

## THE COMMERCE CLAUSE POST-LOPEZ: IT'S NOT DEAD YET<sup>1</sup>

Effectuating social change through policy-oriented legislation has frequently been met with challenges and general skepticism in the United States. Perhaps the earliest, most famous example of this resistance is the *Civil Rights Cases* of 1883.<sup>2</sup> This post-Reconstruction decision effectively nullified the Civil Rights Act of 1875, which was enacted to integrate and protect recently emancipated slaves.<sup>3</sup> Even more importantly, the Supreme Court in this case severely narrowed the scope of the Fourteenth Amendment,<sup>4</sup> limiting its protective power to restriction of state

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<sup>1</sup> See MONTE PYTHON AND THE SEARCH FOR THE HOLY GRAIL (Krypton International Corp. 1974). In this comedic film, the following conversation takes place during the time of the Black Plague:

Undertaker: "Bring out your dead."

Young Man: "Here's one."

Undertaker: "Ninepence."

Old Man: "I'm not dead yet."

Undertaker: "What?"

Young Man: "Nothing, here's your ninepence."

Old Man: "I'm not dead."

Undertaker: "He says he's not dead."

Young Man: "Yes he is."

Old Man: "I'm not."

Undertaker: "He isn't."

Young Man: "Well, he's very ill."

Old Man: "I'm getting better."

Young Man: "No you're not, you'll be stone dead in a moment."

*Id.* Some courts would have the Commerce Clause die before its time, like the characters in this comedy.

<sup>2</sup> See *The Civil Rights Cases*, 109 U.S. 3, 11, 13 (1883) (declaring that the Fourteenth Amendment is not "a code of municipal law regulative of all private rights between man and man in society.").

<sup>3</sup> See J. Clay Smith, Jr., *Shifts of Federalism and Its Implications for Civil Rights*, 39 How. L.J. 737, 738 (1996) (describing that the Civil Rights Act of 1875 was designed to prevent discrimination in places with public accommodations).

<sup>4</sup> See U.S. CONST. amend. XIV, § 1. Section 1 provides in pertinent part:  
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property; without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

action alone, thus excluding private action from its reach.<sup>5</sup> In so holding, the Court stonewalled access to the clearest and most logical source of federal social-policy<sup>6</sup> legislation in the United States Constitution; the amendment was, after all, designed to facilitate socialization of freed slaves and equal access to American society. Since then, Congress has been forced to ground its power in less obvious sources—often the Commerce Clause.<sup>7</sup> For instance, when an effective civil rights act was ultimately passed in 1964, it was enacted under the aegis of the Commerce Clause in order that it reach private, as well as state, discrimination.<sup>8</sup> Use of the Commerce Clause to enact social-policy legislation has been challenged time and again, yet throughout the twentieth century the Supreme Court has deferred to Congress's actions.<sup>9</sup> With the decision in

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<sup>5</sup> See *The Civil Rights Cases*, 109 U.S. at 11. The Court declared that: It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. . . . It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws . . . when these are subversive of the fundamental rights specified in the amendment.

*Id.* The Fourteenth Amendment had the potential to facilitate the elimination of discrimination, but it was interpreted too narrowly by the Court to give the federal government the kind of power it needed to alter existing racism and discrimination. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 485-86 (2d ed. 1991).

<sup>6</sup> See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2161 (1993). "Social" is defined as "of or relating to human society . . . of or relating to the interaction of the individual and the group . . . of, relating to, or concerned with the welfare of human beings as members of society." *Id.* "Policy" is defined as "prudence or wisdom in the management of public and private affairs . . . a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu. determine present and future decisions . . . ." *Id.* at 1754.

The term "social-policy" is used in this Note as a combination of these definitions, meaning government action, policy, or legislation that is aimed toward redefining or changing some evil in American society.

<sup>7</sup> See U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause provides that the United States Congress "shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*; see also Larry E. Gee, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 168 (1995). The author notes that "the Commerce Clause evolved into a conduit for national efforts to reform social problems that had not been adequately addressed by the states." *Id.*

<sup>8</sup> See GERALD GUNTHER, *CONSTITUTIONAL LAW* 149 (12th ed. 1991) (relaying Attorney General Robert F. Kennedy's conviction that use of the Commerce Clause would render the Civil Rights Act clearly constitutional, whereas the Fourteenth Amendment was a riskier source of power).

<sup>9</sup> See, e.g., *Perez v. United States*, 402 U.S. 146, 156-57 (1971) (affirming defendant's conviction under the Consumer Credit Protection Act of 1968 for loan sharking); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 246 (1964) (upholding Title II of the Civil Rights Act of 1964 as a valid exercise of Congress's Commerce Clause

*United States v. Lopez*,<sup>10</sup> however, the Supreme Court may have blocked once again Congress's power to create policy-oriented, socially useful legislation. The lower federal courts seem to be divided, though, on how to interpret *Lopez*. While some courts consider *Lopez* a watershed that changes the face of Commerce Clause jurisprudence, others deem the case noteworthy only because it was the first Supreme Court decision in sixty years to strike down legislation based on the Commerce Clause.<sup>11</sup>

This Note focuses on two important pieces of social-policy legislation that could be affected by *Lopez*: the Violence against Women Act (VAWA)<sup>12</sup> and the Freedom of Access to Clinic Entrances Act (FACE).<sup>13</sup> Conflicts exist in the lower federal courts regarding the constitutionality of both statutes, which were enacted under the Commerce Clause.<sup>14</sup> This Note seeks to resolve the dispute in favor of upholding both acts. Part I surveys the major cases in the history of the Commerce Clause as they relate to social-policy legislation, up to and including *Lopez*. Part II discusses the conflicting cases in the district courts and courts of appeals regarding VAWA and FACE and the different interpretations that lower courts have given *Lopez*. Part III suggests policy reasons why VAWA and FACE should be upheld. Part IV concludes that even if *Lopez* does change the scope of Commerce Clause power, and the deference that courts apply to that power, these two acts should still be upheld, as the majority of lower courts have already confirmed the constitutionality of the statutes.

## I. HISTORY OF THE COMMERCE CLAUSE

Use of the Commerce Clause by Congress as support for legislation has progressed, at least in the context of social-policy legislation, through two major stages. The first stage involved cases that developed a tradition of judicial deference to congressional power.<sup>15</sup> Within this stage there were two phases. The first phase involved the evolution of the

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power).

<sup>10</sup> 514 U.S. 549 (1995).

<sup>11</sup> See *infra* Part II, §§ A & B (discussing the dichotomies in the case law as they pertain to the statutes discussed in this Note).

<sup>12</sup> 42 U.S.C. § 13981 (1994)

<sup>13</sup> 18 U.S.C. § 248 (1994).

<sup>14</sup> Compare *United States v. Wilson*, 73 F.3d 675, 680 (7th Cir. 1995) (affirming the constitutionality of FACE), and *Jane Doe v. John Doe*, 929 F. Supp. 608, 613, 615 (D. Conn. 1996) (upholding the constitutionality of VAWA) with *Hoffman v. Hunt*, 923 F. Supp. 791, 819 (W.D.N.C. 1996) (determining that FACE is an unconstitutional exercise of Congress's Commerce Clause power), and *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 801 (W.D. Va. 1996) (declaring VAWA unconstitutional under the Commerce Clause).

<sup>15</sup> See *infra* notes 20-52 and accompanying text.

scope of Congress's power under the Commerce Clause. The second phase, which began after the Civil Rights Act of 1964,<sup>16</sup> established judicial deference to social-policy legislation.<sup>17</sup> The second stage of Commerce Clause common law started after *Lopez*, which was the first case in sixty years to strike down federal legislation enacted under the Commerce Clause.<sup>18</sup> Since *Lopez*, federal courts have shown less deference to the Commerce Clause as an underlying basis for federal legislation.<sup>19</sup>

#### A. Pre-Civil Rights Act Precedents

The first Supreme Court case to decide the scope of congressional power under the Commerce Clause was *Gibbons v. Ogden*,<sup>20</sup> which was possibly the most expansive interpretation ever of Congress's power. The case involved a dispute over the navigable waters of New York and New Jersey.<sup>21</sup> Robert Livingston and Robert Fulton were granted exclusive rights by the State of New York to operate their steamboats on the Hudson River.<sup>22</sup> Their privilege was assigned to Ogden, the plaintiff, who filed suit to enjoin Thomas Gibbons from running steamboats between the two states, in violation of New York's exclusive grant to Ogden.<sup>23</sup> Gibbons, however, was licensed to operate under a federal act.<sup>24</sup> This created a conflict between state and federal law.<sup>25</sup> The Supreme Court, in an opinion by Chief Justice Marshall, articulated the full meaning of the Commerce Clause's individual words.<sup>26</sup> The Chief Justice expounded that "commerce" meant more than just trade; it meant

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<sup>16</sup> Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 20 U.S.C., 42 U.S.C., and 43 U.S.C.).

<sup>17</sup> See *infra* notes 53-83 and accompanying text.

<sup>18</sup> See *United States v. Lopez*, 514 U.S. 549, 551 (1995) (striking down the Gun-Free School Zones Act as unconstitutional); see also Michael Bablo, Note, Leslie Salt Co. v. United States: Does the Recent Supreme Court Decision in *United States v. Lopez* Dictate the Abrogation of the "Migratory Bird Rule"?, 14 TEMP. ENVTL. L. & TECH. J. 277, 277-78 (1995). The author wrote, "[t]he *Lopez* decision is the first time in approximately 60 years that the Supreme Court has found that Congress does not have the power to regulate pursuant to the Commerce Clause." *Id.*; see also Charles B. Schweitzer, Comment, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of United States v. Lopez*, 34 DUQ. L. REV. 71, 71 (1995) (commenting that "*Lopez* is significant because it invalidated a federal law under the Commerce Clause for the first time since 1936").

<sup>19</sup> See *infra* notes 96-176 and accompanying text.

<sup>20</sup> 22 U.S. 1 (1824).

<sup>21</sup> See *id.* at 2.

<sup>22</sup> See *id.* at 1-2.

<sup>23</sup> See *id.* at 2.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.* at 2-3.

<sup>26</sup> See *Gibbons*, 22 U.S. at 189-97.

“intercourse” as well.<sup>27</sup> This necessarily denoted commerce both without and within the states, as per the word “among.”<sup>28</sup> Chief Justice Marshall then interpreted the word “regulate” to mean that Congress’s power under the Commerce Clause is plenary.<sup>29</sup> The Chief Justice thereby determined that the power to regulate, vested in Congress by the Constitution, is complete and unrestricted.<sup>30</sup> The Court further explained that democratic government, not the judiciary, is the check on the exercise of congressional power.<sup>31</sup>

The underlying premise of *Gibbons*, therefore, is that the Commerce Clause power is restricted only by the political process and not by the courts. Interestingly, Chief Justice Marshall maintained that this was not an interpretation; the Chief Justice wrote that the opinion merely articulated what the Constitution already presented.<sup>32</sup> Yet, in this mere articulation, the Court introduced what was, and what has remained, the

<sup>27</sup> See *id.* at 189-90. These are the famous words: “Commerce, undoubtedly, is traffic, but it is something more: *it is intercourse*. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.” *Id.* (emphasis added).

<sup>28</sup> See *id.* at 194. The Chief Justice wrote that “[c]omprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one.” *Id.*

<sup>29</sup> See *id.* at 196 (declaring that the power to regulate is “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”).

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* The Chief Justice went so far as to state that:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

*Id.* at 197.

<sup>32</sup> See *Gibbons*, 22 U.S. at 187-88. Chief Justice Marshall discussed the idea of strict constructionism as advanced by certain members of the bar, but found there was nothing in the Constitution that dictated strictly construing the enumerated powers of Congress. See *id.* The Chief Justice then described using the natural sense of the words in the Constitution. The Court wrote:

If . . . there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion [sic] with the purposes for which they were conferred.

*Id.* at 188-89.

broadest interpretation of the Commerce Clause ever announced by the Supreme Court.<sup>33</sup>

The next notable step in the first phase of Commerce Clause interpretation, *NLRB v. Jones & Laughlin Steel Corp.*,<sup>34</sup> was decided over 100 years after *Gibbons*. At issue in *Jones & Laughlin* was the scope of the power of the National Labor Relations Board to enforce an order prohibiting corporate discrimination against employees attempting to unionize.<sup>35</sup> Expanding upon prior decisions, Chief Justice Hughes determined that interstate activities “by reason of close and intimate relation to interstate commerce” could be placed under federal control.<sup>36</sup> The Chief Justice reasoned that there was a need for federal regulation in order (1) to prevent interference with interstate commerce and (2) to promote efficiency.<sup>37</sup> The Court refused to inspect the effects on commerce “in a vacuum,” and instead, enunciated that interstate commerce is a “practical conception” that “must be appraised by a judgment that does not ignore actual experience.”<sup>38</sup> The Court’s pragmatic approach expanded the idea that the Court would not limit the power of the federal government under the Commerce Clause and virtually eliminated judicial control over Commerce Clause interpretation.<sup>39</sup> This case also created the substantial effect language that would become the standard in Commerce Clause analysis.<sup>40</sup>

The trend of deference to congressional decisions regarding regulation of interstate commerce continued in *Wickard v. Filburn*,<sup>41</sup> decided during World War II, in the aftermath of the Great Depression. *Wickard* involved a challenge to wheat production quotas set by the Department of Agriculture in the Agricultural Adjustment Act of 1938.<sup>42</sup> Filburn was an Ohio wheat farmer who regularly grew excess wheat outside of what

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<sup>33</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 306 (2d ed. 1988).

<sup>34</sup> 301 U.S. 1 (1937).

<sup>35</sup> See *id.* at 22.

<sup>36</sup> *Id.* at 37.

<sup>37</sup> See *id.* at 38.

<sup>38</sup> *Id.* at 41.

<sup>39</sup> See TRIBE, *supra* note 33, at 309 (stating that the “Supreme Court has exercised little independent judgment [in this area], choosing instead to defer to the expressed or implied findings of Congress”).

<sup>40</sup> See *id.* (noting that since *Jones & Laughlin*, the Court has deferred to congressional findings whenever “the regulated activities have the requisite ‘substantial economic effect.’”); see also *United States v. Lopez*, 514 U.S. 549, 559 (1995) (recognizing that, “consistent with the great weight of case law,” Congress may regulate an activity which “substantially affects” interstate commerce).

<sup>41</sup> 317 U.S. 111 (1942).

<sup>42</sup> See *id.* at 113-14; 7 U.S.C. §§ 1281-1407 (1988).

he marketed in order to feed his livestock and his family.<sup>43</sup> Although Filburn received notice of his annual wheat allotment in 1940, he exceeded his designated number of bushels for 1941 and refused to pay a fine for such excess.<sup>44</sup> The articulated purpose of the Agricultural Adjustment Act of 1938 was to regulate interstate and international commerce in wheat so as to prevent either a surplus or shortage in wheat supply, and in so doing, the Act would regulate prices.<sup>45</sup> The question before the Court was whether Congress exceeded its power under the Commerce Clause by regulating wheat production that was not for market, but solely for personal consumption.<sup>46</sup>

In the decision, the Court rearticulated Chief Justice Marshall's determination in *Gibbons* that the political process, not the judicial system, is the vehicle for creating limitations on congressional Commerce Clause power.<sup>47</sup> Justice Jackson, writing for the majority, created a test for determining whether Congress exceeded its Commerce Clause power.<sup>48</sup> After acknowledging the plenary power Congress had over commerce, Justice Jackson stated that as long as federal legislation had a substantial effect on interstate commerce, either direct or indirect, the Supreme Court would uphold it.<sup>49</sup> If satisfied, the Supreme Court would afford deference to such legislation.<sup>50</sup> This case continued the extremely broad interpretations articulated in *Gibbons*<sup>51</sup> by Chief Justice Marshall and set forth in *Jones & Laughlin* by Chief Justice Hughes.<sup>52</sup>

A groundwork of Commerce Clause jurisprudence was thus laid through the precedents set in *Gibbons*, *Jones & Laughlin*, and *Wickard*.

<sup>43</sup> See *Wickard*, 317 U.S. at 114-15.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See *id.* at 118.

<sup>47</sup> See *id.* at 120. The Court further acknowledged that "[t]he power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Id.* at 124 (citation omitted).

<sup>48</sup> See *Wickard*, 317 U.S. at 125.

<sup>49</sup> See *id.* In articulating the test, the Court wrote:

But 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, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

*Id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824) (declaring that the power to regulate is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.").

<sup>52</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

This first era of Commerce Clause decisions set the tone for even more expansive future interpretations. Proceeding from the deferential decision in *Gibbons*, the Supreme Court provided the federal government the space it needed to make socially fruitful legislation. This tradition of deference became extremely important in the next phase of the first stage—the cases addressing the Civil Rights Act of 1964.

### B. *The Civil Rights Act of 1964 and Ensuing Case Law*

The stated purpose of the Civil Rights Act of 1964 (the Act)<sup>53</sup> was to create a peaceful solution to “the persistent problem of racial and religious discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business, and trade associations.”<sup>54</sup> Congress realized that racism and discrimination were nationwide problems that had to be eliminated at the national level.<sup>55</sup> Because the activities being regulated were both related to national commerce, Congress justified the Act under the Commerce Clause.<sup>56</sup> The history of the Act reveals awareness that use of the Com-

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<sup>53</sup> Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 20 U.S.C., 42 U.S.C., and 43 U.S.C.).

<sup>54</sup> S. REP. NO. 872, at 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2355.

<sup>55</sup> *See id.* at 1, 8, *reprinted in* 1964 U.S.C.C.A.N. 2355, 2362. Eliminating discrimination was a part of both major parties' platforms, but it was the nationwide campaign of civil disobedience that acted as a catalyst by really pressing politicians to take action. *See id.* at 8-9, *reprinted in* 1964 U.S.C.C.A.N. 2355, 2363. This was evidenced by President Kennedy's speech to Congress on June 19, 1963, in which he said:

Events of recent weeks have again underlined how deeply our Negro citizens resent the injustice of being arbitrarily denied equal access to those facilities and accommodations which are otherwise open to the general public. That is a daily insult which has no place in a country proud of its heritage . . . Surely, in 1963, 100 years after emancipation, it should not be necessary for any American citizen to demonstrate in the streets for opportunity to stop at a hotel, or eat at a lunch counter in the very department store in which he is shopping, or to enter a motion picture house, on the same terms as any other customer.

*Id.*

<sup>56</sup> *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 20 U.S.C., 42 U.S.C., and 43 U.S.C.). The Act provides for injunctive relief against any establishment found to discriminate “on the ground of race, color, religion, or national origin,” provided the establishment “is a place of public accommodation” and its operations affect interstate commerce. 42 U.S.C. § 2000(a)-(c) (1988) (establishing the criteria for determining whether the operations of an establishment affect interstate commerce). Among the establishments included within the Act are hotels and restaurants. *See id.* § 2000(b). Studies concluded that segregation was detrimental to the national economy, as it was “economically wasteful,” and further, that “[i]ntolerance is a species of boycott and any business or job boycott is a cancer in the economic body of the Nation.” S. REP. NO. 872, at 11 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2365.



merce Clause to effectuate societal change might be challenged, but also knowledge that socially-oriented objectives would not render use of the Commerce Clause power any less valid.<sup>57</sup>

The Act became law on July 2, 1964.<sup>58</sup> By October of the same year, two cases challenging the constitutionality of the Act reached the Supreme Court. The first of the two was *Heart of Atlanta Motel, Inc. v. United States*.<sup>59</sup> In *Heart of Atlanta* and in violation of the act, a motel refused to rent rooms to African Americans.<sup>60</sup> The motel owner brought an action to enjoin enforcement of the Act, claiming that Congress had exceeded the scope of its power under the Commerce Clause.<sup>61</sup> The Court, however, declared that Congress had the constitutional power to prevent such socially disgraceful practices.<sup>62</sup>

Looking to the history of the Act, Justice Clark noted that other civil rights acts had been enacted after the Civil War and in various years since, but none were so extensive as the one signed in 1964 by President Johnson.<sup>63</sup> The Justice noted that the principles used for scrutinizing Title II, the section of the Act addressing public accommodations, were based on the *Gibbons* decision.<sup>64</sup> Considering the increase in interstate travel since *Gibbons*, the Justice wrote that legislation prohibiting discrimination that has an adverse effect on interstate travel would be even

<sup>57</sup> S. REP. NO. 872, at 13 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2367. Congress requested opinions from legal scholars regarding the constitutionality of the Act. The overwhelming response was that:

"The commerce power is clearly adequate and appropriate. No impropriety need be felt in using the commerce clause as a response to deep moral concern." Where social injustices occur in commercial activities the commerce clause has been used to prevent discrimination . . . [and] it has been used to reach intrastate activities if they have a substantial effect (individually or cumulatively) upon commerce. . . . Congress, in the exercise of its plenary power over interstate commerce, may regulate commerce or that which affects it for other than purely economic goals. . . . *The fact that [the Act] would accomplish socially oriented objectives by aid of commerce clause powers would not detract from its validity.* There are many instances in which Congress has discouraged practices which it deems evil, dangerous, or unwise by a regulation of interstate commerce.

*Id.* (emphasis added).

<sup>58</sup> See Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 20 U.S.C., 42 U.S.C., and 43 U.S.C.).

<sup>59</sup> 379 U.S. 241 (1964).

<sup>60</sup> See *id.* at 249.

<sup>61</sup> See *id.* at 243-44.

<sup>62</sup> See *id.* at 246. The Court wrote, "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." *Id.* at 257.

<sup>63</sup> See *id.* at 245.

<sup>64</sup> See *id.* at 253-54.

more justified in relying on the Commerce Clause than legislation addressing interstate steamboat traffic.<sup>65</sup> Building on Chief Justice Marshall's exposition on "intercourse," Justice Clark stated that the social-policy goals of Congress did not render the regulation of the interstate activity any less legitimate.<sup>66</sup>

This language was key to upholding the Civil Rights Act. The Court not only acknowledged the social-policy goals of Congress, but also deferred to the Congressional determination that racial discrimination had a significant effect on interstate commerce.<sup>67</sup> The Court expounded further that the power to regulate commerce includes the ability to regulate "local incidents thereof."<sup>68</sup> As such, preventing a motel owner from excluding African Americans was well within the scope of Congress's power.<sup>69</sup>

Justice Clark concluded by noting that while Congress may have had other means of preventing discrimination, it was not the role of the Court to interfere with Congress's discretion in such matters.<sup>70</sup> The only requirement imposed by the Court was satisfaction of the traditional rational relation test, which holds that the means chosen by Congress must be reasonably related to the desired ends.<sup>71</sup> Satisfied that this test had been met, the Court continued its tradition of deference to legislative decisions in matters involving regulation of social-policy issues through use of the Commerce Clause.<sup>72</sup>

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<sup>65</sup> See *Heart of Atlanta*, 379 U.S. at 251.

<sup>66</sup> See *id.* at 257. Justice Clark declared:

That Congress was legislating against moral wrongs . . . rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and . . . *Congress was not restricted by the fact that the particular obstruction to interstate commerce . . . was also deemed a moral and social wrong.*

*Id.* (emphasis added).

<sup>67</sup> See *id.* at 257-58.

<sup>68</sup> See *id.* at 258. The Court wrote:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . . .

*Id.* (citing *United States v. Darby*, 312 U.S. 100, 118 (1941)).

<sup>69</sup> See *id.* at 261.

<sup>70</sup> See *id.* at 261-62.

<sup>71</sup> See *Heart of Atlanta*, 379 U.S. at 261 (holding that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.").

<sup>72</sup> See *id.*

*Katzenbach v. McClung*,<sup>73</sup> the companion case to *Heart of Atlanta*, involved a restaurant that refused to serve African Americans at its tables.<sup>74</sup> The restaurant was subsequently charged with a violation of the Civil Rights Act of 1964.<sup>75</sup> Referring to the reasoning in *Heart of Atlanta*, the Court held that the Commerce Clause provided a legitimate source of power to validate the Civil Rights Act of 1964.<sup>76</sup> More importantly, Justice Clark, writing for the majority, relied on the history of the Act and the findings made by Congress regarding the sweeping purpose of the Act.<sup>77</sup>

The Court announced that it was not necessary for Congress to make formal findings about the effects of the Act on commerce and that the hearings delineated well enough Congress's need to rely on the Commerce Clause.<sup>78</sup> Finally, the Court reiterated the view that Congress has plenary power in regulating commerce under the Commerce Clause.<sup>79</sup> As such, the Court continued, where Congress does not violate some other express clause in the Constitution, any rational purpose for using the Commerce Clause is valid.<sup>80</sup>

For decades to come, the precedent set in these two cases created a tradition of deference to congressional action taken under the auspices of the Commerce Clause.<sup>81</sup> The Court time and again declared that a rational relationship was all that was required for Congress to regulate commerce and that the power to regulate was expansive.<sup>82</sup> When creat-

<sup>73</sup> 379 U.S. 294 (1964).

<sup>74</sup> *See id.* at 296 (noting that the restaurant provided only take-out service for African Americans).

<sup>75</sup> *See id.* at 295.

<sup>76</sup> *See id.* at 301 (stating that racial discrimination is a nationwide problem, not a local or regional one).

<sup>77</sup> *See id.*

<sup>78</sup> *See id.* at 303-04 (discussing that while congressional findings do not preclude the Court from investigating whether interstate activity is affected, if the Court does examine the legislation, the Court is only seeking a rational relationship between the means and the ends).

<sup>79</sup> *See Katzenbach*, 379 U.S. at 305.

<sup>80</sup> *See id.*

<sup>81</sup> *Cf. Schweitzer*, *supra* note 18, at 71 (commenting that "*Lopez* is significant because it invalidated a federal law under the Commerce Clause for the first time since 1936").

<sup>82</sup> *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). In *Hodel*, the Court once more recognized that deference will be given to rational findings that certain activities have an effect on commerce. *See id.* at 276 (relying on *Heart of Atlanta* and *Katzenbach*).

The line of cases that established such deference is too extensive to recount here, but the cases aforementioned are frequently cited for the notions of deference and the rational relationship test. *See, e.g., Victoria Davis*, Note, *A Landmark Lost: The Anemic Impact of United States v. Lopez*, 115 S. Ct. 1624 (1995), on the *Federalization of Criminal*

ing social-policy legislation, Congress had over a century's worth of case law on which to rely and knew how to prevent enactments from being declared unconstitutional. Federal courts, using the same jurisprudence, also understood the degree of deference afforded social-policy legislation. Then, a controversial decision, *United States v. Lopez*,<sup>83</sup> threw both the lower federal courts and Congress into a quagmire.

### C. Lopez: Watershed or Anomaly?

The infamous *Lopez* case was decided in a political climate of Republican downsizing that desired decentralization of the federal government.<sup>84</sup> This climate still exists today and sheds some light on the current composition of a Supreme Court that may have narrowed the scope of the Commerce Clause.<sup>85</sup> In *United States v. Lopez*,<sup>86</sup> the Court was confronted with a challenge to the Gun-Free School Zones Act of 1990.<sup>87</sup> Chief Justice Rehnquist, writing for a majority of the Court, created a three-part analysis for determining legitimate exercises of Commerce Clause power.<sup>88</sup> The majority wrote:

[W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, 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 activity. Finally, Congress' commerce authority includes the power to regulate those activities

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*Law*, 75 NEB. L. REV. 117, 120-28 (1996); Bablo, *supra* note 18, at 283-88; Schweitzer, *supra* note 18, at 83-95.

<sup>83</sup> 514 U.S. 549 (1995).

<sup>84</sup> *See id.* at 580 (Kennedy, J., concurring) (discussing the need to curb Congress's Commerce Clause power).

<sup>85</sup> *See* STONE, *supra* note 5, at lvii-lxxiv. The Supreme Court, in 1964, consisted of Chief Justice Earl Warren, Justice Clark, Justice Black, Justice Douglas, Justice Goldberg, Justice Brennan, Justice Frankfurter, Justice Harlan, and Justice Stewart. *See id.* Under the stewardship of Chief Justice Warren, the Court leaned far toward the "liberal" side, and away from strict constructionism. However, the makeup of the Supreme Court in 1995 is far different. The Chief Justice at the time the Court decided *Lopez*, William H. Rehnquist, was substantially more conservative than Chief Justice Warren, and the remainder of the Court consisted of Justice Stevens, Justice O'Connor, Justice Scalia, Justice Kennedy, Justice Souter, Justice Thomas, Justice Ginsberg, and Justice Breyer. *See* Staci Rosche, *How Conservative Is the Rehnquist Court? Three Issues, One Answer*, 65 FORDHAM L. REV. 2685, 2727 (1997). The Rehnquist Court has made 42.8% "liberal" decisions in the area of civil liberties, while the Warren Court had a rate of 71.4%. *See id.* at 2727, 2745 n.303.

<sup>86</sup> 514 U.S. 549 (1995).

<sup>87</sup> *See id.* at 551. The Act made it an offense knowingly to "possess a firearm at a place" classified as a "school zone." *Id.*

<sup>88</sup> *See id.* at 558.

having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.<sup>89</sup>

Using the above analysis, the Court struck down the Gun-Free School Zones Act.<sup>90</sup> The part of this analysis that seems most controversial and will most significantly affect the legislation discussed in this Note is the third prong: the substantial relation test.<sup>91</sup>

While the three-category approach would seem to narrow the ability of Congress to create legislation under the Commerce Clause, there is an important loophole that will enable Congress to continue legislating—congressional findings. The Court mentioned, almost in passing, that if Congress had made formal findings concerning the legislation, the Gun-Free School Zones Act might have been upheld.<sup>92</sup> It is this dicta regarding congressional findings that may now enable some courts to continue to defer to legislation enacted pursuant to the Commerce Clause.<sup>93</sup>

Other courts, however, cite the three-category test as a complete turnaround in Commerce Clause analysis that narrowed Congress's power.<sup>94</sup> Although *Lopez* cannot be overlooked, neither can the 170 years of Commerce Clause jurisprudence that preceded *Lopez*.<sup>95</sup> It is no longer virtually guaranteed, however, that legislation enacted under the Commerce Clause will be upheld automatically by the courts. It is in light of this uncertainty that courts are now examining the statutes at issue in this Note.

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<sup>89</sup> *Id.* at 558-59 (citations omitted).

<sup>90</sup> *See id.* at 551.

<sup>91</sup> *See id.* at 559. The Court declared that the third category of activities that Congress may regulate under the Commerce Clause includes "those activities having a substantial relation to interstate commerce." *Id.* at 558-59. The Court explained that whether an activity falls within the third category "requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559.

<sup>92</sup> *See Lopez*, 514 U.S. at 562. The Court stated that under *Katzenbach*, formal findings are not always necessary, but that where the effects of an activity on commerce are not readily apparent, Congress should clarify its determination with findings so the courts may understand its reasoning. *See id.* at 562-63; *see also* Betty S. Diener, Recent Case, 55 MD. L. REV. 963, 968 (1996) (stating that the Court in *Lopez* placed emphasis on the importance of legislative findings).

<sup>93</sup> *See United States v. Wilson*, 73 F.3d 675, 680 (7th Cir. 1995); *Jane Doe v. John Doe*, 929 F. Supp. 608, 615 (D. Conn. 1996).

<sup>94</sup> *See Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 787 (W.D. Va. 1996); *Hoffman v. Hunt*, 923 F. Supp. 791, 806 n.5 (W.D.N.C. 1996).

<sup>95</sup> *See United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995) (stating that although *Lopez* stands out as only one of a few cases since 1935 in which the Court found Congress exceeded its Commerce Clause power, the Court did not overturn all prior Commerce Clause jurisprudence).

## II. CONFLICT IN THE COURTS

The Violence against Women Act (VAWA)<sup>96</sup> and the Freedom of Access to Clinic Entrances Act (FACE)<sup>97</sup> were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>98</sup> Both of these statutes were enacted under the auspices of the Commerce Clause, and the constitutional basis of both has been challenged. District and circuit courts are not in agreement about how Commerce Clause power may be used in light of *Lopez*, but as the following discussion reveals, the majority of cases agree that Congress still has plenary power to enact social-policy legislation.

### A. *The Violence against Women Act*

There has been less commentary surrounding the constitutional validity of VAWA than there has been surrounding FACE. Perhaps this is because its subject is less politically charged and more widely condemned as a universal evil than that action addressed by FACE. VAWA<sup>99</sup> was

<sup>96</sup> 42 U.S.C. § 13981 (1994)

<sup>97</sup> 18 U.S.C. § 248 (1994).

<sup>98</sup> 42 U.S.C. § 13981 (1994); 18 U.S.C. § 248 (1994).

<sup>99</sup> 42 U.S.C. § 13981 (a)-(e). The statute provides in pertinent part:

(a) Purpose: Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence: All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

(c) Cause of Action: A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions: For purposes of this section—

(1) the term “crime of violence motivated by gender” means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender; and

(2) the term “crime of violence” means—

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title

enacted in order to extend civil rights for women beyond the workplace and into the home and streets by making crimes against women a violation of their civil rights.<sup>100</sup> The Act federalized both crimes of domestic violence and violations of protection orders.<sup>101</sup> Testimony before congressional subcommittees made it clear that local and state law simply were not adequately protecting victims of domestic violence.<sup>102</sup> In order to qualify for federal regulation, however, the crimes had to be interstate criminal offenses.<sup>103</sup> It is this aspect of VAWA that has created conflicting opinions in federal district courts.

The first case to address the constitutionality of VAWA was *Jane Doe v. John Doe*.<sup>104</sup> In *Jane Doe*, a wife sued her husband under VAWA for violating her federal rights by subjecting her to domestic violence, a gender-based crime.<sup>105</sup> Her husband sought to dismiss the action by challenging the authority of Congress to enact the legislation.<sup>106</sup>

18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

(e) Limitation and Procedures

(1) Limitation: Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).

*Id.*

<sup>100</sup> See H.R. CONF. REP. NO. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1801, 1853. Subtitle C provides that "Congress has found that crimes of violence motivated by gender constitute bias crimes in violation of the victim's right to be free from discrimination on the basis of gender. . . ." *Id.*

<sup>101</sup> See 42 U.S.C. § 13981 (1994).

<sup>102</sup> See Michelle W. Easterling, *For Better for Worse: The Federalization of Domestic Violence*, 98 W. VA. L. REV. 933, 938-39, 941 (1996) (explaining that local police frequently hesitate to arrest in domestic situations because they do not want to interfere in the home). Congressional testimony indicates that gender-motivated crime is not addressed in state courts; that some states still do not recognize rape of a wife by her husband; and that in some states, wives may not sue their husbands after being assaulted due to the interspousal immunity doctrine. See *id.* at 941 (discussing the congressional testimony of Sally Goldfarb of the National Organization of Women).

<sup>103</sup> See *id.* at 934-35. VAWA "created two new federal criminal offenses: interstate domestic violence and interstate violation of a protection order." *Id.* at 935.

<sup>104</sup> 929 F. Supp. 608, 610 (D. Conn. 1996). Because this was the first time the statute was considered, both the federal government and several organizations that advocate women's rights were allowed to intervene on behalf of the plaintiff. See *id.* at 610 & n.2.

<sup>105</sup> See *id.* at 610 & n.2.

<sup>106</sup> See *id.* at 610.

In evaluating the constitutionality of VAWA, the court examined the history, findings, and hearings that were conducted prior to the law's enactment.<sup>107</sup> After utilizing the analysis from *Lopez* and focusing solely on the third prong,<sup>108</sup> the court found that VAWA was an appropriate exercise of congressional power.<sup>109</sup>

Most important to the court in distinguishing VAWA from the Gun-Free School Zones Act, which was held to be unconstitutional in *Lopez*,<sup>110</sup> was the degree of analysis and extent of the findings made by Congress prior to enacting VAWA.<sup>111</sup> Because of the statistical, medical, and economic information that was collected by Congress, the court was able to find a rational basis for Congress's findings that there was a substantial effect on interstate commerce.<sup>112</sup> Thus, the *Jane Doe* court concluded that VAWA was a permissible use of Congress's power under the Commerce Clause.<sup>113</sup>

A month after the *Jane Doe* decision, a conflicting opinion was announced in *Brzonkala v. Virginia Polytechnic and State University*.<sup>114</sup> The court in *Brzonkala* applied the test from *Lopez* and held that VAWA was an invalid exercise of Congress's Commerce Clause power.<sup>115</sup> Contrary to the holding in *Jane Doe*, the *Brzonkala* court held that the findings made by Congress in its enactment of VAWA were insufficient to sustain the scrutiny of the *Lopez* substantial relation test.<sup>116</sup> Instead of

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<sup>107</sup> See *id.*

<sup>108</sup> See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The third prong of *Lopez* recognizes that the power to regulate under the Commerce Clause extends to "those activities that substantially affect interstate commerce." *Id.*

<sup>109</sup> See *Jane Doe*, 929 F. Supp. at 613, 615. The court reviewed the holding in *Lopez* and determined that although *Lopez* acknowledged that Commerce Clause power has limits, it did not overturn the rationality test that was established in *Hodel*. See *id.* (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 425 U.S. 264, 276-80 (1981)).

<sup>110</sup> See *Lopez*, 514 U.S. at 552.

<sup>111</sup> See *Jane Doe*, 929 F. Supp. at 615. Recall that the Court in *Lopez* hinted that if Congress had made findings evidencing a stronger link between students with guns and interstate commerce, the law might have been upheld. See *Lopez*, 514 U.S. at 563. In the case of VAWA, Congress made very specific findings regarding the detrimental effects of violence against women on commerce. See *Jane Doe*, 929 F. Supp. at 611. The district court noted, for example, that "[g]ender based violence bars its most likely targets—women—from full participation in the national economy. . . . [S]tudies report that almost 50% of rape victims lose their job or are forced to quit in the aftermath of the crime." *Id.* at 613 (citation omitted).

<sup>112</sup> See *Jane Doe*, 929 F. Supp. at 615.

<sup>113</sup> See *id.*

<sup>114</sup> 935 F. Supp. 779 (W.D. Va. 1996).

<sup>115</sup> See *id.* at 801.

<sup>116</sup> See *id.* at 786-93; *Lopez*, 514 U.S. at 558-59 (recognizing that Congress may "regulate those activities having a substantial relation to interstate commerce"). The court's analysis in *Brzonkala* compared the similarities and differences between the en-



analyzing the congressional findings or performing a Commerce Clause analysis, however, the *Brzonkala* court simply compared its case to the situation in *Lopez* and concluded that the case at hand was similarly unconvincing as a valid exercise of power under the Commerce Clause.<sup>117</sup> Perhaps this tactic would have sufficed if the court had examined the record as a whole, but the opinion instead chose to focus on findings that it found particularly weak; this resulted in a judgment invalidating VAWA.<sup>118</sup>

The Supreme Court stated in *Lopez* that it was not overruling or denying all prior Commerce Clause precedent,<sup>119</sup> yet the *Brzonkala* court relied solely on *Lopez*.<sup>120</sup> If the district court actually adhered to *Lopez* as strictly as it thought it had, the court would have realized that it should have considered all of Commerce Clause common law and not just *Lopez*.<sup>121</sup> The final line of the court's analysis even stated, "[a] reasonable adherence to *Lopez* reveals that VAWA is not a proper use of the commerce power."<sup>122</sup>

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actment of the Gun-Free School Zones Act and VAWA. *Id.* at 789-93. The court concluded that the differences were insignificant, but that the similarities were overwhelming. *See id.* at 789. The court's analysis is unconvincing, however, as it made statements such as, "[t]he commerce power is based on a reasonable effect on interstate commerce, not on Congress's perceived effect on commerce." *Id.* But it is well established that the legislature determines whether an activity affects commerce such that Congress may regulate in that area, subject only to a rational basis test by the courts. *See Katzenbach v. McClung*, 370 U.S. 294, 301 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-59 (1964); *Gibbons v. Ogden*, 22 U.S. 1, 196-97 (1824). The *Brzonkala* court seems to have ignored that fact. *See* 935 F. Supp. at 789-90.

<sup>117</sup> *See Brzonkala*, 935 F. Supp. at 791.

<sup>118</sup> *See id.* at 792-93. The court examined the findings Congress made about effects on interstate commerce and decided that an effect on the national economy is not the same as an effect on interstate commerce. *See id.* at 792. The court then accepted the defendants' argument that insomnia costs the national economy more than domestic abuse does, but to allow the federal government to regulate insomnia would take away too much power from the states. *See id.* at 792-93. The argument is inept, though, because insomnia is not a crime that has traditionally been ignored or denied by the states, who are supposed to regulate crime. Furthermore, insomnia is not imposed on one gender by another, nor inflicted upon one person by another, as are domestic violence and rape. Victims of such crimes are forced to cease work due to the trauma they have suffered, which was the point made in testimony to Congress about the effects on interstate commerce and the national economy. *See H.R. CONF. REP. NO. 103-711*, at 385-86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1801, 1853-54. The annual economic cost of the problem is not the focus of the findings, so the analogy is questionable. Furthermore, to compare domestic violence and rape to insomnia is to trivialize both the magnitude of the problem and the severity of the crimes.

<sup>119</sup> *See Lopez*, 514 U.S. at 559 (stating that the tests the majority was enunciating were "consistent with the great weight of our case law").

<sup>120</sup> *See Brzonkala*, 935 F. Supp. at 788-92.

<sup>121</sup> *See Lopez*, 514 U.S. at 552-59.

<sup>122</sup> *See Brzonkala*, 935 F. Supp. at 793.

The *Heart of Atlanta* and *Katzenbach* Courts noted in dicta that the social-policy aspect of legislation does not prevent such legislation from representing a valid exercise of Commerce Clause power.<sup>123</sup> Courts should well remember the dicta in those two Supreme Court cases when examining VAWA. Congress held lengthy hearings and made extensive findings before enacting VAWA, as was encouraged in *Lopez*.<sup>124</sup> Because the *Jane Doe* court noted and relied on congressional findings and the *Brzonkala* court essentially ignored them, *Jane Doe*'s reasoning is more consistent with the holding in *Lopez* and less myopic than *Brzonkala*.

### B. *The Freedom of Access to Clinic Entrances Act*

The Freedom of Access to Clinic Entrances Act<sup>125</sup> (FACE) was enacted in order to protect a woman's constitutional right to choose whether

<sup>123</sup> See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303 (1964).

<sup>124</sup> See H.R. CONF. REP. NO. 103-711, at 385-86 (1994), reprinted in 1994 U.S.C.C.A.N. 1801, 1853-54; see also *Lopez*, 514 U.S. at 562-63. The majority in *Lopez* wrote:

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

*Id.*

<sup>125</sup> 18 U.S.C. § 248 (1994). The Freedom of Access to Clinic Entrances Act provides criminal and civil penalties against anyone who:

(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;

. . . .

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . . .

*Id.* The act continues:

(d) Rules of Construction.—Nothing in this section shall be construed—

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

. . . .

or not to have an abortion and to follow through on that decision.<sup>126</sup> The impetus for FACE was the killing of a doctor outside of an abortion clinic in Florida<sup>127</sup> and the ensuing recognition that the “pro-life” or “anti-choice”<sup>128</sup> campaign was both nationwide and violent.<sup>129</sup> FACE was not designed to stem peaceful assemblies protesting or supporting abortion; First Amendment rights are *not intended to be implicated* by FACE.<sup>130</sup> It is, however, intended to deter the bombings, violent physical attacks, and other threats imposed by anti-abortion demonstrators on clinics and patients.<sup>131</sup>

Federal legislation was necessary because either state action was inadequate or local police were unwilling to stop the protesters or protect the patients and their providers.<sup>132</sup> Furthermore, existing federal statutes

(e) Definitions.—as used in this section:

. . . .

(2) Interfere with.—The term “interfere with” means to restrict a person’s freedom of movement.

(3) Intimidate.—The term “intimidate” means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical Obstruction.—The term “Physical obstruction” means rendering impassable ingress to or egress from a facility that provides reproductive health services . . . or rendering passage to or from such a facility . . . unreasonably difficult or hazardous.

(5) Reproductive health services.—The term “reproductive health services” means reproductive health services provided in a hospital, clinic, physician’s office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

*Id.*

<sup>126</sup> See *American Life League, Inc. v. Reno*, 47 F.3d 642, 646 (4th Cir. 1995). In *American Life*, the court stated that FACE aims to protect and promote public safety and health “by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.” *Id.*

<sup>127</sup> See *id.*

<sup>128</sup> There are many terms used to identify this side of the abortion debate: in this Note, the terms pro-life, anti-choice, and anti-abortion will be used interchangeably.

<sup>129</sup> See H.R. REP. NO. 103-306, at 9 (1994), reprinted in 1994 U.S.C.C.A.N. 699, 706. This is evidenced in the findings made by Congress with a quote from Randall Terry, the president of Operation Rescue (a national organization whose goal is to stop abortions by any means available). See *id.* The congressional findings note Terry’s statement “that doctors are the ‘weak link’ in the provision of abortion services; and he has vowed to make doctors’ lives a ‘living hell.’” *Id.*

<sup>130</sup> See *id.* at 10, reprinted in 1994 U.S.C.C.A.N. 699, 707.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

were not available as a result of a 1993 Supreme Court decision that held that civil rights actions under 42 U.S.C. § 1985<sup>133</sup> could not be used to protect women's access to abortion clinics.<sup>134</sup> It was the nationwide effort of the protesters, however, that enabled the federal government to regulate their activities under the Commerce Clause. Significantly, most federal courts have agreed that FACE is valid, both before and after *Lopez*.<sup>135</sup>

The first case to pass judgment on whether or not FACE is a valid exercise of Congress's Commerce Clause power was *American Life League, Inc. v. Reno*,<sup>136</sup> decided by the United States Court of Appeals for the Fourth Circuit prior to *Lopez*. Applying the traditional rational basis test, the court determined that the findings of Congress regarding the effects on interstate commerce were rational and therefore found that use of the Commerce Clause was constitutional.<sup>137</sup> Interestingly, although this case was decided before *Lopez*, the court examined and placed weight on the findings made by Congress before it enacted FACE.<sup>138</sup> In concluding that protesters' violence interfered with interstate commerce, Congress relied, *inter alia*, on the following facts:

Many women travel across state lines to seek reproductive health care. Reproductive health facilities engage doctors and other staff in an interstate market. For example, Dr. David Gunn, who was murdered in Florida . . . performed abortions in several states. [The] facilities buy medical and office supplies that move in interstate commerce. "Clinics have been closed because of blockades and sabotage and have been rendered unable to provide services."<sup>139</sup>

The court found that the findings rationally supported Congress's conclusion that interstate commerce was being affected, especially in light of such decisions as *Heart of Atlanta* and *Katzenbach*.<sup>140</sup> The Fourth

<sup>133</sup> See 42 U.S.C. § 1985(3) (1988). Section 1985 provides a cause of action when there has been a conspiracy to interfere with a person's civil rights. See *id.*

<sup>134</sup> See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993) (holding that the elements of a conspiracy are not met by the nationwide efforts of anti-abortion protesters).

<sup>135</sup> See *United States v. Wilson*, 73 F.3d 675, 680 (7th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1521 (11th Cir. 1995); *American Life League, Inc. v. Reno*, 47 F.3d 642, 647 (4th Cir. 1995).

<sup>136</sup> 47 F.3d 642 (4th Cir. 1995).

<sup>137</sup> See *id.* at 647. The court applied the rational basis test from *Hodel*, which may still be valid after *Lopez*. See *id.* (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981)).

<sup>138</sup> See *id.* (recognizing the "extensive legislative record" with which Congress concluded that interstate commerce was affected).

<sup>139</sup> *Id.* (citations omitted).

<sup>140</sup> See *id.*

Circuit made a final poignant observation that FACE balanced the rights of the protesters and the rights of the women and doctors using the clinics, while still ensuring that violence would not become the solution to this nationwide societal conflict.<sup>141</sup> In so stating, the *American Life* court recognized that Congress had adopted a rational means of regulation in a difficult and conflicted-filled area.<sup>142</sup>

Although the next two cases to decide the legality of FACE came down after *Lopez*, the courts hearing these cases still upheld the precedent set in *American Life*. The court in *Cheffer v. Reno*<sup>143</sup> was faced with the same situation as the court in *American Life*—a challenge by anti-abortion activists to all aspects of the constitutionality of FACE.<sup>144</sup> The United States Court of Appeals for the Eleventh Circuit adopted the reasoning of the Fourth Circuit in *American Life*, but not without examining the effects of *Lopez* on Commerce Clause analysis.<sup>145</sup>

The court distinguished the Gun-Free School Zones Act from FACE with one observation; FACE regulated a commercial activity and the Gun-Free School Zones Act did not.<sup>146</sup> That, combined with the extensive findings made by Congress, was the basis upon which the court decided that FACE was a legitimate use of Commerce Clause power.<sup>147</sup> The court also noted that it disagreed with *United States v. Wilson*,<sup>148</sup> a district court decision.<sup>149</sup>

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<sup>141</sup> See *id.* at 656 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). In recognizing this balance, the Court wrote:

“There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members” . . . Congress acted to ensure that violence and aggressive obstruction are not used as means of settling what has become a loud and vexing public dispute.

The Access Act strikes a balance among competing rights holders . . .

*Id.*

<sup>142</sup> See *American Life*, 47 F.3d at 647, 656.

<sup>143</sup> 55 F.3d 1517 (11th Cir. 1995).

<sup>144</sup> See *id.* at 1518.

<sup>145</sup> See *id.* at 1519-20.

<sup>146</sup> See *id.* at 1520.

<sup>147</sup> See *id.* at 1520-21. The court examined the language in *Lopez* that stated that the Gun-Free School Zones Act “neither regulates a commercial activity nor contains a requirement that the possession [of a firearm] be connected in any way to interstate commerce.” *Id.* at 1520 (citing *United States v. Lopez*, 514 U.S. 549, 551 (1995)). The court found that FACE did not fit that description. See *id.* Rather, the court determined that FACE fell under the auspices of the Commerce Clause because the “provision of reproductive health services” is a commercial activity. *Id.*

<sup>148</sup> 880 F. Supp. 621 (E.D. Wis. 1995), *rev'd*, 73 F.3d 675, 677 (7th Cir. 1995).

<sup>149</sup> See *Cheffer*, 55 F.3d at 1521 n.6.

The district court in *Wilson* held that because FACE regulated conduct affecting commercial entities and not the entities themselves, the Act was not a valid use of Commerce Clause power.<sup>150</sup> Incidentally, when *Wilson* was appealed to the United States Court of Appeals for the Seventh Circuit, the district court was reversed, and the Seventh Circuit was the next court to uphold the constitutionality of FACE.<sup>151</sup>

In *Wilson*, anti-abortion protesters were being prosecuted under FACE for interfering with access to clinics and intimidating patients.<sup>152</sup> Applying the three-prong analysis from *Lopez*, the court held that FACE was a constitutional exercise of congressional power under the third category, as a regulation of activity that substantially affects commerce.<sup>153</sup> The court of appeals found the congressional findings regarding the operation of reproductive health facilities in interstate commerce to be "plainly rational."<sup>154</sup> The court also adopted the reasoning of the *American Life* court, which recognized that the regulatory means were reasonably related to permissible ends, the second part of the rational basis analysis as required by *Hodel*.<sup>155</sup> The *Wilson* court also agreed with the

<sup>150</sup> See *Wilson*, 880 F. Supp. at 623 (holding FACE unconstitutional).

<sup>151</sup> See *United States v. Wilson*, 73 F.3d 675, 677 (7th Cir. 1995).

<sup>152</sup> See *id.* The protesters blockaded the entrances to a women's health clinic by wedging cars in the doors, wedging themselves into the cars, and sealing themselves in bizarre contraptions. See *id.* The court described their extremist tactics:

Three defendants welded themselves into the [car] with an interlocking steel apparatus. The upper body of one defendant protruded through a hole cut in the floor of the [car] and his lower body was on the ground underneath the car. . . .

. . . The other three defendants welded themselves in various positions to and in the second car. One . . . [was] restrained by a welded steel device confining his head in a steel harness, which was locked around his head by placing a car jack inside a hollow steel pipe. Another . . . was in a hole cut in the passenger-side floorboard, with his lower body resting on the pavement and his upper body confined inside an electric clothes dryer. His head was restrained in a locked harness secured around his throat. The third defendant was in the right rear passenger seat with his arm encased and handcuffed inside a steel pipe.

*Id.*

It took firefighters four and a half hours to remove the defendants (who also displayed anti-abortion signs outside the clinic) by various means, including blowtorches and hydraulic equipment. See *id.* Because of the blockade, 12 women were prevented from receiving services at the clinic. See *id.* The federal government subsequently charged the defendants with violations of FACE. See *id.*

<sup>153</sup> See *id.* at 680.

<sup>154</sup> See *id.* at 680-83.

<sup>155</sup> See *id.* at 680. The court found especially persuasive the "five permissible ends" that were enunciated by the Fourth Circuit:

(1) protecting the free flow of goods and services in commerce, (2) protecting patients in their use of the lawful services of reproductive health facilities, (3) protecting women when they exercise their constitutional right to

distinction made in *American Life* between the Gun-Free School Zones Act and FACE<sup>156</sup> and found a further distinction in the congressional findings regarding the effects on interstate commerce in enacting FACE.<sup>157</sup> The court concluded that the district court overstepped its bounds by not deferring to the rational findings made by Congress.<sup>158</sup> The court announced that this deference, which has always been required in Commerce Clause jurisprudence, is still necessary even after *Lopez*.<sup>159</sup> This decision applied both a traditional Commerce Clause analysis and the *Lopez* reasoning, making the court's holding both current and convincing.

The most recent decision regarding the constitutionality of FACE, *Hoffman v. Hunt*,<sup>160</sup> was not in accordance with the above-mentioned courts of appeals decisions.<sup>161</sup> The persuasive value of *Hoffman*, however, is undermined because the circuit in which the district court sits had already decided the issue in *American Life*.<sup>162</sup> Thus, the district court contradicted the binding precedent set by its appellate court.

In *Hoffman*, anti-abortion activists were seeking a declaratory judgment regarding FACE and a parallel North Carolina state statute.<sup>163</sup> The court's analysis relied heavily on *Lopez*, specifically the substantial relation test.<sup>164</sup> The *Hoffman* court did not find Congress's determinations to

choose an abortion, (4) protecting the safety of reproductive health care providers, and (5) protecting reproductive health care facilities from physical destruction and damage.

*Id.* at 680 n.6 (citing *American Life League, Inc. v. Reno*, 47 F.3d 642, 647 (4th Cir. 1995)).

<sup>156</sup> See *id.* at 683. Recall that the United States Court of Appeals for the Eleventh Circuit in *Cheffer v. Reno* decided that providing health services is a commercial activity, whereas the regulated activity in *Lopez* was not. See *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 (11th Cir. 1995).

<sup>157</sup> See *Wilson*, 73 F.3d at 685. The court opined that the true relevance of *Lopez* was that "it helps define the line between what Congress may regulate and what it may not. . . . [I]t did what had not been done for decades. But the Supreme Court left intact and relied on decades of Commerce Clause jurisprudence." *Id.* at 685-86.

<sup>158</sup> See *id.* at 688.

<sup>159</sup> See *id.* at 688-89.

<sup>160</sup> 923 F. Supp. 791 (W.D.N.C. 1996).

<sup>161</sup> Compare *id.* with *Wilson*, 73 F.3d at 680 and *Cheffer*, 55 F.3d at 1521 and *American Life League, Inc. v. Reno*, 47 F.3d 642, 647 (4th Cir. 1995).

<sup>162</sup> See *American Life*, 47 F.3d at 647.

<sup>163</sup> See *Hoffman*, 923 F. Supp. at 794. The initial challenge was to the state statute and its supposed violation of the plaintiffs' First Amendment rights. See *id.* FACE was signed into law while the case was pending, and the court allowed the plaintiffs to file an amended complaint. See *id.* *American Life* and *Lopez* were decided while a motion to stay, filed by the United States as intervenor, was in effect. See *id.* at 795.

<sup>164</sup> See *id.* at 806. The district court, contrary to the analyses given by other federal courts, interpreted *Lopez* as creating new, more narrow, law in defining Congress's Commerce Clause power. See *id.* at 806-07.

be persuasive, analogizing them to the findings in *Lopez* that were insufficient to uphold the Gun-Free School Zones Act.<sup>165</sup> Judge Potter stated that the court was of the opinion that Congress enacted FACE on the very arguments rejected in *Lopez*.<sup>166</sup>

This is the second weakness of the court's decision, but like the *Brzonkala* court, the *Hoffman* court only compared the case before it to *Lopez*.<sup>167</sup> It failed to utilize the complete Commerce Clause analysis, which *Lopez* clearly enunciated was still a part of Commerce Clause jurisprudence.<sup>168</sup> The court completely refuted the findings of Congress by remarking that there was a complete lack of evidence that the protest activities had an actual or probable effect on interstate commerce.<sup>169</sup> In so stating, the *Hoffman* court rebuked not only its immediate superior court,<sup>170</sup> it also derided the opinions from the Seventh and Eleventh Circuits.<sup>171</sup> In closing, the court stated that "[n]othing in this decision, or in *Lopez*, implicates the wide range of activities that Congress has regulated via its commerce power and can still regulate consistent with *Lopez*."<sup>172</sup> These words are far from reassuring in light of the rest of the decision.

Ultimately, it seems that FACE has a stronger commercial flavor than does VAWA, which makes it more likely that FACE will be upheld, regardless of the conflict between the federal courts' decisions. Two important points also support the validity of FACE. First, courts of appeals

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<sup>165</sup> See *id.* at 807. The district court did not give weight to any of Congress's findings; instead of affording the traditional deference to Congress, it found reasons why each finding could be inadequate. See *id.* at 807-10. For instance, the court wrote, "[i]n fact, FACE is not aimed at the commercial activity of abortion clinics. It is aimed at the basic freedom of individuals to engage in civil protest." *Id.* at 809. The court seems to ignore willfully the words of Congress that said specifically that FACE was intended to stem all violence in connection with the ongoing abortion debate, not inhibit the right of either side to protest peacefully. See H.R. REP. NO. 103-306, at 10 (1994), reprinted in 1994 U.S.C.C.A.N. 699, 707.

<sup>166</sup> See *Hoffman*, 923 F. Supp. at 812.

<sup>167</sup> See *id.* at 806-19.

<sup>168</sup> See *United States v. Lopez*, 514 U.S. 549, 559 (1995).

<sup>169</sup> See *Hoffman*, 923 F. Supp. at 815.

<sup>170</sup> See *American Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995).

<sup>171</sup> See *United States v. Wilson*, 73 F.3d 675, 680 (7th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1521 (11th Cir. 1995). The district court adds insult to injury by minimizing the actual effects of the protesters' violence on abortion and other women's health activities. See *Hoffman*, 923 F. Supp. at 814-15. For example, the court wrote that "there is really no significantly probative evidence showing the degree, if any, to which these activities have actually reduced abortion-related commerce." *Id.* at 814. Commentary such as this flies in the face of the extensive record accompanying the enactment of FACE, which included empirical data about the effects on interstate commerce. See generally H.R. REP. NO. 103-306 (1994), reprinted in 1994 U.S.C.C.A.N. 699.

<sup>172</sup> *Hoffman*, 923 F. Supp. at 819.



have upheld the statute both before and after *Lopez*.<sup>173</sup> Thus, assuming arguendo that *Lopez* will narrow the band of activity that Congress may regulate under the Commerce Clause, FACE still falls within the range of permissibly regulated activity.<sup>174</sup> Second, commercial activity is being regulated, and Congress made substantial findings about the effects that the protesters' activity has on interstate commerce.<sup>175</sup> The dicta from *Lopez* seems to imply that congressional findings will be important in determining whether Congress has acted within its enumerated powers.<sup>176</sup> The real question is whether courts will still defer to congressional findings or whether stricter scrutiny will be applied in upcoming cases. Under current rational basis review, FACE would likely pass constitutional muster. The importance of the dicta in *Lopez*, however, remains to be seen, and it could affect the constitutionality of VAWA.

### III. THE IMPORTANCE OF POLICY

The issue, therefore, is whether FACE and VAWA will survive judicial scrutiny in light of *Lopez* and current fluctuating Commerce Clause jurisprudence. The majority of cases indicate that FACE will be upheld,<sup>177</sup> but the law on VAWA is less certain.<sup>178</sup> Ultimately, however, there is more to consider in determining the soundness of a statute. When the Civil Rights Act of 1964 was passed, Congress not only considered the breadth of its constitutional power but also heeded the weight of the social problem it was facing and the need to address problems on a national level.<sup>179</sup> Similarly, both FACE and VAWA seek to rectify problems of national societal import, and policy concerns constitute a large part of the record created by Congress for each statute.<sup>180</sup>

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<sup>173</sup> See *Wilson*, 73 F.3d at 680; *Cheffer*, 55 F.3d at 1521; *American Life*, 47 F.3d at 656.

<sup>174</sup> See *Cheffer*, 55 F.3d at 1520 (stating that FACE does regulate commercial activity).

<sup>175</sup> See *id.* See generally H.R. REP. NO. 103-306 (1994), reprinted in 1994 U.S.C.C.A.N. 699.

<sup>176</sup> See *United States v. Lopez*, 514 U.S. 549, 562-63 (1995).

<sup>177</sup> See *Wilson*, 73 F.3d at 680; *Cheffer*, 55 F.3d at 1521; *American Life*, 47 F.3d at 656.

<sup>178</sup> Compare *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 793 (W.D. Va. 1996) (declaring VAWA unconstitutional) with *Jane Doe v. John Doe*, 929 F. Supp. 608, 610 (D. Conn. 1996) (opining that VAWA is constitutional).

<sup>179</sup> See GUNTHER, *supra* note 8, at 149. Attorney General Robert F. Kennedy said, "there is an injustice that needs to be remedied. We have to find the tools with which to remedy that injustice." *Id.* Senator Pastor said, "I believe in this bill, because I believe in the dignity of man, not because it impedes our" commerce. *Id.* at 150. The Senator believed that the Fourteenth Amendment was a better source for the bill, but nonetheless supported it as a matter of policy. See *id.* at 150-51.

<sup>180</sup> See H.R. CONF. REP. NO. 103-711, at 385 (1994), reprinted in 1994

These acts are analogous in three ways. First, each contains findings that link the social-policy issue to the use of the Commerce Clause.<sup>181</sup> Second, each addresses a problem that is national in scope.<sup>182</sup> Third, state statutes were not sufficiently rectifying either problem.<sup>183</sup> The similarities evidence important policy reasons for upholding FACE and VAWA. Although policy alone cannot save legislation, it underscores the importance of following decisions that have upheld the constitutionality of FACE and VAWA.

Each act contains congressional findings that point to widespread problems. This has traditionally facilitated the Supreme Court's approval of statutes enacted under the Commerce Clause.<sup>184</sup> Findings are especially important in the aftermath of *Lopez* because of the dicta that called for findings clarifying how and why Congress was using the Commerce Clause to enact social-policy legislation.<sup>185</sup>

Furthermore, it has traditionally been the policy of the Supreme Court to defer to Congress when the legislature addresses social-policy issues under the Commerce Clause.<sup>186</sup> The Commerce Clause has been used to legislate against social evils such as firing unionized employees,<sup>187</sup> loan sharking,<sup>188</sup> and of course, racial discrimination.<sup>189</sup> An important part of each of the decisions accompanying these statutes has been the findings made by Congress regarding the chosen course of action.<sup>190</sup>

U.S.C.C.A.N. 1801, 1853.

<sup>181</sup> See *id.*

<sup>182</sup> See *Jane Doe v. John Doe*, 929 F. Supp. 608, 611 (D. Conn. 1996) (discussing the findings Congress made regarding widespread domestic violence and the lack of an adequate response).

<sup>183</sup> See H.R. CONF. REP. NO. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1801, 1853.

<sup>184</sup> See *Deborah Jones Meritt, Commerce!*, 94 MICH. L. REV. 674, 703 (1995) (discussing the distinguishing features of *Lopez*, and noting that "*Lopez* lacked [the] aura of national urgency" that historically persuaded the Court that Congress's actions were pressing and necessary).

<sup>185</sup> See *United States v. Lopez*, 514 U.S. 549, 562-63 (1995).

<sup>186</sup> See *Schweitzer*, *supra* note 18, at 71-72 (examining whether *Lopez* will end the traditional deference to congressional use of the Commerce Clause and deciding that *Lopez* is limited).

<sup>187</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act).

<sup>188</sup> See *Perez v. United States*, 402 U.S. 146, 156-57 (1971) (upholding the Consumer Credit Protection Act of 1968).

<sup>189</sup> See *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (upholding the Civil Rights Act of 1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964) (same).

<sup>190</sup> See *Perez*, 402 U.S. at 147 n.1. The Court relayed the findings made by Congress about the dangers of loan sharking and its connection to organized crime. See *id.* The Court recognized that "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce." *Id.* at 154.

The Supreme Court has employed rational basis review and, thus, deferred generally to congressional findings.<sup>191</sup> Courts are not even required to analyze such findings in order to uphold Commerce Clause legislation.<sup>192</sup>

There is no reason not to continue this traditional deference to Congress when it has made extensive findings. The Court in *Lopez*, if anything, only reinforced what the Court has done for over 100 years when asked to examine legislation.<sup>193</sup> Extensive findings exist for both VAWA and FACE; this provides a basis for upholding the constitutionality of both statutes. Each contains congressional findings regarding the problem addressed and explains how commerce is affected. For instance, in enacting VAWA, Congress wrote:

[C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . . .<sup>194</sup>

Lower courts have deferred to such findings in accordance with traditional Commerce Clause jurisprudence, which affords to Congress significant deference.<sup>195</sup>

A second policy reason for upholding FACE and VAWA is that they address national issues. The Civil Rights Act of 1964 is an obvious example of federal legislation designed to address an urgent national problem that states both could not and would not address.<sup>196</sup> The level of racism and discrimination that was rampant in this country came to the forefront of the collective American conscience with the landmark case of *Brown v. Board of Education*.<sup>197</sup> No doubt this played a role in the Court's decisions in *Heart of Atlanta Motel* and *Katzenbach*, in which the Court recognized that Congress can legislate against moral and social

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<sup>191</sup> See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

<sup>192</sup> See *United States v. Lopez*, 514 U.S. 549, 562-63 (1995).

<sup>193</sup> See *id.* at 558-59.

<sup>194</sup> See H.R. CONF. REP. NO. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1801, 1853.

<sup>195</sup> See *Jane Doe v. John Doe*, 929 F. Supp. 608, 615 (D. Conn. 1996).

<sup>196</sup> See *Smith*, *supra* note 3, at 739-40 (noting the lack of comprehensive state civil rights laws enacted between the Civil Rights Act of 1875 and the Civil Rights Act of 1964 and the lack of enforcement of such laws that did exist).

<sup>197</sup> Cf. 349 U.S. 294 (1955) (deciding that separate but equal education is inherently unequal and thus unconstitutional).

wrongs.<sup>198</sup> Similarly, abortion and domestic violence, two issues that bear largely on women's civil rights, have recently come to the attention of mainstream America as national crises.<sup>199</sup>

FACE was enacted after anti-abortion extremists murdered several doctors who performed abortions.<sup>200</sup> As the court in *United States v. White*<sup>201</sup> recognized, Congress enacted FACE in response to clinics beset by increasing violence that is the result of nationally, not locally, organized groups of protesters.<sup>202</sup> Similarly, VAWA was enacted because domestic violence has become a national epidemic.<sup>203</sup>

Some might argue that domestic violence is a private act affecting individuals. Such an argument ignores the larger picture in which local police and laws are insufficiently protecting women, just as, similarly, they were insufficiently protecting African Americans until 1964.<sup>204</sup> The collective must be observed in order to understand the extensive damage that battering does to women nationally. This national effect also includes economic and commercial issues because women who are battered are frequently unable to work or even leave the home.<sup>205</sup>

As a matter of national policy, it is also not socially useful for courts to strike down legislation that protects women and their children from gender-based crimes. Women have a constitutionally protected right to make a decision regarding their reproductive abilities,<sup>206</sup> a right which FACE protects. Women have a right to be free from misogynistic

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<sup>198</sup> See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964). See generally *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding the constitutionality of the Civil Rights Act of 1964 as it applies to restaurants).

<sup>199</sup> See Lisa M. Fitzgerald, *The Violence Against Women Act: Is It An Effective Solution?*, 1 HOW. SCROLL: THE SOC. JUST. REV. 46, 50 (1993) (drawing a small parallel between the rape of women and the lynching of blacks in terms of civil rights violations).

<sup>200</sup> See H.R. REP. NO. 103-306, at 6-7 (1994), reprinted in 1994 U.S.C.C.A.N. 699, 703-04; see also *Cheffer v. Reno*, 55 F.3d 1517, 1520 (11th Cir. 1995) (distinguishing the enactment of FACE from the Gun-Free School Zones Act by the extensive legislative findings that Congress made regarding the national affect on doctors, clinics, and female patients); *Meritt*, supra note 184, at 724-26 (discussing the atmosphere in which FACE was enacted).

<sup>201</sup> 893 F. Supp. 1423 (C.D. Cal. 1995).

<sup>202</sup> See *id.* at 1427.

<sup>203</sup> See H.R. CONF. REP. NO. 103-711, at 381-87 (1994), reprinted in 1994 U.S.C.C.A.N. 1801, 1849-55.

<sup>204</sup> See *Jane Doe v. John Doe*, 929 F. Supp. 608, 611 (D. Conn. 1996) (discussing the findings Congress made about widespread domestic violence and the lack of an adequate response).

<sup>205</sup> See H.R. CONF. REP. NO. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1801, 1853.

<sup>206</sup> See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that a woman has a right to choose to terminate or maintain a pregnancy before the fetus is viable and that the state may not place an undue burden upon that right).

violence, and VAWA legitimately advances that right. Congress chose the Commerce Clause as the vehicle for protecting those rights, but that does not make the legislation any less important or legitimate.

A third policy reason for upholding the validity of FACE and VAWA is that state statutes do not suffice. To continue the analogy to the Civil Rights Act of 1964, the 1960 platform of both major national political parties stated, “[w]e recognize that civil rights is [sic] a responsibility not only of States and localities; it is a national problem and a national responsibility.”<sup>207</sup> Similar words can be found in the findings made by Congress for FACE and for VAWA. In enacting VAWA, Congress couched the law in terms of women’s civil rights and the lack of sufficient protection for women:

Congress has found that crimes of violence motivated by gender constitute bias crimes in violation of the victim’s right to be free from discrimination on the basis of gender; current law provides a civil rights remedy for gender crimes committed in the workplace, but not for crimes of violence motivated by gender committed on the street or in the home; State and Federal criminal laws do not adequately protect against the bias element of crimes of violence motivated by gender  
.....<sup>208</sup>

Federalists might argue that this is simply the federalization of crime, similar to the Gun-Free School Zones Act that was struck down in *Lopez*. There, however, Congress made no findings regarding the lack of state gun-control laws before enacting the Gun-Free School Zones Act; in VAWA, the findings are more than adequate. A more apt analogy is to the Civil Rights Act of 1964, which also sought to rectify a shameful lack of local protection by establishing a federal law. Like the Civil Rights Act of 1964, VAWA is a response to that lack of protection, protection which is desperately needed for women who are victims of gender-motivated crime.

Similarly, before enacting FACE, Congress made findings regarding the inadequacy of state and local laws. The court in *United States v. White*<sup>209</sup> discussed the history of violence against clinics, patients, and providers:

The [Senate] Report further emphasized that existing laws are inadequate to redress these problems. Some jurisdictions have refused to respond at all to clinic violence and blockades. Even those that have responded have found it difficult if not impossible to reach across

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<sup>207</sup> See S. REP. NO. 872, at 8 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2362.

<sup>208</sup> See H.R. CONF. REP. NO. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1801, 1853.

<sup>209</sup> 893 F. Supp. 1423 (C.D. Cal. 1995).

state lines to prosecute the individuals or groups responsible for planning the actions.<sup>210</sup>

These findings underscore that state and local responses to violence against abortion clinics, abortion providers, and women were simply inadequate. Like the problems addressed by the Civil Rights Act of 1964—where even if states did respond to the problem it was not enough—so too here did Congress have to recognize serious societal problems and react accordingly. As a matter of tradition and policy, the federal government must recognize social ills that are not being addressed on the local level and that uniformly affect all Americans, not just local residents. Given the severity of the crimes addressed in VAWA and FACE, it is important that federal courts continue to uphold these statutes.

#### IV. CONCLUSION

While *Lopez* is noteworthy as the first case in sixty years to strike down legislation passed pursuant to the Commerce Clause, it is not a complete turnaround in Commerce Clause jurisprudence. Two areas of *Lopez* will be important for future legislation: the dicta calling for congressional findings to support the legislation and the third prong of the analysis, the substantial relation test. Courts are still uncertain about this latter standard, “whether the regulated activity ‘substantially affects’ interstate commerce.”<sup>211</sup> The crucial issue will be how expansively the Supreme Court interprets the idea of commerce. FACE and the Civil Rights Act of 1964 addressed activity related to commerce—the provision of health care and the service industry, respectively. VAWA, however, while addressing activity that substantial effects commerce, does not directly regulate commerce. It remains to be seen how the Court will continue to refine and interpret *Lopez*. The consensus, though, among lower federal courts is that deference to Congress is still the correct approach.<sup>212</sup> *Lopez* is just another step in a long line of Commerce Clause jurisprudence. Given this analysis, it is clear that FACE and VAWA should be upheld. Adherence to *stare decisis* dictates that courts follow precedent, and precedent, from long ago up until the cases upholding the Civil Rights Act of 1964, mandates deference to the decisions of Congress. Combined with the strong social-policy reasons for upholding

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<sup>210</sup> *Id.* at 1427 (citations omitted).

<sup>211</sup> *United States v. Lopez*, 514 U.S. 549, 559 (1995).

<sup>212</sup> *See United States v. Wilson*, 73 F.3d 675, 680 (7th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1520 (11th Cir. 1995); *American Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995); *Jane Doe v. John Doe*, 929 F. Supp. 608, 615 (D. Conn. 1996).

these two statutes, it is clear that the courts that upheld the constitutional validity of FACE and VAWA were right to do so.

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