerce.[42] Finding the link between gun possession at schools and economic harm too generalized, the Court imposed the requirement that the prohibited action be an economic one, citing both *McClung* and *Wickard* for this proposition.[43] Additionally, the Court held that if a statute regulates noneconomic activities, it must provide an express jurisdictional element to "ensure, through case-by-case inquiry, that the [prohibited act] in question affects interstate commerce."[44]

In an apparent departure from mere rationality review, the Court also noted that the absence of legislative findings would hamper its evaluation of whether Congress could rationally conclude that the prohibited act substan-

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39. 115 S. Ct. 1624, 1626 & n.1 (1995). Under the Gun-Free School Zones Act, it is a federal offense "'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" *Id.* (quoting 18 U.S.C. § 922(q)(1)(A) (1988)).

40. *Id.* at 1634.

41. *Id.* at 1652-53. In A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935), the Court employed a direct/indirect effects formula to strike down a wage- and hour-fixing statute as an impermissible indirect regulation of interstate commerce. *Lopez*, 115 S. Ct. at 1627-28. Federalism concerns that the government might otherwise become too centralized undergirded this formulaic approach. *Id.*

42. *See Lopez*, 115 S. Ct. at 1630 (Note that this decision involves only the third category of regulable activities. In this category, the Court clarified inconsistent precedent concerning the requisite showing of an activity's effect on interstate commerce by stating that it must be substantial.).

43. *Id.* In the holding that the Act is devoid of any commercial nexus, it is significant that the Court interposed with a footnote effectively chastising Congress for attempting to exercise broad police powers under the guise of its commerce power, in displacement of state criminal law. *See id.* at 1631 n.3. According to some commentators, this language and the tenor of the majority and concurring opinions in general signal a new era for states' rights, though possibly only in the area of federal criminal legislation. *See* Gregory W. O'Reilly & Robert Drizin, United States v. Lopez*: Reinvigorating the Federal Balance by Maintaining the States' Role as the "Immediate and Visible Guardians" of Security*, 22 J. LEGIS. 1, 1-5 (1996).

44. *See Lopez*, 115 S. Ct. at 1631. Because the Supreme Court did not explicitly limit activities that substantially affect interstate commerce to these two requirements, some courts have held that *Lopez* merely reaffirms precedent, although finding an instance where Congress went too far. *See, e.g.*, United States v. Wilson, 73 F.3d 675, 685 (7th Cir. 1995) (upholding the Access Act, reasoning that the "economic activity" language in *Lopez* is not a prerequisite, as such a reading would be inconsistent with commerce-clause precedent); O'Reilly & Drizin, *supra* note 41, at 9, 12 (discussing *Lopez* as restoring a balance of power between state and federal governments by preserving to the states their police powers to the ultimate benefit of an overburdened judiciary).

tially affects interstate commerce.[45] The Court then rejected the Government's argument that gun possessions in school zones substantially interfere with the learning process, resulting in less productive students and ultimately, a weak national economy.[46] After concluding that the prohibited action "has nothing to do with 'commerce' or any sort of economic enterprise," the Court stated that the Gun-Free School Zones Act cannot be sustained as a regulation of a local economic activity that in aggregate has a substantial effect on interstate commerce.[47] In reaching this conclusion, the Court looked at the prohibited action in isolation,[48] stating that the "local student" had not "move[d] in interstate commerce," and his prohibited possession did not contain a jurisdictional element to ensure in this case that Congress has constitutional authority for displacing state criminal law.[49]

In the instant case, the Eleventh Circuit was called upon to reconcile *Lopez* with Congress contested authority under the Commerce Clause to enact the Access Act.[50] Responding to the heightened use of violence by the pro-life contingent in its stance against the legality of abortions, Congress passed the Access Act to provide remedies to abortion providers and recipients, victimized by the pro-life campaign.[51] Specifically, section 248(a)(1) exposes to a civil suit or criminal penalties any person who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with" a person who is or has been obtaining or providing "reproductive health services."[52] Congress stated authority for passing the

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45. *See Lopez*, 115 S. Ct. at 1631-32. The Court did acknowledge that consistent with its decision in *McClung*, formal findings were not required. *Id.* The dissent views the differing outcomes in the majority holding and in *McClung* as turning on whether the act in question is regarded as commercial or noncommercial. *Id.* at 1653-54 (Souter, J., dissenting). According to the dissent, "calibrating the level of deference" by such line-drawing portends a return to the abandoned formulaic approach, *id.*, and to a judgment of legislation on the merits, *id.* at 1656-57; *see also* cases cited *supra* notes 11 & 12 and accompanying text.

46. *Lopez*, 115 S. Ct. at 1632-33. The dissent thoroughly reviewed these arguments, finding that gun possessions substantially affect interstate commerce. *Id.* at 1659-62 (Breyer, J., dissenting).

47. *Id.* at 1630-31. According to the dissent, however, the majority has recast *McClung* and *Wickard* as cases in which an economic activity was involved, rather than noncommercial activities with substantial economic effects. *Id.* at 1663-64 (Breyer, J., dissenting); *see Wickard*, 317 U.S. at 120, 125.

48. *Lopez*, 115 S. Ct. at 1664-65 (Breyer, J., dissenting).

49. *Id.* at 1634, 1630-31 & n.3.

50. *Cheffer*, 55 F.3d at 1520.

51. *Id.* at 1519.

52. 18 U.S.C. § 248 (Similar sanctions apply under subsection (a)(3) to a person who "intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services." Under subsections (e)(1) and (5), "reproductive health services" are defined as "medical, surgical, counselling [sic], or referral services relating to the human reproductive system," provided in a "facility," including clinics, hospitals, and doctors' offices.).

Access Act was that such activities burdened interstate commerce.[53]

In determining that Congress had rationally concluded that the Access Act regulates economic activity by protecting it from obstruction, the instant court deferentially considered Congress findings.[54] First, because patients and doctors often travel across state lines to obtain or provide reproductive care, an interstate market exists for those services.[55] Second, the clinics purchase their equipment through interstate commerce.[56] Third, because the clinics operate within the stream of interstate commerce, Congress then found that violence against providers and recipients of reproductive care, and physical obstruction of clinic entrances, threatened, or halted interstate commerce.[57] Apart from these indirect connections, none of the marshaled facts pertained to the economic nature of the prohibited act.

On these findings, the instant court distinguished *Lopez*, in which the Gun-Free School Zones Act lacked formal findings.[58] Further, the instant facts indicated that an economic activity, namely providing reproductive care, was being regulated by being protected, whereas no economic activity was

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53. H.R. CONF. REP. NO. 488, 103rd Cong., 2d Sess. 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 699, 724.

54. *Cheffer*, 55 F.3d at 1520-21. The instant court adopted the analysis of the Fourth Circuit in American Life League, Inc. v. Reno, 47 F.3d 642, 647 (4th Cir. 1995), which was decided prior to the *Lopez* decision, and then independently considered the Access Act's validity under *Lopez*. *Cheffer*, 55 F.3d at 1519-20.

55. *Cheffer*, 55 F.3d at 1520. The findings indicated that women are more likely to cross state lines when such services are scarce. H.R. REP. NO. 306, 103rd Cong., 2d Sess. 7-8 (1993), *reprinted in* 1994 U.S.C.C.A.N. 699, 704-05. Scarcity occurs either because rural clinics are targeted since they are the only facilities providing abortions within a reasonable radius or because doctors are deterred from gynecological practice due to threats to and murders of providers. *Id.* at 8-9, *reprinted in* 1994 U.S.C.C.A.N. at 705-06.

56. *Cheffer*, 55 F.3d. at 1520. This includes "the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states." H.R. CONF. REP. NO. 488, *supra* note 53, at 7, *reprinted in* 1994 U.S.C.C.A.N. at 724.

57. H.R. CONF. REP. NO. 488, *supra* note 53, at 7, *reprinted in* 1994 U.S.C.C.A.N. at 724. Though not cited by the instant court, Congress found that the interstate nature of the nationwide pro-life campaign brought the violence, threats, and obstruction outside the range of effective local and state law enforcement, thereby making this a proper subject of federal legislation. H.R. REP. NO. 306, *supra* note 55, at 6, *reprinted in* 1994 U.S.C.C.A.N. at 703. Moreover, the U.S. Supreme Court's decision in Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993), deprived women injured by the obstruction of abortion facilities of a remedy under the Ku Klux Klan Act. H.R. CONF. REP. NO. 488, *supra* note 53, at 7-8, *reprinted in* 1994 U.S.C.C.A.N. at 724-25. On these findings, Congress concluded that federal legislation is needed to safeguard the exercise of the constitutionally protected right to obtain an abortion. H.R. REP. NO. 306, *supra* note 55, at 6, *reprinted in* 1994 U.S.C.C.A.N. at 703.

58. *Cheffer*, 55 F.3d at 1520. In *Lopez*, although the Court stated that Congress need not advance formal findings, there is some indication that the majority applied a heightened standard of review due to the absence of findings. *Lopez*, 115 S. Ct. at 1631-32.

regulated in *Lopez*.[59] In a footnote, the instant court addressed the argument that the Access Act did not regulate an economic activity but private acts of protest that affected commercial activity.[60] Stating that there is no precedent for the proposition that Congress power to legislate under the Commerce Clause extends only to the acts of commercial entities, the court then cited Supreme Court cases upholding federal statutes criminalizing private conduct that substantially affected interstate commerce.[61]

In the instant case, the court liberally construed the *Lopez* holding in sustaining the Access Act provisions for both civil violations and criminal penalties, as enacted under the Commerce Clause. Analyzing the Access Act as a whole, seemingly under the third category of regulable activity, the instant court held that the economic-activity requirement was met because regulation of obstructive conduct in turn protected a commercial activity.[62] The court reached this conclusion by mingling the language of the second category of regulable activity, that is, regulation and protection of persons or things in interstate commerce, with that of the third, which was solely at issue in *Lopez*.[63] While the Access Act is possibly sustainable on both grounds,[64] the "protect" language used here effectively enables Congress to regulate "indirect effects" on interstate commerce. However, *Lopez* essentially restored the direct/indirect distinction by imposing an economic-activity requirement on the third category of regulable activity.[65] Thus, the "protect" proxy used in the instant case would cover a nonregulable activity, itself noncommercial and therefore having only an indirect effect on interstate commerce, albeit a substantial one.[66]

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59. *See Cheffer*, 55 F.3d at 1520.

60. *Id.* at 1520 n.6. Here, the instant court was citing the lower court's decision in United States v. Wilson, 880 F. Supp. 621 (E.D.Wis.), *rev'd*, United States v. Wilson, 73 F.3d 675 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3669 (U.S. May 20, 1996) (No. 95-1523) (invalidating the Access Act on the grounds that it did not regulate economic activity). *Cheffer*, 55 F.3d at 1520 n.6. In reversing the lower court, the Seventh Circuit in *Wilson* sustained the Access Act as a valid regulation of conduct that interfered with persons engaging in commercial activities, thereby satisfying the economic-activity requirement of *Lopez*. *Wilson*, 73 F.3d at 683-84.

61. *Cheffer*, 55 F.3d at 1520 n.6.

62. *Id.* at 1520. At this juncture, the instant court quotes *Lopez*: "'Where economic activity substantially affects interstate commerce, legislation regulating *that activity* will be sustained.'" *Id.* (quoting *Lopez*, 115 S. Ct. at 1630) (emphasis added).

63. *See Lopez*, 115 S. Ct. at 1629-30.

64. *See, e.g., Wilson*, 73 F.3d at 687 (entertaining the argument but declining to hold that the activities protected under the Access Act fall within a specious subcategory of acts, protection of persons in interstate commerce, of the second category of activities reachable by the commerce power).

65. *Lopez*, 115 S. Ct. at 1631-32.

66. *See id.* The dissent in *Lopez* criticizes the majority's formalistic approach, as it suggests that "the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is 'commercial' in

In another departure from *Lopez*, the instant court disputed the contention that Congress may regulate only economic activities.[67] In support of its position, the Eleventh Circuit Court cites Supreme Court precedent upholding under the Commerce Clause federal criminal statutes that penalize private conduct.[68] No mention is made, however, of the fact that those statutes contained the requisite jurisdictional element.[69] Moreover, the entire opinion fails to address the jurisdictional element now required of criminal statutes, and thus of the Access Act, under *Lopez*. It may be, however, that given the Supreme Court's use of the word "ensure," the instant court views the jurisdictional element as a safeguard, only to be required when a noncommercial act is being criminalized, as in *Lopez*.[70]

Such an analysis facilitates the instant court's validation of the Access Act's presumptive categorization of acts that substantially affect interstate commerce, thereby avoiding the case-by-case determination required for criminal statutes.[71] While this presumption was permissible upon favorable judicial review in *McClung*,[72] it may not suffice for criminal penalties under *Lopez*. This is especially true, considering the *Lopez* Court's seeming reversion to the direct/indirect nomenclature, at which it arrived by recasting cases like *Wickard* and *McClung* as involving regulations of economic activity.[73] Such a revision of commerce clause precedent enabled the *Lopez* Court to confine Congress regulatory powers to economic acts. If an act is noncommercial, any effects on interstate commerce are by definition indirect and must be proven in each case under the requisite jurisdictional element.[74] Thus, legislation will be sustained only if the regulated act is commercial, and has a substantial effect on interstate commerce.[75] The instant court,

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nature." *Id.* at 1663 (Breyer, J., dissenting).

67. *Cheffer*, 55 F.3d at 1520 n.6.

68. *Id.*

69. *Id.* For example, the instant court cites Russell v. United States, 471 U.S. 858 (1985), as sustaining 18 U.S.C. § 844(i), which criminalized destruction of property used in activities affecting interstate commerce. *Cheffer*, 55 F.3d at 1520 n.6.

70. *See Lopez*, 115 S. Ct. at 1631; *supra* text accompanying note 44.

71. *See Lopez*, 115 S. Ct. at 1631. Section 248(a)(1) of the Access Act does not make an express reference to safeguarding the availability of reproductive services that specifically involve interstate commerce. Rather, Congress findings, describing obstruction of reproductive services, support creation of a per se category of activities that substantially affect interstate commerce. H.R. CONF. REP. NO. 488, *supra* note 53, at 7; *see supra* notes 53, 55-57 and accompanying text for further discussion. Thus, any person who intentionally prevents another person from obtaining or providing such services is deemed to engage in prohibited conduct that necessarily interferes with interstate commercial activities. *Id.*

72. *McClung*, 379 U.S. at 302-03. For further discussion of the review in *McClung*, *see also supra* notes 29-34 and accompanying text.

73. *See Lopez*, 115 S. Ct. at 1663-64 (Breyer, J., dissenting).

74. *See id.* at 1631.

75. *See id.* at 1630.

however, fails to require a jurisdictional element for the Access Act's criminal penalties for conduct indirectly affecting interstate commerce. Moreover, the instant court is clearly at odds with the *Lopez* Court's formalistic approach when it refutes the proposition that Congress commerce power reaches only "commercial actors, and not private individuals who interfere with commercial activities in interstate commerce."[76]

This refutation, however, aligns the instant case with the functionalist approach of *Wickard*.[77] In *Wickard*, the U.S. Supreme Court held that Congress may regulate "many kinds of intrastate activity," whether or not commercial, so long as Congress rationally concludes that there is a nexus with interstate commerce.[78] This regulatory power was expanded further in *McClung* when the Court held that Congress may use its commerce power for the noncommercial purpose of prohibiting racial discrimination in restaurants.[79]

Similarly, just as the noncommercial, home consumption of wheat reduces the amount purchased interstate, noncommercial, obstructive conduct interferes with commerce by preventing delivery of reproductive care. Further, like the widespread racial discrimination in *McClung*, the national scale of clinic violence makes the aggregate effects of obstructive conduct all the more severe.[80] After recasting *Wickard* and *McClung* as involving economic activities,[81] *Lopez* would view any such noncommercial conduct in isolation, rather than in light of its cumulative effects, which ensue from what is a nationally mounted campaign.[82]

The instant case is a no-win decision. Consistent as it is with long-standing commerce-clause precedent, it sustains the Access Act's regulation of what is, under *Lopez* standards, noncommercial private conduct, albeit conduct that has a substantial effect on interstate commerce. This result, however, contravenes the *Lopez* holding, which extended commerce authority either over economic activities with a substantial effect on interstate commerce or over noncommercial private conduct when a constitutional nexus is part of the government's prima facie case.[83] This apparent

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76. *Cheffer*, 55 F.3d at 1520 n.6.

77. *Wickard*, 317 U.S. at 125. For further discussion *see supra* notes 21-24 and accompanying text. In its abandonment of the direct/indirect distinction, the *Wickard* Court noted that "'commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.'" 317 U.S. at 122 (quoting Swift & Co. v. United States, 196 U.S. 375, 398 (1905) (Holmes, J.)).

78. *Wickard*, 317 U.S. at 122, 125.

79. *McClung*, 379 U.S. at 301.

80. For further discussion of the spread of violence, *see supra* notes 35, 55 and accompanying text.

81. *Lopez*, 115 S. Ct. at 1663-64 (Breyer, J., dissenting).

82. *Id.* at 1664-65 (Breyer, J., dissenting).

83. *Id.* at 1630-31.

dilemma arises in a setting where a congress legislates in the wake of public fury over appalling state crimes, and where the judiciary invokes federalism's jealous reservation of police power to the states, though with an eye toward reducing the explosion of criminal cases on the federal dockets.[84] Many such policy issues will be asserted, and established commerce-clause principles revisited, as courts decide the deluge of commerce power challenges facilitated by *Lopez*. The instant case represents the first of those cases to part the waters, still holding fast to established commerce-clause principles.

84. *See* O'Reilly & Drizin, *supra* note 43, at 8-10.