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Freedom of Access to Clinic Entrances Act of 1994: The Face of Things to Come?

Helen R. Franco*

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Abstract

Many women view the 1973 United States Supreme Court decision in *Roe v. Wade*² as the culmination of a battle for women's rights that began before the Civil War

KEYWORDS: access, clinic, freedom

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I. INTRODUCTION

*Abortion. It is one of the most divisive issues of our time. . . . To some it is nothing less than the slaughter of millions upon millions of the most innocent and vulnerable of all victims, and thus stands as the most monstrous moral outrage in human history. To others it tests our society's commitment to fundamental principles of individual liberty, personal autonomy, and women's welfare.*¹

Many women view the 1973 United States Supreme Court decision in *Roe v. Wade*² as the culmination of a battle for women's rights that began before the Civil War.³ However, the holding in *Roe*, that a woman's right

1. DONALD P. JUDGES, *HARD CHOICES, LOST VOICES* 4 (1993). For a strong feminist point of view, see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 981 (1984) ("Only women have abortions. Laws restricting access to abortion have a devastating sex-specific impact.").

2. 410 U.S. 113 (1973).

3. See John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77, 79 (1991) (quoting ELLEN C. DUBOIS, *FEMINISM AND SUFFRAGE, THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN*

to privacy includes a qualified right to abortion, did not settle the controversy concerning termination of a pregnancy in its early stages.⁴ Instead, less than twenty years later, in *Planned Parenthood v. Casey*,⁵ the Court dismantled the trimester scheme outlined in *Roe*, although it affirmed the constitutional right to abortion.⁶ Since *Casey*, access to abortion is governed by a test that condones numerous restrictions on a woman's freedom of choice.⁷

The decisions in *Casey* and *Roe* constitute the goal posts at the opposite ends of the playing field. In between, many judicial decisions delineate yards gained or lost in the ongoing struggle for unchecked access to abortion.⁸ This legal battle is kept alive by feminist groups such as the National Organization of Women ("NOW") and Planned Parenthood on behalf of women seeking abortions.⁹ Their opponents are the groups and

AMERICA 1848-1869, at 22 (1978)). DuBois enumerates two sources as providing the impetus for women to unite: women's "growing awareness of their common conditions and grievances" in the decade preceding the Civil War and the abolitionists' emphasis on universal equality. *Id.* at 79 n.16.

4. *Roe*, 410 U.S. at 153-54. The trimester test is governed by the point of fetal viability, the point at which the State's interest in the health of the mother becomes compelling. *Id.* at 163. When the Court heard the case 20 years ago, medical knowledge pinpointed viability at the end of the first trimester of the pregnancy. *Id.* Thus, the Court divided pregnancy into trimesters, leaving the decision as to abortion in the hands of the woman's physician in the first trimester; allowing the state to regulate abortion in the second trimester; and permitting abortions in the third trimester only "for the preservation of the life or health of the mother." *Id.* at 163-64.

5. 112 S. Ct. 2791 (1992).

6. *Id.* at 2818. In place of the trimester scheme, the Court instituted an "undue burden" test, specifying that "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Id.* at 2821. But the opinion gave little guidance as to the meaning of "undue."

7. The Court held that the following restrictions are constitutional: a 24 hour waiting period to meet an informed consent requirement; parental consent for unemancipated women under 18; and record keeping and reporting requirements for abortion facilities other than those which would require spousal notice or consent. *Id.* at 2791.

8. See *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1494, 1496 n.13 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part and vacated in part sub nom. Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (discussing subsequent United States Supreme Court decisions that narrowed the *Roe* holding prior to *Casey*). The decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), was perhaps the most noteworthy prior to *Casey*. The decision was pivotal because it allowed State regulation of abortion in the second trimester for protection of the fetus rather than the mother. JUDGES, *supra* note 1, at 190.

9. See John H. Henn & Maria Del Monaco, *Civil Rights and RICO: Stopping Operation Rescue*, 13 HARV. WOMEN'S L.J. 251, 255 n.19 (1990). Henn and Del Monaco list cases in

individuals whose avowed purposes are to discourage pregnant women from seeking abortions and to close down abortion clinics.¹⁰ Their objective is ultimately to make it impossible for women to terminate a pregnancy legally in the United States.¹¹

To accomplish this purpose, abortion protestors, often under the aegis of the militant group known as Operation Rescue,¹² began a systematic, national campaign to obstruct access to abortion services in 1988.¹³ During the blockades, abortion protestors disrupt the provision of medical and counseling services and exhort patients, clinic personnel, and bystanders to join the illegal activity.¹⁴ In addition, the "rescuers" vandalize clinic property, often defacing signs and disrupting traffic near the clinic by spreading nails on the asphalt to deflate tires so that immobilized vehicles barricade the clinic entrances.¹⁵ Leaders of the anti-abortion movement justify these illegal activities by invoking biblical passages and comparing their mission to end abortion to the struggle for freedom and equality waged by Gandhi and Martin Luther King, Jr.¹⁶ Because the movement is nationwide, Congress has decided the solution to ensuring women's access to abortion facilities should be embodied in federal legislation.¹⁷

which courts have issued injunctions against clinic blockaders; of the 10 cases cited, at least six involved NOW or Planned Parenthood as plaintiffs. *Id.*

10. See *Operation Rescue*, 726 F. Supp. at 1487-88. The trial court found the "principal goals [of the defendant anti-abortionists] are to stop abortion and to end its legalization." *Id.* at 1487; see also *Bray*, 113 S. Ct. at 758. Writing for the majority, Justice Scalia portrays Operation Rescue, one of the petitioners, as "an unincorporated association whose members oppose abortion . . . [It] organizes antiabortion [sic] demonstrations in which participants trespass on, and obstruct general access to, the premises of abortion clinics." *Id.*

11. Elizabeth L. Crane, *Abortion Clinics and Their Antagonists: Protection from Protestors Under 42 U.S.C. § 1985(3)*, 64 U. COLO. L. REV. 181, 182-83 (1993).

12. See generally David Van Biema, *In Your Town, in Your Face*, TIME, July 19, 1993, at 29 (recounting Operation Rescue's history and goals). Four years earlier, the magazine described Operation Rescue protestors favorably as "crusaders" and "uterine warriors." Garry Wills, "Save the Babies:" *Operation Rescue: A Case Study in Galvanizing the Antiabortion Movement*, TIME, May 1, 1989, at 26. The group's religious roots are evidenced by its name, which comes from a passage in the Bible: "Rescue those who are being taken away." *Id.* at 28 (citing *Proverbs* 24:11).

13. Henn & Del Monaco, *supra* note 9, at 253.

14. *Bray*, 113 S. Ct. at 781 (Stevens, J., dissenting).

15. *Operation Rescue*, 726 F. Supp. at 1489-90.

16. See Whitehead, *supra* note 3, at 89, 90 n.100 ("The strategy of Operation Rescue is massive civil disobedience in the tradition of Henry David Thoreau, Mahatma Gandhi, and Martin Luther King, Jr.") (citations omitted).

17. See Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (to be codified as amended at 18 U.S.C. § 248).

This new legislation will have an impact on Operation Rescue and its supporters as parties to much of the recent litigation in the abortion controversy.¹⁸ Part II of this article begins with an overview of this high-profile anti-abortion group, and includes an analysis of *Bray v. Alexandria Women's Health Clinic*,¹⁹ the case which spurred Congress to pass the Freedom of Access to Clinic Entrances Act of 1994 ("FACE").²⁰ Part III examines the legislative history of FACE chronicled in congressional committee reports and the Congressional Record as the Act wound through the House and the Senate. The search through the legislative record is instructive in understanding FACE and what it meant to accomplish. Part IV surveys the First Amendment arguments addressed in *Madsen v. Women's Health Center, Inc.*²¹ In *Madsen*, three members of Operation Rescue petitioned the United States Supreme Court to overturn a Florida Supreme Court decision favoring the owners of a Melbourne, Florida abortion facility.²² Despite the gradual dismemberment of the holding in *Roe v. Wade*, the latest judicial decisions have affirmed that a woman's right to an abortion is constitutionally guaranteed.²³

18. See, e.g., *National Org. for Women v. Scheidler*, 114 S. Ct. 798, 800 (1994) (describing the respondent, Joseph Scheidler, as opposing legal abortion); *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1343 (2d Cir. 1989) (citing as defendants both Randall Terry and Operation Rescue); *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664 (Fla. 1993), *aff'd in part and rev'd in part sub nom. Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994).

19. 113 S. Ct. 753 (1993).

20. Pub. L. No. 103-259, 108 Stat. 694; see also Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 COLUM. L. REV. 293, 301 (1994) (reviewing BARBARA H. CRAIG & DAVID M. O'BRIEN, *ABORTION AND AMERICAN POLITICS* (1993)) (stating that Congress intends the Act to void the Court's holding in *Bray*). The Senate sent the bill to President Clinton for signature on May 12, 1994, and the President signed it into law on May 26, 1994. See *Foes Sue Over Abortion-Protest Law*, SUN-SENTINEL, May 27, 1994, at 3A [hereinafter *Foes*]; see also 140 CONG. REC. S5628 (1994) (giving the roll call in the Senate as 69 vote for and 30 vote against passage of FACE); *Clinic Access: Senate Sends Prez Stiff FACE; Challenge Looms*, *Abortion Report*, May 13, 1994, available in LEXIS, Cmpgn Library, Abtrpt File [hereinafter *Clinic Access*].

21. 114 S. Ct. 2521 (1994).

22. *Id.*

23. *Madsen*, 114 S. Ct. at 2516; *Scheidler*, 114 S. Ct. at 798; see also *Operation Rescue*, 726 F. Supp. at 1494 n.13 (listing United States Supreme Court decisions that restricted the scope of *Roe*); *infra* note 225.

II. BACKGROUND

A. *Operation Rescue: The New Civil Disobedience*

Although one commentator maintained that “civil *disobedience* is in fact obedience, that it respects the law and is within the law,”²⁴ another defined it as “*an illegal public protest, non-violent [sic] in character.*”²⁵ Operation Rescue has devised a specific type of civil disobedience to influence governmental policy and to persuade the general public of the righteousness of its cause: preventing access to abortion clinics by forming human barricades at the doorways.²⁶ Viewed historically, the anti-abortion movement is the latest in a series of national campaigns to use civil disobedience to hasten social and political change.²⁷ Today, because of the violence of its tactics and the resulting polarization of public opinion, Operation Rescue clinic entrance blockades command considerable media coverage; the pronouncements and arrests of its organizers provide headlines for the local and national press.²⁸

24. Symposium, *Civil Disobedience and the Law*, 21 RUTGERS L. REV. 1, 17 (1966) (section written by Harrop A. Freeman). Freeman concludes:

When [the protestor] has decided that the highest demands of law, the highest morality, the highest values of humanity require a specific law to be challenged (and particularly when there is no other *effective* way for him to do so) then the conscientious citizen *must* humbly and contritely but courageously engage in civil disobedience.

Id. at 26.

25. *Id.* at 3 (section written by Carl Cohen).

26. Henn & Del Monaco, *supra* note 9, at 251-53.

27. See Whitehead, *supra* note 3, at 89. Whitehead discusses American protest movements beginning with the colonial protest against the British Stamp Act prior to the American Revolution, and including abolition of slavery, women’s rights, civil rights, anti-Vietnam protests, and anti-vivisection demonstrations. *Id.* at 77-89. Positioning Operation Rescue as the culmination of this list of milestones that helped shape the American political system perhaps clothes the anti-abortion movement in historical legitimacy it does not deserve.

28. See generally Abortion Report, *supra* note 20. The Report, updated daily, compiles news clips from major newspapers on abortion issues of national interest. For example, a summary of an editorial in the *Milwaukee Sentinel* on June 8, 1994, concerning the arrest of seven abortion protestors who blockaded the entrance to a Milwaukee abortion clinic, states that United States Attorney Thomas Schneider is “correct in his assessment that this is a clear matter for a few individuals taking it upon themselves to deny the women involved their constitutional right to an abortion.” *Id.* (daily ed. June 13, 1994) (quoting the *Milwaukee Sentinel*). The protestors were charged with violation of the newly-signed Freedom of Access

Prior to *Roe*, opponents of abortion were organized into lobbying and educational groups and were supported by the Roman Catholic Church.²⁹ The abortion protests consisted of peaceful marches; “[c]ivil disobedience was not their style.”³⁰ After *Roe*, Catholics began to sit in at clinics.³¹ Randall Terry³² met two of the leaders of these passive protests in 1986, and by 1987 he had organized Operation Rescue into a viable organization, drawing members mainly from among evangelical Protestants.³³

The first “rescue”³⁴ was on November 28, 1987, in Cherry Hill, New Jersey.³⁵ The success of the event, in which 300 rescuers participated in preventing the performance of abortions by blocking access to the clinic for the day, convinced two other clinics to shut their doors voluntarily.³⁶ Furthermore, other anti-abortion groups copied Operation Rescue’s methods

to Clinic Entrances Act. *Id.* The same issue of the Report also quoted a *New York Times* article under the heading, *Hunters Seek FACE*, the *Cincinnati Enquirer* on abortion protests in Cincinnati, as well as the *Milwaukee Journal* on the arrest of the seven clinic blockaders. *Id.*

29. Wills, *supra* note 12, at 27.

30. *Id.*

31. *Id.*

32. Terry was a high school dropout raised in New York by his mother and two aunts who were ardent feminists. Michael P. O’Brien, Note, *Operation Rescue Blockades and the Misuse of 42 U.S.C. § 1985(3)*, 41 CLEV. ST. L. REV. 145, 145 n.1 (1993) (quoting Sue Hutchison & James N. Baker, *The Right-to-Life Shock Troops*, NEWSWEEK, May 1, 1989, at 32). After moving to Texas to become a rock star, he experienced a religious conversion and became an evangelical minister. *Id.* Terry, who is now a superstar of the anti-abortion movement, began his career as an abortion protestor by talking with patients outside an abortion clinic during breaks from his job as a used car salesman. Henn & Del Monaco, *supra* note 9, at 253; Whitehead, *supra* note 3, at 89 n.98 (citation omitted); *see also* Sandra G. Boodman, *Abortion Foes Strike at Doctors’ Home Lives: Illegal Intimidation or Protected Protest?*, WASH. POST, Apr. 8, 1993, at A1 (depicting Terry as “the nation’s best-known antiabortion [sic] leader”). The conversations with patients then escalated to picketing outside the clinic with others who objected to the performance of abortions inside the facility. Whitehead, *supra* note 3, at 89 n.98 (citation omitted). Terry eventually aligned himself with the anti-abortion movement and became a disciple of Joseph Scheidler, who heads the Pro-Life Action League and has been active in the anti-abortion movement since 1973. Boodman, *supra*, at A1; *see also* cases cited *supra* note 18.

33. Wills, *supra* note 12, at 28.

34. “In general, a ‘rescue’ is a demonstration at the site of a clinic where abortions are performed. At a ‘rescue,’ the demonstrators, called ‘rescuers,’ intentionally trespass on the clinic’s premises for the purpose of blockading the clinic’s entrances and exits, thereby effectively closing the clinic.” *Operation Rescue*, 726 F. Supp. at 1487.

35. Whitehead, *supra* note 3, at 89.

36. *Id.*

so that clinic blockades evolved into a national phenomenon.³⁷ Since 1987, their obstructionist tactics have put Operation Rescue and its supporters in the forefront of the abortion controversy.

Operation Rescue's tactics include packing rescuers around doors to abortion clinics so no one can enter or leave the facility.³⁸ The abortion protestors at a 1989 clinic blockade in California were depicted as moving "in a human sludge, on their knees, not standing," to avoid direct confrontation with the pro-choice demonstrators.³⁹ In the first year after its founding, Operation Rescue staged hundreds of such nonviolent actions, and police arrested thousands of the protestors.⁴⁰ By 1991, the group was so well-organized that it nearly paralyzed Wichita, Kansas with a clinic blockade that lasted forty-six days.⁴¹ Operation Rescue has subsequently stayed in the headlines with widespread summer protests, such as the recent "Cities of Refuge" campaign in 1993, which targeted seven urban areas.⁴²

Terry's strategy evolved into activist protest: He and his followers put aside speeches and placards in favor of trespass and other forms of civil disobedience that lead to massive arrests.⁴³ His goal is to force the government to rescind its support of the pro-abortion stance of the courts.⁴⁴ Terry designs anti-abortion demonstrations to pit modern civil disobedience against the constitutionally-sanctioned freedom of choice for women.

In the last twelve years, abortion protests have become violent, culminating in the shooting deaths of two doctors, two clinic workers, and

37. Henn & Del Monaco, *supra* note 9, at 254.

38. Wills, *supra* note 12, at 27. Wills describes the jockeying for media attention during the blockades, with the pro-choice protestors trying to dominate the TV cameras' footage of the event with their own placards: "It is a noisy scene, hymns vs. chanted slogans, with both sides resorting to bullhorns to get above the din (and the police finally adding their loudspeakers)." *Id.*

39. *Id.*

40. *Id.*; see also Whitehead, *supra* note 3, at 89 (noting that by 1989 Operation Rescue had branches in 200 cities and 35,000 members).

41. Van Biema, *supra* note 12, at 29.

42. *Id.*

43. See Henn & Del Monaco, *supra* note 9, at 254-55 & nn.19-20, 256 (listing cases granting injunctions against clinic blockaders and cases in which contempt orders were issued for violations of the injunctions).

44. "Terry has framed the issue in stark terms, asking, 'When the government has to decide between jailing tens of thousands of people and making abortion illegal again, what do you think it's going to do?'" *Id.* at 256 (quoting Michael Matza, *Throw this Man in Jail*, PHILADELPHIA INQUIRER MAG., June 26, 1988, at 20, 22).

an abortion-provider's bodyguard since March 1993.⁴⁵ Three of the five killings occurred in Pensacola, Florida.⁴⁶ David Gunn, a physician, was killed on March 10, 1993, as he arrived at the Women's Medical Services clinic in Pensacola.⁴⁷ On July 29, 1994, John Britton, a doctor who worked at The Ladies Center in Pensacola, and his voluntary escort, James Barrett, were fatally shot while sitting in the front seat of a pickup truck outside the clinic.⁴⁸ Barrett's wife, June, who was sitting in the rear of the truck, was wounded in the left arm.⁴⁹ A third physician, Dr. George Tiller, was wounded at an abortion clinic in Wichita, Kansas in August 1993.⁵⁰

The most recent violence also claimed the most victims in a single shooting spree. Two clinic staff members, Shannon Lowney and Lee Ann Nichols, were murdered and five others were wounded on December 30, 1994, in an attack on two suburban Boston, Massachusetts clinics.⁵¹ The rampage continued the next day in Norfolk, Virginia until the gunman was arrested after firing shots at a third clinic.⁵²

The person responsible for the July 1994 shooting deaths in Pensacola, Paul Hill, gained notoriety as the first offender charged with violation of FACE. On October 5, 1994, after a three-day trial, a federal jury convicted Hill of two counts for killing Britton and Barrett, a third count for the wounding of June Barrett, and a fourth count for using a firearm.⁵³ In Boston, federal prosecutors are considering whether to charge John Salvi with violations of FACE.⁵⁴ Massachusetts state attorneys are seeking life

45. "[T]he tally of violence over the past 12 years includes 123 cases of arson and 37 bombings in 33 states, and more than 1,500 cases of stalking, assault, sabotage and burglary" nationwide, according to federal statistics. Laurie Goodstein, *Clinic Killings Follow Years of Antiabortion Violence*, WASH. POST, Jan. 17, 1995, at A1.

46. Ann O'Hanlon, *Pensacola's Chain of Violence*, WASH. POST, July 30, 1994, at A4; see also *Foes*, *supra* note 20, at A3.

47. O'Hanlon, *supra* note 46, at A4.

48. William Claiborne, *Two Killed at Clinic in Florida: Radical Abortion Foe Charged in Shootings*, WASH. POST, July 30, 1994, at A1.

49. *Id.*

50. Don Phillips, *Violence Hardly Ruffled Protest Ritual: Foes, Supporters of Abortion Rights Resume Routine at Kansas Clinic*, WASH. POST, August 22, 1993, at A8.

51. Christopher B. Daly, *Salvi Denies Murder Charges in Shooting Attacks on Massachusetts Clinics*, WASH. POST, Jan. 10, 1995, at A3; Pamela Ferdinand, *Salvi Acted Alone, DA Says; Detailed Plan Alleged in Deadly Clinic Attack*, BOSTON GLOBE, Feb. 16, 1995, at 29.

52. Daly, *supra* note 51, at A3.

53. *FACE Trial: Hill Is the First Convicted Under New Act*, Abortion Report, October 6, 1994, available in LEXIS, Cmpgn Library, Abtrpt File.

54. Daly, *supra* note 51, at A3.

imprisonment for Salvi, who is charged with two counts of murder and five counts of attempted murder.⁵⁵

By passing FACE, which criminalizes the use of force, threats, or blockades to intimidate or to interfere with women seeking abortions or with abortion providers, Congress has increased the cost to protestors for obstructing access to clinics and to abortion services.⁵⁶ The government hopes to quell the rising violence of the protests without infringing the rights of the protestors. Whether this escalation of liability will deter Terry and his supporters depends on whether their judicial attacks on the law's constitutionality will succeed.⁵⁷

B. *The Bray Decision: A Misguided First*

Bray v. Alexandria Women's Health Clinic,⁵⁸ decided on January 13, 1993, was the first Supreme Court case to apply 42 U.S.C. § 1985(3)⁵⁹ to abortion clinic blockaders. The statute provides a federal cause of action to those deprived of their constitutional rights against persons conspiring to

55. *Id.*

56. 108 Stat. at 694.

57. See *Foes, supra* note 20, at 3A (reporting that two anti-abortion groups filed suits challenging the Act's constitutionality immediately after the Act took effect).

58. 113 S. Ct. 753 (1993).

59. The section reads as follows:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1988).

deprive “any person or class of persons of the equal protection of the laws.”⁶⁰ *Bray* was also the first consideration by the Court of a claim based on the “hindrance clause,” the second clause of § 1985(3).⁶¹

Section 1985(3) was originally enacted as section 2 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act.⁶² The 1871 Act “was a response to the massive, organized lawlessness that infected our Southern States” during Reconstruction, and it contained both a criminal and a civil component.⁶³ Its modern equivalent is twofold: § 1985(3) applies to the infringement of civil rights, and 18 U.S.C. § 241 outlines the criminal sanctions available against conspirators who deprive persons of the right to equal protection.⁶⁴

The respondents in *Bray* were nine clinics that performed abortions or provided abortion counseling in the greater Washington, D.C. area, and five organizations that supported free access to abortion.⁶⁵ The petitioners were Operation Rescue⁶⁶ and six individuals who opposed the voluntary termination of pregnancy and dedicated themselves to actions that would prevent the further sanctioning of abortion.⁶⁷ The respondents sought an injunction to prevent the petitioners from trespassing on the premises of abortion clinics in or around Washington, D.C. or from preventing access to those

60. *Id.*

61. Marjorie Richter, Comment, *Blinking at Reality: An Examination of Bray v. Alexandria*, 20 HASTINGS CONST. L.Q. 905, 910-11 (1993) (containing an excellent discussion of the *Bray* case).

62. *Id.* at 911; *see also* United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 836 (1983) (“The central theme of the bill’s proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters.”). *See generally* JUDGES, *supra* note 1, at 264 (discussing the *Bray* decision). Richter also points out that the *Bray* opinions call it “The Ku Klux Act of 1871,” rather than the more common “Ku Klux Klan Act.” *See, e.g., Bray*, 113 S. Ct. at 779 (Stevens, J., dissenting); Richter, *supra* note 61, at 911 n.44.

63. *Bray*, 113 S. Ct. at 779 (Stevens, J., dissenting); *see also* Richter, *supra* note 61, at 911 (detailing the statutory history of § 1985(3)). Justice Stevens explained that in deciding whether to apply the statute, the Court should consider “whether the controversy has a purely local character or the kind of federal dimension that gave rise to the legislation.” *Bray*, 113 S. Ct. at 779.

64. 18 U.S.C. § 241 (1988) (sanctioning fines of up to \$10,000 and imprisonment of up to 10 years for each violation).

65. *Operation Rescue*, 726 F. Supp. at 1487.

66. *See* discussion of Operation Rescue *supra* part II.A.

67. *Operation Rescue*, 726 F. Supp. at 1488.

clinics by patients and staff.⁶⁸ The lower court granted injunctive relief, and the Court of Appeals for the Fourth Circuit affirmed its decision, adding that abortion protestors had “crossed the line from persuasion into coercion” by denying the respondents their legal rights.⁶⁹

For the Supreme Court, Justice Scalia wrote the majority opinion, in which Chief Justice Rehnquist and Justices White, Kennedy, and Thomas joined. According to the majority, the sole question presented to the Supreme Court was “whether the first clause [the “deprivation” clause] of . . . § 1985(3) . . . provides a federal cause of action against persons obstructing access to abortion clinics.”⁷⁰ Thus, as one commentator was careful to highlight, the Court limited the legal question in *Bray* to “the jurisdiction of federal courts to hear blockade cases rather than the status of abortion rights themselves.”⁷¹

Relying on two precedents⁷² for an interpretation of the statute, the majority stated that for a private conspiracy to violate the deprivation clause, a plaintiff must prove that “some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators’ action.”⁷³ The plaintiff must also show that the goal of the conspiracy is to interfere with rights that are protected against private and governmental infringement.⁷⁴

68. *Operation Rescue*, 914 F.2d at 584; *Operation Rescue*, 726 F. Supp. at 1486, 1496-97.

69. *Operation Rescue*, 914 F.2d at 585; *Operation Rescue*, 726 F. Supp. at 1486, 1496-97. The trial court granted the injunction because of interference with the plaintiffs’ constitutional right to interstate travel and defendants’ violation of the Virginia state law prohibiting trespass and Virginia common law against creation of a public nuisance. *Id.* at 1493-95. However, the court rejected, on First Amendment grounds, the plaintiffs’ request for an injunction against the activities of abortion protestors “that tend to intimidate, harass or disturb patients or potential patients of the clinics.” *Id.* at 1497.

70. *Bray*, 113 S. Ct. at 757-58.

71. JUDGES, *supra* note 1, at 264.

72. The two cases the *Bray* Court based its opinion were *Griffin v. Breckenridge* and *Carpenters*. *Bray*, 113 S. Ct. at 758, 763 (citing *Griffin v. Breckenridge*, 403 U.S. 88 (1971) and *Carpenters*, 463 U.S. at 825). In *Griffin*, three African-American plaintiffs sued a group of whites for attacking them on a public highway. The Court held that private conspiracies could violate 42 U.S.C. § 1985(3). Richter, *supra* note 61, at 913 (citing *Griffin*, 403 U.S. at 89-92, 107). While *Griffin* broadened the scope of § 1985(3), the Court in *Carpenters* voted five to four that the statute does not cover conspiracies against economic groups and therefore cannot be applied to prejudice against non-union employees, thus narrowing the reach of the statute. *Id.* at 915 (citing *Carpenters*, 463 U.S. at 838).

73. *Bray*, 113 S. Ct. at 758 (quoting *Griffin*, 403 U.S. at 102).

74. *Id.* at 758 (quoting *Carpenters*, 463 U.S. at 833).

The Court held that the respondents met neither of these two requirements.⁷⁵ The first element, requiring a “class-based, invidiously discriminatory animus,” was not satisfied because, contrary to what the district court had found, women wanting to terminate a pregnancy are not a class within the meaning of § 1985(3).⁷⁶ Furthermore, the Court asserted that the protestors opposed abortion and not women, so that they were not motivated by gender discrimination.⁷⁷ The second element, requiring a violation of protected rights, was also unsatisfied. Of the two constitutional rights cited, the right to interstate travel and the right to abortion, the former, although protected against private conspirators, was only incidentally affected.⁷⁸ The Court held that a right not directly affected does not constitute a sufficient basis for proving discriminatory animus.⁷⁹ In addition, the right to abortion, while targeted by the petitioners, is not protected against private interference.⁸⁰ Because neither element was satisfied, the majority concluded that the respondents’ § 1985(3) deprivation claim failed.⁸¹

Even more damaging to the pro-choicers was the Court’s unwillingness to rule on the hindrance clause claim.⁸² In contrast, the three dissenting

75. *Id.*

76. *Id.* at 759. Justice Scalia maintained that although it is unclear what the term “class” encompasses beyond a class defined by the race of its members as the term was used in *Griffin*, it must mean more than a group of persons engaged in conduct of which the defendant being tried under § 1985(3) disapproves. *Id.* Because it reasoned that the protests did not target women as a class, the Court also declined to rule whether women qualify as a class for purposes of the conspiracies that § 1985(3) prohibits. *Bray*, 113 S. Ct. at 759. Thus, the Court did not interpret the hesitant “perhaps” left undefined in *Griffin* and did not shed light on whether class-based discrimination under the statute can include gender discrimination, as well as racial prejudice. *See supra* note 72 and accompanying text.

77. *Bray*, 113 S. Ct. at 759-60. Justice Scalia explained that “[w]hatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward . . . women as a class” *Id.* at 760. He did not, however, list those reasons.

78. *Id.* at 762; *see also Operation Rescue*, 726 F. Supp. at 1494. In *Operation Rescue*, the trial court deliberately sidestepped the abortion issue, reasoning that the holding in *Webster* suggested that a woman’s right to abortion may no longer be constitutionally guaranteed. *Id.* (citations omitted). The court concluded that in order to resolve the instant case, “it is unnecessary and imprudent to venture into this thicket.” *Id.*

79. *Bray*, 113 S. Ct. at 762.

80. *Id.* at 764.

81. *Id.*

82. *Id.* at 764-65. Justice Scalia noted that a claim based on the second clause of § 1985(3) had never been presented to the Court for resolution. *Id.* at 767. But quixotically he proceeded to give a substantial analysis of the claim, as if it were before the Court. *Bray*, 113 S. Ct. at 765. He concluded that a close reading of the statute makes it clear that a

opinions all agreed that the petitioners had violated the second clause of § 1985(3).⁸³ The hindrance clause bans any protest which seeks to hinder the state authorities from protecting the rights of persons in the state.⁸⁴ Thus, the Court cut off access to both sections of the statute as a legal framework for putting an end to the abortion protests, “the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Klan Act in 1871 and gave it its name.”⁸⁵

According to the dissenting justices, the majority refused to apply either clause of § 1985(3) because it erroneously assumed that the issue in dispute was the defendants’ opposition to abortion.⁸⁶ The dissenters argued vigorously that this case was only superficially about abortion. They claimed that the substantive issue before the Court was whether the government could use its authority to end a national conspiracy based on disregard for the law.⁸⁷ They further asserted that the Court could have ensured protection of a woman’s right to abortion from those who want the government to rescind that right. Instead, by reversing the district court’s decision to grant injunctive relief, the Court condoned the anti-abortionists conduct directed at preventing every woman from taking advantage of the constitutional right to terminate her pregnancy.⁸⁸ As the dissenting opinions aptly demonstrated, the majority sidestepped a historic opportunity to invoke federal jurisdiction over abortion protestors, who have become “organized and violent mobs across the country.”⁸⁹

hindrance clause claim required the same two elements as the deprivation clause claim and therefore would fail for the same two reasons: a lack of class-based animus, and the absence of a right protected against private conspiracies. *Id.* at 765-67.

83. *Id.* at 779 (Souter, J., concurring in part and dissenting in part), 795 (Stevens, J., dissenting), 805 (O’Connor, J., dissenting). Justice Souter concluded that the finding of a violation of the hindrance clause, which he called the prevention clause, required express clarification from the district court and recommended that the case be remanded for that purpose. *Id.* at 769. Justice Stevens stated his opinion more forcefully; he asserted that the respondents unquestionably proved a hindrance clause claim. *Id.* at 795 (Stevens, J., dissenting).

84. 42 U.S.C. § 1985(3) (1988).

85. *Bray*, 113 S. Ct. at 782 (Stevens, J., dissenting).

86. *Id.* at 798.

87. *Id.*

88. *Id.* at 788.

89. *Id.* at 780.

By foregoing this opportunity, the Supreme Court in *Bray* yielded its judicial lawmaking authority to the legislative branch, allowing Congress to draw the line between legal clinic picketing and illegal clinic blockades.⁹⁰

III. FACE: A LEGISLATIVE HISTORY

A. *Abortion Politics*

In the years preceding the *Roe v. Wade*⁹¹ decision, the legislative and executive branches of the federal government kept a low profile in the abortion controversy, allowing the states to regulate the issue.⁹² Since *Roe*, and until recently, although Congress initiated a remarkable number of proposals affecting abortion, “abortion politics [was] a controversy where rarely have so many public officials worked so hard to say so little about an issue on the minds of so many citizens.”⁹³

Examination of legislative records show that in the past two decades Congress has confronted the abortion issue itself only indirectly.⁹⁴ Of note are the passage of the Pregnancy Discrimination Act in 1978⁹⁵ and the enactment of the Adolescent Family Life (“AFL”) Demonstration Projects in 1981,⁹⁶ also known as the Chastity Act.⁹⁷ The ban on employer

90. See 108 Stat. 694; see also *infra* note 193 and accompanying text (distinguishing between peaceful picketing and violent obstruction).

91. 410 U.S. at 113.

92. Devins, *supra* note 20, at 294. Through the 1960s, following a 100 years of political inaction, 23 states changed their abortion legislation, four by repealing their abortion laws and 19 by liberalizing them. *Id.* (citations omitted). Devins also indicates that even when Congress acted on abortion prior to *Roe*, it did no more than “preserve the anti-abortion status quo ante.” *Id.* (citations omitted).

93. *Id.* at 295 & n.15 (citing Amy Gutmann, *No Common Ground*, NEW REPUBLIC, Oct. 22, 1990, at 43).

94. Although Congress has not acted to codify the holding in *Roe* granting women a right to abortion in the first trimester of pregnancy prior to fetus viability, a pro-choice initiative, known as the Freedom of Choice Act of 1993, was introduced in the first session of the 102d Congress. Devins, *supra* note 20, at 298 & n.23 (citing H.R. 25, 102d Cong., 1st Sess. (1991)). Currently, the initiative is pending in both the House and the Senate. Bill Tracking Report, *H.R. 25 and S. 25*, available in LEXIS, Legis Library, Bltrck File. The Act would prevent a state from restricting a woman’s right to choose abortion either prior to fetal viability or whenever the woman’s life or health is threatened by the pregnancy. *Id.*

95. 42 U.S.C. § 2000e(k) (1988).

96. *Id.* § 300z-10. The legislation provides that “grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.” *Id.* § 300z-10(a).

97. See generally Devins, *supra* note 20, at 301. Devins cites these two pieces of legislation as examples of Congress refraining from restricting abortion funding and defeating

discrimination against pregnant women broadened the scope of rights afforded to working women, by equating pregnancy discrimination with gender discrimination.⁹⁸ But in addition to this praiseworthy achievement, the Pregnancy Discrimination Act also allowed employers to exclude abortions from health insurance benefits.⁹⁹ The AFL Demonstration Projects legislation attempted to discourage unwanted pregnancies, and hence the need for abortions, by providing religious groups with federal funding to promote sexual abstinence among teenagers.¹⁰⁰ Under closer scrutiny, it is clear that the Pregnancy Discrimination Act encourages a woman to give birth rather than to abort the fetus, and the AFL legislation advocated abstinence, thereby averting the need for abortion.¹⁰¹ Both acts illustrate the conservative posture of Congress regarding abortion rights.

Otherwise, legislative activity has consisted mostly of placing limitations on abortion funding, although Congress has avoided legislating actual restrictions on access to abortion services. Beginning in 1976, Congress started cutting off Medicaid funds for abortions.¹⁰² Legislators stopped funding abortion services in federal programs on family planning, American assistance to foreign countries, legal aid, armed forces hospitals, and prisons, as well as limited the funds for abortions in the District of Columbia.¹⁰³ Because of this lack of federal funding, unrestricted access to abortion has receded further and further from the reach of economically disadvantaged women who are often in the greatest need of federally subsidized abortion services.

Although Congress has not shifted its position on abortion funding restriction for several reasons, the recent enactment of the Freedom of Access to Clinic Entrances Act of 1994 marks a turning point in congressional involvement in abortion politics. First, by criminalizing violence and the threat of violence at abortion clinic entrances, FACE safeguards a woman's right to receive abortion services. Second, the fact that the anti-abortion and pro-choice factions of Congress could agree on the need for FACE reveals a congressional consensus that a woman's right to choose should be free from physical intimidation. Third, by providing federal legislation, Congress has acknowledged that the problem of abortion clinic

attempts to overrule the Supreme Court holding in *Roe*. *Id.*

98. 42 U.S.C. § 2000e(k) (1988).

99. *Id.*

100. Devins, *supra* note 20, at 301.

101. *Id.*

102. *Id.* at 300 (citing material from CRAIG & O'BRIEN, *supra* note 20, at 110-37).

103. *Id.* (citing material from CRAIG & O'BRIEN, *supra* note 20, at 112-13, 131).

blockades is now a national problem that can best be handled on the national level. With the enactment of FACE, the federal legislative and executive branches have finally confronted the abortion issue squarely and discovered that a limited compromise is possible.

B. *Evolution of FACE*

A bill similar to the House of Representatives version of the enacted law was first introduced in Congress in 1992.¹⁰⁴ The House Subcommittee on Crime and Criminal Justice conducted a hearing on the proposal on May 6, 1992.¹⁰⁵ The Subcommittee heard testimony on the abortion clinic blockades and protests that had disrupted health care services both in Wichita, Kansas during the summer of 1991 and in Buffalo, New York, in the spring of 1992.¹⁰⁶ Both the violence and the national scope of these demonstrations brought obstruction of clinic access to the attention of federal lawmakers.¹⁰⁷ The House did not have the opportunity to consider enactment of House Bill 1703 in 1992, but the bill paved the way for further action in the 103d Congress. House Bill 796 was introduced on February 3, 1993, as the next version of FACE.¹⁰⁸

Although the House took initiative by introducing a bill to address the rising violence of the ongoing abortion protests, it was the Senate proposal, Senate Bill 636, which was presented to the President on May 17, 1994.¹⁰⁹ President Clinton signed the bill into law on May 26, 1994, which was entered into the Congressional Record on June 7, 1994.¹¹⁰ Senator Edward M. Kennedy introduced the bill on the Senate floor on March 23, 1993, and that same day it was referred to the Senate Labor and Human

104. H.R. REP. NO. 306, 103d Cong., 1st Sess. 1 (1993), *reprinted in* 1994 U.S.C.-C.A.N. 699, 699 (referring to H.R. 1703, 102d Cong., 2d Sess. (1992)).

105. *Id.*

106. *Id.*

107. *Id.*

108. H.R. 796, 103d Cong., 1st Sess. (1993); 139 CONG. REC. H483 (daily ed. Feb. 3, 1993); *see also* Bill Tracking Report, H.R. 796, 103d Cong., 1st Sess., *available in* LEXIS, Legis Library, BLT103 (containing a synopsis of the bill's progress through the House from its introduction on Feb. 3, 1993, to the last action taken on Mar. 17, 1994, when House Bill 796 was incorporated into Senate Bill 636).

109. S. 636, 103d Cong., 2d Sess. (1994); *see generally* Bill Tracking Report, S. 636, 103d Cong., 1st Sess., *available in* LEXIS, Legis Library, BLT103 (containing a synopsis of the bill's progress through the Senate from its introduction on March 23, 1993, to the final action taken on June 7, 1994, when the newly signed law was entered into the Congressional record).

110. Bill Tracking Report, S. 636, *supra* note 108.

Resources Committee for consideration.¹¹¹ In his remarks, the senator noted the grisly statistics in the war being waged against free access to abortion facilities: "Over 100 clinics have been torched or bombed in the past 15 years. Over 300 have been invaded and over 400 have been vandalized. Already this year, clinics have sustained more than \$1.3 million in damage from arson alone."¹¹² He then stressed that only federally enacted laws can stop the rising toll of "nationwide extremist acts" and the resulting damage to property and to the well-being of clinic patients and staff.¹¹³ The senator's statement echoed that of William S. Sessions, Director of the Federal Bureau of Investigation, who wrote prior to the enactment of FACE that current federal legislation was inadequate to handle the violent obstruction of abortion clinic entrances.¹¹⁴ Although it took another fourteen months for the bill to become law, the majority of the members of Congress eventually agreed with Senator Kennedy that the situation demanded action on the federal level.

The text of the bill printed in the record at the request of Senator Kennedy contained a section, since expunged,¹¹⁵ outlining the congressional findings,¹¹⁶ and represented the initial version of Senate Bill 636,

111. 139 CONG. REC. S3523-25 (daily ed. Mar. 23, 1993) (containing the full text of the original version of Senate Bill 636); *see also id.* at S3479 (referring the bill to the Committee on Labor and Human Resources). Senator Kennedy's introductory remarks included the following statement: "Mr. President, today we are introducing legislation to protect women, physicians, and other health personnel, and public and private health clinics, from opponents of abortion who resort to violence, blockades, and other vigilante tactics." *Id.* at S3523. The senator spoke less than two weeks after Dr. David Gunn was murdered outside a clinic in Pensacola, Florida. *See supra* note 44 and accompanying text.

112. 139 CONG. REC. S3523 (daily ed. Mar. 23, 1993).

113. *Id.* at S3524. Several months later, Senator Kennedy, in a speech to his colleagues, reiterated his plea for speedy congressional action to put a stop to the mounting violence. "It is not enough for Congress simply to condemn this reprehensible conduct. Legislation must be enacted before another doctor dies, or another clinic is blockaded or burned to the ground." *Id.* at S11,311 (daily ed. Sept. 9, 1993) (remarks entitled, *The Tragedy of Continuing Anti-Abortion Violence*).

114. *The Freedom of Access to Clinic Entrances Act of 1993: Hearing on S. 636 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. 5 (1993) [hereinafter *Hearing*] (letter from William S. Sessions, Director, FBI, to Sen. Tom Harkin).

115. H.R. CONF. REP. NO. 488, 103d Cong., 2d Sess., pt. 2 (1994), *reprinted in* 1994 U.S.C.A.N. 699, 724 (deleting the Findings section in the Senate Bill but including some of the factual findings in the Purpose section).

116. 139 CONG. REC. S3524 (daily ed. Mar. 23, 1993). The following is a partial text of the findings:

SEC. 2. CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE.

(a) Findings. -- Congress finds that --

which was to undergo four subsequent rewritings.¹¹⁷ Dated May 13, 1994,¹¹⁸ the fifth and final version incorporated House Bill 796, which had become part of Senate Bill 636 on March 17, 1994.¹¹⁹ Thus, in tracking the evolution of the Act, the development of the Senate Bill is more instructive.

For two months following the introduction of Senate Bill 636 on March 23, 1993, co-sponsors were added at subsequent congressional sessions.¹²⁰ The next significant event in the bill's evolution was the Senate Labor and Human Resources Committee hearing on May 12, 1993.¹²¹ The testimony given at the hearing¹²² formed the basis for the committee report dated

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- (1) medical clinics and other facilities offering abortion services have been targeted in recent years by an interstate campaign of violence and obstruction aimed at closing the facilities or physically blocking ingress to them, and intimidating those seeking to obtain or provide abortion services;
 - (2) as a result of such conduct, women are being denied access to, and health care providers are being prevented from delivering, vital reproductive health services;
 - (3) such conduct subjects women to increased medical risks and thereby jeopardizes the public health and safety; . . .
 - (6) such conduct operates to infringe upon women's ability to exercise full enjoyment of rights secured to them by Federal and State law, both statutory and constitutional, and burdens interstate commerce[;] . . .
 - (10) the obstruction of access to abortion services can be prohibited, and the right of injured parties to seek redress in the courts can be established, without abridging the exercise of any rights guaranteed under the First Amendment . . .

Id.

117. The fifth version was adopted by both the Senate and the House in May 1994 and was sent to President Clinton to sign. 140 CONG. REC. H3135 (daily ed. May 5, 1994), S5628 (daily ed. May 12, 1994), S5824 (daily ed. May 17, 1994); *see also* Full Text of Bills, 1994 S. 636, 103d Cong., 2d Sess., *available in* LEXIS, Legis Library, BTX103.

118. H.R. CONF. REP. NO. 488.

119. 139 CONG. REC. H1519 (daily ed. Mar. 17, 1994).

120. Bill Tracking Report, S. 636, *supra* note 108.

121. *Hearing, supra* note 114, at 1.

122. Senate Report 117 quotes extensively from the statements of two of the witnesses at the hearing, Attorney General Janet Reno and Harvard University Law Professor Laurence H. Tribe. S. REP. NO. 117, 103d Cong., 1st Sess., pts. IV & V (1993), *available in* LEXIS, Legis Library, Cmtrpt File. Attorney General Reno expressed her opinion concerning the need for federal legislation to discourage the use of violence during abortion protests. She testified as follows:

This is a problem that is national in scope. It is occurring throughout the country; on the doorstep of the Nation's Capital; in Alexandria and Falls Church in northern Virginia; in Pensacola and Melbourne in Florida; in West Hartford,

July 29, 1993 and reported in the Senate the same day “with an amendment in the nature of a substitute” of the Senate Bill.¹²³

This second version retained the congressional findings of fact outlining the necessity for such legislation and defending its constitutionality.¹²⁴ But version two of the bill added four paragraphs to the original section entitled, “Congressional Statement of Findings and Purpose.”¹²⁵ These

CT; in Wichita, KS; in Fargo, ND, and Dallas, TX, just to name a few of the more visible incidents. Moreover, much of the activity has been orchestrated by groups functioning on a nationwide scale. Because of this nationwide scope, the problem transcends the ability of any single local jurisdiction to address it.

Hearing, supra note 114, at 9 (statement of Janet Reno, Attorney General of the United States).

Professor Tribe testified concerning the ability of the Act as conceived to withstand the expected constitutional challenges from its opponents:

[N]o court in the history of this country has ever suggested that the Bill of Rights prevents Congress from limiting its prohibitions to those acts of force that are deliberately intended by the actor to interfere with the finite, congressionally specified set of activities or rights.

The first amendment just does not include any kind of ‘all or nothing’ requirement.

Id. at 91. Professor Tribe also commented on a statement made by Professor Michael McConnell regarding Senate Bill 636 that “Congress has selected a single point of view—opposition to abortion—and subjected it to penalties applied to no other point of view.” *Id.* at 92 (quoting Professor McConnell). He maintained that the “singling-out” argument does not apply to the bill as written:

The . . . objection . . . completely misstates what this proposed bill does. It does not select a point of view at all. What it selects is a specific lawful activity—the provision of abortion services—and then it prohibits those acts and only those acts that are intended to interfere forcibly with that specific lawful activity.

Id.

123. S. REP. NO. 117.

124. 139 CONG. REC. S15,655-56 (daily ed. Nov. 16, 1993); *see also supra* notes 114-15 and accompanying text.

125. 139 CONG. REC. S15,655-56 (daily ed. Nov. 16, 1993); *see also* S. REP. NO. 117, pt. V.C. (discussing the sources of constitutional authority permitting Congress to regulate clinic access). The Senate Committee on Labor and Human Resources found that:

Congress has clear constitutional authority to enact [FACE] under the Commerce Clause, which gives it authority to regulate interstate commerce.

. . . Further, once Congress finds that a class of activities affects interstate commerce, Congress may regulate all activities within that class, even if any of those activities, taken individually, has no demonstrable effect on interstate commerce.

Id. at pt. V.C.1. The Committee also found that § 5 of the Fourteenth Amendment, provides independent authority to enact the Act because § 1 of the Amendment prohibits deprivation

additional facts emphasized the national scope of the problem and clarified the connection between the operation of the clinics and interstate commerce.¹²⁶ The statement of purpose in section 2(B) also added a reference to “activities affecting interstate commerce” and empowered State Attorneys General, together with the Attorney General of the United States, to bring an action under the proposed statute.¹²⁷

In addition, the second version dropped two sections that mandated a study of the effect of the proposed legislation on national reproductive health services and that called for an investigation of past violations.¹²⁸ As a result of the latter deletion, FACE would not criminalize past offenses, but only violations occurring subsequent to its enactment. Furthermore, the second version expanded the definitions section to explain the words “interfere with,” “intimidate,” and “physical obstruction,” thus specifying the types of conduct that the bill prohibited.¹²⁹

The most significant change was the expansion of the term “abortion services” to read “abortion-related services” throughout subsequent Senate versions.¹³⁰ This alteration of the language broadened the location of the prohibited conduct to encompass clinics which counsel alternatives to abortion, as well as those that provide abortion services. Finally, the July 1993 version added a fourth section “expressly provid[ing] . . . that [the Act] will apply only to conduct occurring on or after the date of its

of “liberty” without due process and § 5 gives Congress the power to enforce the Amendment. *Id.* at pt. V.C.2. In *Casey*, 112 S. Ct. at 2791, the Supreme Court reaffirmed the holding in *Roe* that a woman’s right to choose abortion is protected by the Fourteenth Amendment. Thus, the Committee found two sources of constitutional authority to support the congressional enactment.

126. 139 CONG. REC. S15,655-56 (daily ed. Nov. 16, 1993).

127. *Id.* at S15,656; S. REP. NO. 117, pt. X.

128. 139 CONG. REC. S15,655 (daily ed. Nov. 16, 1993) (dropping proposed § 2715(c)-(d) of version one); *see also id.* at S3524 (daily ed. Mar. 23, 1993) (setting forth text of proposed § 2715(c)-(d)). The Senate version of the Act originally proposed inclusion of the new provision ensuring clinic access in Title 42, the title governing public safety and welfare, as § 2715. *Id.* at S3523. The sponsors reasoned that because the Senate bill was modeled after the other civil rights legislation contained in this title, its rightful location would be in Title 42, as an amendment of the Public Health Service Act, alongside such laws as § 1985(3). S. REP. NO. 117, pt. V.A.1; *see discussion supra* part I.B. (discussing 42 U.S.C. § 1985(3) (1988) in the context of abortion clinic blockades); *see also* 139 CONG. REC. S3523 (daily ed. Mar. 23, 1993) (introducing the bill in the Senate as a proposed amendment to 42 U.S.C. § 300aaa).

129. 139 CONG. REC. S15,656 (daily ed. Nov. 16, 1993).

130. *Id.* at S15,655-56; *see also* S. REP. NO. 117.

enactment,” thus specifically prohibiting retroactive application of its provisions.¹³¹

The third version, dated November 16, 1993, contained several substantive changes to the previous proposal. First, a new section, unrelated to abortion services, was inserted to protect the exercise of religion “at a place of worship.”¹³² Second, an addition to the proposed section governing penalties¹³³ distinguished between violent and nonviolent offenses,¹³⁴ and reduced the maximum penalties for violations not involving force or the threat of force, as proposed by Senator Kennedy.¹³⁵ The addition also lowered the ceiling for criminal fines under Title 18 from \$100,000 for first offenses and \$250,000 for subsequent offenses to \$10,000 and \$25,000, respectively.¹³⁶ Third, an insertion in the pivotal first section, outlining the prohibited conduct, changed “obtaining or providing abortion-related

131. 139 CONG. REC. S15,656 (daily ed. Nov. 16, 1993); S. REP. NO. 117, pt. V.A.4.

132. 139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993). The full text of the proposed section reads:

Whoever . . . by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place worship . . . shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c) . . .

Id. The phrase “at a place of worship” was subsequently changed in the final version of FACE to read “a place of *religious* worship.” 108 Stat. at 694 (emphasis added).

The Hatch Amendment, adopted on November 16, 1993, would “guarantee that religious liberty is protected against Government intrusion. Through this amendment, religious liberty would also be protected against private intrusion -- in exactly the same way that S. 636 would protect abortion.” 139 CONG. REC. S15,660 (daily ed. Nov. 16, 1993) (remarks of Sen. Orrin G. Hatch). Senator Hatch was one of four senators of the seventeen-member Senate Labor and Human Resources Committee to vote against adoption of the proposed Senate Bill 636 on June 23, 1993. S. REP. NO. 117, pt. 1.

133. 139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993).

134. Proposed § 2715(b)(2) was expanded with the insertion of the following provision:
[E]xcept that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than \$10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall be not more than \$25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense

139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993).

135. *Id.* at S15,669.

136. *Id.* at S15,728; *see also* 140 CONG. REC. S5596 (daily ed. May 12, 1994) (“Nonviolent obstructions of clinics do not warrant the same maximum penalties as violence, death threats, or destruction of property.”).

services” to “obtaining or providing *pregnancy or abortion-related services*.”¹³⁷ As in the change from the original version of Senate Bill 636 to the second version, where the term “abortion services” was changed to “abortion-related services,” this last alteration again ensures that the bill will prohibit the obstruction of clinics counseling alternatives to abortion, as well as those *performing* abortions.

In addition, the November 1993 version of Senate Bill 636 added a provision to the section specifying the Rules of Construction. The new provision addressed possible abridgement of the First Amendment rights of abortion protestors.¹³⁸ This addition specifically concerned freedom of speech and expanded the fifth Rule of Construction included in the first two versions of the bill, which states that “[n]othing in this section shall be construed or interpreted to . . . prohibit expression protected by the First Amendment”¹³⁹ This same element was repeated in an additional section, but was deleted in the enacted version of the bill.¹⁴⁰ Nonetheless, its inclusion here indicates the adamant stance of the anti-abortion legislators against the possible infringement of the protestors’ rights to free speech and the willingness of the pro-choice senators to compromise so that the bill would be enacted.

On November 18, 1993, the House of Representatives debated its latest version of House Bill 796 and added several amendments.¹⁴¹ Four months later, the House voted to substitute its November 1993 version of the bill for

137. 139 CONG. REC. S15,727 (daily ed. Nov. 16, 1993) (setting forth text of proposed § 2715(a)(1)) (emphasis added).

138. *Id.* at S15,728. Section 2715(d)(6) reads: “Nothing in this section shall be construed or interpreted to . . . create new remedies for interference with expressive activities protected by the First Amendment to the Constitution, occurring outside a medical facility, regardless of the point of view expressed.” *Id.*

139. *Id.*

140. The additional section contained the following language:

Sec. 4. Rule of Construction.

Notwithstanding any other provision of this Act, nothing in this Act shall be construed to interfere with the rights guaranteed to an individual under the First Amendment to the Constitution, or limit any existing legal remedies against forceful interference with any person’s lawful participation in speech or peaceful assembly.

Id.

141. 139 CONG. REC. H10,093-94, H10,098, H10,109 (daily ed. Nov. 18, 1993). The full amended text can also be found in the Senate proceedings. 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994).

the then current version of Senate Bill 636¹⁴² by a recorded vote of 237 yeas and 169 nays, with twenty-seven Representatives not voting.¹⁴³ This House amendment became the fourth version of Senate Bill 636.

During an impassioned late night¹⁴⁴ debate preceding the vote, Representative McKinney, speaking in support of the Act, declared that “[t]his bill is directed at terrorists and their malicious acts of violence. These individuals are blocking real live Americans from exercising their constitutional rights.”¹⁴⁵ Representative Hyde spoke against the Act with equal vehemence, encouraging his colleagues to “resist it because it destroys, it shreds, it does violence to the constitutional precept of equal protection of the law,” by singling out anti-abortion protestors because of their views.¹⁴⁶ These remarks highlight the sharp differences of opinion among the members of Congress.

Similarly, a comparison of the House¹⁴⁷ and Senate¹⁴⁸ bills (version three) illustrates the differences in the outlook between the two Houses. The most obvious of these are as follows: 1) The Senate bill begins with a Congressional Statement of Findings and Purpose, which is absent from the House version;¹⁴⁹ 2) the Senate bill amends Title 42 of the *United States Code* governing the public health and welfare, while the House bill appends its proposal to Title 18 of the Code, governing crimes and criminal procedure; 3) the Senate bill refers to “pregnancy or abortion-related services” throughout, while the House bill refers to “reproductive health services;” 4) the Senate proposal includes a prohibition against interference

142. See *supra* notes 130-38 and accompanying text (discussing the changes in the third version of Senate Bill 636).

143. 140 CONG. REC. H1519 (daily ed. Mar. 17, 1994).

144. Representative Schroeder, who moved to make the substitution, apologized for the lateness of the hour, and continued: “In my entire tenure I have never seen us have to go through this extraordinary procedure to go to conference on a bill that passed 69 to 30 in the other body, and on the motion to recommit it here it was defeated 246 to 182.” *Id.* at H1510. Thus, although a definitive majority in the House supported passage of the bill and the need for a conference with the Senate to work out differences concerning the specifics of the legislation, the debate dragged on as members rose to vent personal feelings. For example, Representative Bunning disclosed that four members of his immediate family were active in Operation Rescue, but he insisted that “[n]ot one of them poses any kind of threat of violence whatsoever.” *Id.* at H1500.

145. *Id.* at H1520 (daily ed. Mar. 17, 1994).

146. *Id.* at H1513.

147. 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994) (text of version four of the bill).

148. 139 CONG. REC. S15,727 (daily ed. Nov. 16, 1993) (text of version three of the bill).

149. See *supra* notes 108, 114-15 and accompanying text.

with the freedom of religion, which is absent from the House bill;¹⁵⁰ 5) the House bill does not include the distinction in penalties between violent and nonviolent physical obstruction which the Senate version incorporated; 6) the Rules of Construction in both versions explicitly refer to First Amendment protection of expression, but the Senate bill includes other guarantees such as the right “to seek other available civil remedies;”¹⁵¹ and, 7) the Senate version defines “interfere with,” as well as “intimidate.”¹⁵² Thus, a conference was necessary to reach a viable compromise between the House’s blanket approach to stopping the violence and the Senate’s more narrowly defined solution to the problem.

In an accompanying motion, the House voted 228 in favor and 166 against, with thirty-nine members not voting, to “insist on its amendments to [Senate Bill] 636 and request a conference with the Senate thereon.”¹⁵³ A month later, the Senate agreed to the House’s request for a conference.¹⁵⁴ On April 26, 1994, the conferees appointed by each chamber agreed to file a conference report.¹⁵⁵ The resulting document highlights the differences between the Senate and the House and the resolution of these differences.¹⁵⁶ This compromise led to congressional enactment of the Freedom of Access to Clinic Entrances Act of 1994 on May 26, 1994,¹⁵⁷ and provided a new impetus for the deterrence of abortion-related violence.

C. *Legislative Intent*

In their separate committee reports recommending the enactment of FACE, both the House Committee on the Judiciary and the Senate Committee on Labor and Human Resources explained the purpose of the

150. 139 CONG. REC. S15,727 (daily ed. Nov. 16, 1993) (setting forth the text of proposed § 2715(a)(2)).

151. *Id.* (setting forth the text of proposed § 2715(d)(4)).

152. *See generally* H.R. CONF. REP. NO. 488 (listing the differences between the two versions of the legislation before explaining the compromise reached).

153. 140 CONG. REC. H1519-20 (daily ed. Mar. 17, 1994).

154. *Id.* at S4183 (daily ed. Apr. 12, 1994). Representative Mitchell requested that the House version of Senate Bill 636 be presented to the Senate. *Id.* He then requested “unanimous consent that the Senate disagree to the House amendments and agree to the request for a conference with the House on the disagreeing votes of the two Houses” This request was also granted, and the presiding officer appointed nine conferees. *Id.*

155. *Id.* at D487 (daily ed. Apr. 26, 1994).

156. *See* H.R. CONF. REP. NO. 488.

157. 140 CONG. REC. D627 (daily ed. June 7, 1994) (listing Senate Bill 636 as a new public law, Pub. L. No. 103-259).

legislation.¹⁵⁸ The House committee members intended that the Act prevent the mounting violence generated by the abortion protest movement.¹⁵⁹ In contrast, the Senate committee sought to protect a woman's right to seek an abortion.¹⁶⁰ These two divergent points of view epitomize the most significant difference between the House version of FACE and its Senate counterpart: the House version¹⁶¹ amended Title 18 of the *United States Code* addressing criminal acts, while the Senate proposal amended Title 42 of the Code safeguarding civil rights.¹⁶² Thus, the House bill emphasized the criminalization of the act of blocking abortion clinics, while the Senate bill focused on preserving women's freedom of access to clinics.

Illustrative of this dichotomy are the descriptive headings each house chose for the operative section of the bill. The House of Representatives proposed an amendment to Title 18 by the addition of section 248 entitled, "Blocking access to reproductive health services."¹⁶³ The Senate proposed an amendment to Title 42 by the addition of section 2715 entitled, "Freedom of Access to Clinic Entrances."¹⁶⁴

The compromise in the enacted legislation was twofold: First, a statement of purpose was included based on the one which appeared as a preface to section 2715 in the Senate proposal, but omitting the extensive list of congressional findings in Senate Bill 636.¹⁶⁵ Instead, the House proposed incorporation of part of the findings in the statement of purpose, which also now refers to the imposition of "Federal criminal penalties" and the provision of civil remedies for violations of the Act.¹⁶⁶ The prefatory statement also uses the word "violent" to describe the banned conduct, thus highlighting the need for criminal penalties as well as distinguishing the illegal violent conduct from legal nonviolent, peaceful activity.¹⁶⁷ Further-

158. H.R. REP. NO. 306; S. REP. NO. 117.

159. H.R. REP. NO. 306, pt. 1 ("The purpose of the . . . Act is to prevent the growing violence accompanying the debate over the continued legality and availability of abortion and other reproductive health services.").

160. S. REP. NO. 117, pt. V.C.2. ("The . . . Act seeks to protect the right to terminate a pregnancy, a right that falls squarely within the rights guaranteed by the Fourteenth Amendment.").

161. 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994).

162. 139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993); H.R. CONF. REP. NO. 488, pt. 3 ("Codification"); *see also supra* notes 127-31 and accompanying text.

163. 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994).

164. 139 CONG. REC. S15,727 (daily ed. Nov. 16, 1993).

165. *Id.*; *see also* H.R. CONF. REP. NO. 488, pt. 2.

166. 108 Stat. at 694 (quoting from "Sec. 2. Purpose."); *see also* H.R. CONF. REP. NO. 488, pt. 2.

167. 108 Stat. at 694.

more, the statement echoes the use of the word “intentionally” as found in section 248(a), “Prohibited Activities,” and adds the term “intended to” to describe the banned conduct.¹⁶⁸ This addition also addresses the criminal component of the legislation by indicating that conviction under the Act requires intent.

Second, the title of the operative section is now a hybrid between the two versions. While the legislation remains located within Title 18, Crimes and Criminal Procedure, as the House favored, the inclusion of the concept “Freedom of” in its name suggests a protected civil right, more appropriately found under a Title 42 heading.¹⁶⁹

As a result of a further compromise between the two houses, the word “abortion” appears only once in the Act, as part of the fourth Rule of Construction.¹⁷⁰ The conferees agreed to replace the only reference to abortion, which appeared throughout the Senate version in the phrase “pregnancy and abortion-related services,” with the House terminology, “reproductive health services.”¹⁷¹ Furthermore, in section 248(e)(5) the phrase “including services relating to pregnancy or the termination of pregnancy” is added to the definition of “reproductive health services.”¹⁷² This substitution replaced the definition of “pregnancy and abortion-related services” in the Senate’s version of section 2715(e)(5). The phrase “reproductive health services” better expresses the conferees’ intent that FACE apply to blockages of clinics that offer counseling on alternatives to abortion, as well as clinics that provide abortion services.¹⁷³ Thus, Congress intended that the Act be perceived as evenhanded, outlawing blockades of abortion clinics by abortion protestors, as well as criminalizing similar conduct by pro-choice demonstrators.

Several other alterations of section 248(e), containing definitions of key terms, were intended to guard against challenges to the Act’s constitutional-

168. *Id.*

169. *Id.*: 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994); 139 CONG. REC. S15,727 (daily ed. Nov. 16, 1993).

170. 108 Stat. at 696 (setting forth the text of 18 U.S.C. § 248(d)(4)). According to the Conference Report, the word “abortion” was a concession to the Senate conferees for their agreement to omit a provision from § 248(a)(1) that nothing in this section shall be “construed as ‘expanding or limiting the authority of States to regulate the performance of abortions or the availability of pregnancy or abortion-related services.’” H.R. CONF. REP. NO. 488, pt. 9(d). Thus, the word “abortion” can be said to have crept back into the Act through the back door.

171. 108 Stat. 694; H.R. CONF. REP. NO. 488, pt. 4.

172. H.R. CONF. REP. NO. 488, pt. 10(a).

173. *Id.*

ity. For example, the conferees agreed to retain the Senate's inclusion of a definition of the verb "interfere with," noting that the phrase "injure, intimidate, or interfere with" is patterned after existing federal civil rights laws, and that these terms are intended to have the same meaning.¹⁷⁴ Furthermore, the conferees noted that the language in section 248(a) describing the person or class of persons against whom certain conduct is proscribed also stemmed from existing federal civil rights laws.¹⁷⁵ By carefully modeling this Act after existing legislation that has not fallen to judicial challenge, Congress meant to avert an attack on the legislation's constitutionality.

In addition, the final version of the Act retains the Senate definition of "physical obstruction" as rendering access "hazardous."¹⁷⁶ The conferees noted that this definition was taken from a Texas penal statute that has withstood a First Amendment challenge.¹⁷⁷ Moreover, in a final supplement to both versions of the bill, the House agreed to the inclusion of a severability clause to guard against defeat of the whole Act should one part be held unconstitutional.¹⁷⁸ These decisions concerning the content of FACE indicate a cautious approach to the issue of the Act's constitutionality, which has sometimes been absent in Congress' prior enactments.¹⁷⁹

In a coup for the Senate conferees, the oddly-placed prohibition against interference with religious worship remained a part of the final enactment.¹⁸⁰ But the House inserted the word "religious" before the word "worship" in the reference to "place of worship" in section 248(a)(2).¹⁸¹ Apparently, the House members of the conference committee intended to ensure that this section did not create a new cause of action and remedy for

174. *Id.* at pt. 10(c).

175. *Id.* at pt. 5.

176. 108 Stat. at 696.

177. H.R. CONF. REP. NO. 488, pt. 10(d).

178. *Id.* at pt. 11.

179. Devins, *supra* note 20, at 318-19. Devins asked, "Does elected government take seriously its responsibility as constitutional interpreter?" *Id.* at 318. He then cited legislation in which legislators did not concern themselves with the constitutionality of their legislation, e.g., the AFL Demonstration Projects, and proposals of which Congress carefully examined all the constitutional implications, e.g., the Freedom of Choice Act of 1989. *Id.* at 318-19 (footnotes omitted); *see also supra* note 93 (discussing the Freedom of Choice Act). Devins concluded that the answer is neither yes nor no, but somewhere in between. Devins, *supra* note 20, at 318.

180. 108 Stat. at 694; H.R. CONF. REP. NO. 488, pt. 6.

181. H.R. CONF. REP. NO. 488, pt. 6.

interference with worship outside a clinic.¹⁸² The final version of section 248(d)(2) repeats this caution and also states that the Act shall not be interpreted to create new remedies for interference with free speech.¹⁸³ Thus, the conferees concerned themselves with narrowing the scope of the Act to avoid creating a new federal tort, as well as broadening it to include free access to places of religious worship.

Overall, the final version of FACE is more concise than the Senate bill and more cognizant of civil rights than the House bill. For example, the lengthy Senate section on congressional findings and purpose was deleted from the final version; the six Senate Rules of Construction plus the additional section, "Rules of Construction," were pared down to four rules.¹⁸⁴ But these four constitute two more than appeared in the House version.¹⁸⁵

With respect to civil rights, the final version contains several safeguards not present in the House bill. Two examples illustrate this focus on civil rights in the Senate proposal. First, the finalized Rules of Construction include a prohibition on limiting any existing causes of action for interference with the exercise of free speech or the free exercise of religion.¹⁸⁶ This prohibition was absent from the House version.¹⁸⁷ This Rule of Construction would safeguard a person's right of access to the courts and thus his or her civil rights. Second, and more important, the House bill omitted any restriction on who may bring a private suit.¹⁸⁸ Thus, the House version may be interpreted as constraining the civil rights of the protestors, since it created a potentially larger pool of plaintiffs who could force them to defend their actions in court. In contrast, the Senate bill provided more protection for abortion protestors by allowing fewer persons the right to file a suit against them.

182. *Id.*

183. 108 Stat. at 696.

184. *Id.*

185. See 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994).

186. 108 Stat. at 696; see also H.R. CONF. REP. NO. 488, pt. 9(b).

187. See 140 CONG. REC. S4183 (daily ed. Apr. 12, 1994).

188. *Id.* 18 U.S.C. § 248(c)(1) reads: "RIGHT OF ACTION GENERALLY—*Any person who is aggrieved by a violation of subsection (a) of this section may in a civil action obtain relief under this subsection.*" *Id.* (emphasis added). In contrast, the Senate bill limited the person who may bring a private suit to someone either obtaining services from, or providing services in, a clinic. 139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993) (setting forth the text of proposed 42 U.S.C. § 2715(c)(1)(A)); see also H.R. CONF. REP. NO. 488, pt. 8(a).

However, most protective of civil rights is the retention of the Senate's version of the penalties for violations of the Act.¹⁸⁹ This section distinguishes between nonviolent and violent prohibited conduct by lowering the maximum criminal fines and prison terms for nonviolent physical obstruction.¹⁹⁰ In its final version, the bill creates different categories of offenses. It punishes physical obstruction without force by fines and imprisonment and it imposes stiffer fines and longer prison terms on violent obstruction.¹⁹¹ However, it specifically excludes peaceful picketing from punishment.¹⁹² On the one hand, the bill is not meant to reach peaceful demonstrators;¹⁹³ but on the other hand, FACE contains stiff penalties for persons who use violence to express their views.

Congress' intent in passing FACE was to stop "the massive wave of violence, intimidation, and harassment directed at clinic patients and personnel across the country."¹⁹⁴ To achieve this necessary end, Congress created legislation to punish those who obstruct access to legal medical services at clinics. The need for such a law is clear because the only cure for a national campaign of violence is national legislation.¹⁹⁵

D. *The Opposition*

Throughout the congressional debate on FACE, the legislators opposing FACE repeated several reasons for their opposition to the enactment of legislation aimed at deterring abortion clinic blockades.¹⁹⁶ The foremost

189. 139 CONG. REC. S15,728 (daily ed. Nov. 16, 1993).

190. 108 Stat. at 695; H.R. CONF. REP. NO. 488, pt. 7(a); *see also supra* notes 124-27 and accompanying text.

191. 108 Stat. at 695.

192. 18 U.S.C. § 248(d)(1) (1988).

193. 140 CONG. REC. S5596 (daily ed. May 12, 1994). According to Senator Kennedy:

Those who are picketing peacefully outside clinics, praying or singing, or engaging in sidewalk counseling and similar activities that do not block the entrances have nothing to fear from the law. Those activities are protected by the first amendment, and this legislation does not restrict them.

Nor does this legislation discriminate against any particular viewpoint. . . . The only conduct it prohibits is violent or obstructive conduct that is far outside any constitutional protection.

Id.

194. *Id.* at S5596-97 (remarks of Sen. Kennedy).

195. *Id.* at S5597.

196. *See, e.g.*, S. REP. NO. 117, pt. IX; H.R. REP. NO. 306; 139 CONG. REC. S15,719 (daily ed. Nov. 16, 1993). According to Senator Smith, who was a vocal opponent of FACE during the debate preceding the adoption of the third Senate version of the bill: "To sum up, . . . there are five reasons why [Senate Bill] 636 should be defeated. First, it is extreme.

criticism voiced by the minority was that the Act is not facially neutral and instead, discriminates against the anti-abortion movement.

First, opponents accused the supporters of the bill of targeting the movement because the current political fashion mandates a pro-abortion or pro-choice point of view.¹⁹⁷ According to Senator Hatch: "Unfortunately, [Senate Bill] 636 . . . is not really about stopping violence outside abortion clinics. It is about punishing purely peaceful civil disobedience on behalf of a cause that is not politically correct."¹⁹⁸

Second, opponents criticized the legislation as treating abortion protestors unequally. According to the dissenting views appended to House Report 306, the House bill did not protect abortion protestors, whose activities take place outside a facility.¹⁹⁹ The language of the bill protected only those persons *inside* a facility who are "obtaining or providing reproductive health services."²⁰⁰ According to Senator Smith, the result was that under the bill, a nun peacefully saying her rosary outside a clinic subjects herself to imprisonment of up to eighteen months and fines of up to \$25,000 for blocking the entrance.²⁰¹ Opponents pointed out that although the bill set lower jail terms and fines for nonviolent physical obstruction, its failure to eliminate the penalty for a peaceful blockade means that those who protest abortion are treated less favorably than owners of abortion clinics or their patients.²⁰²

Furthermore, the members of the Senate Committee on Labor and Human Resources who opposed adoption of the bill wrote in their dissent that the proposal for ending violence at clinic entrances is hostile to the anti-abortion point of view.²⁰³ They cited two examples of this hostility. First, the legislation singles out the anti-abortion movement for penalties that cannot be applied to other causes employing similar tactics.²⁰⁴ This singling-out occurs because the legislation prohibits physical obstructions only of facilities providing reproductive health services.²⁰⁵ Second, the

Second, it sets a terrible precedent. Third, it is vague. Fourth, it is hypocritical. And fifth, it is unconstitutional." *Id.* at S15,722.

197. 140 CONG. REC. S5598 (daily ed. May 12, 1994).

198. *Id.*

199. H.R. REP. NO. 306 (referring to § 248(a)(1) printed in the House report).

200. *Id.*

201. 139 CONG. REC. S15,723 (daily ed. Nov. 16, 1993).

202. 108 Stat. at 695 (referring to § 248(b)(2)).

203. S. REP. NO. 117, pt. IX.

204. *Id.*

205. 108 Stat. 694.

bill uses vague and overbroad terminology that would chill free speech.²⁰⁶ The opponents contend that both these effects render the legislation unconstitutional.²⁰⁷

Finally, opponents of the bill objected to the legislation as unnecessary. They claim that existing state laws adequately protect abortion facilities and that the Supreme Court decision in *Scheidler*²⁰⁸ provided a suitable federal remedy for clinic blockades.²⁰⁹ House Report 306 pointed to the 70,000 arrests of abortion protestors in five years as evidence that local law enforcement authorities can handle the protests without federal intervention.²¹⁰ Furthermore, the House report quoted from Justice Kennedy's concurring opinion in *Bray* and argued that existing federal statutes already provide for federal assistance to local authorities.²¹¹ In addition, opponents of the bill pointed to the Supreme Court's holding in *Scheidler* that abortion protestors violate the federal racketeering laws when they conspire to force clinics out of business.²¹² With RICO²¹³ available for use against violent clinic blockades, opponents asserted that Congress should not have enacted another federal law to solve the problem.

Supporters of the legislation pointed out, however, that state law cannot deal effectively with a phenomenon that is interstate or one in which local

206. S. REP. NO. 117, pt. IX (citations omitted). See also 139 CONG. REC. S15,723 (daily ed. Nov. 16, 1993), in which Senator Smith cited the term "physical obstruction" as unconstitutionally vague, even though the bill includes a definition of the term in 18 U.S.C. § 248(e)(4). 108 Stat. at 696.

207. "[S]peech on issues like abortion lies at the core of first amendment protections. . . . [D]ebate on public issues should be uninhibited, robust, and wide-open." H.R. REP. NO. 306 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)). The dissent concluded that any legislation that inhibits or chills free speech is unconstitutional. In addition, House Report 306 cited another case that held that the government may not single out speech because it disapproves of the topics presented. *Id.* (citing *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992)). Opponents of the bill assert that any hint of this type of viewpoint discrimination would render it unconstitutional.

208. 114 S. Ct. at 798.

209. *E.g.*, 140 CONG. REC. S5598 (daily ed. May 12, 1994). According to Senator Hatch, state laws contain even more severe penalties for violent obstruction than the bill would impose. *Id.*

210. H.R. REP. NO. 306.

211. *Id.* Justice Kennedy suggested that 42 U.S.C. §§ 10501, 10502(2)-(3) are available to the states and local authorities. *Bray*, 113 S. Ct. at 769 (Kennedy, J., concurring). These statutes empower the United States Attorney General to use federal law enforcement resources at the request of a state. *Id.*

212. Marcia Coyle, *Clinics Win One: Justices Accept RICO Use Against Protesters; Free Speech Challenge Lies Ahead*, NAT'L L.J., Feb. 7, 1994, at 1.

213. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1988).

authorities sometimes refuse to act.²¹⁴ According to Attorney General Janet Reno's testimony before the Senate Committee on Labor and Human Resources, "[t]he reluctance of local authorities to protect the rights of individuals provides a powerful justification for the enactment of federal protections that has been invoked previously by Congress in passing laws to protect civil rights."²¹⁵ Supporters of the bill also maintained that RICO is not a forceful deterrent to the violence of abortion clinic blockades. Under the federal racketeering laws, the clinic owners and users would have difficulty in establishing the liability of the protestors.²¹⁶ Thus, RICO would be too unwieldy a legal tool for stopping the violent obstructions and is not an adequate replacement for FACE.²¹⁷

The overwhelming support for FACE in Congress deflated the arguments of the bill's opponents against its passage.²¹⁸ Nevertheless, of all their objections to the Act, the minority argued most persuasively that the Act constitutes a breach of the protestors' right to free speech. The Supreme Court decision in *Madsen v. Women's Health Center, Inc.*,²¹⁹ handed down on June 30, 1994, declined to endorse the petitioners' free speech arguments.²²⁰ Although the context was a challenge to a state court injunction and was not based on the newly enacted FACE, as a result of the Court's decision, challengers of the new legislation may find it difficult to convince the courts to overturn FACE on these First Amendment grounds.

The *Madsen* decision, the third Supreme Court opinion on the abortion issue in eighteen months,²²¹ is also noteworthy because it represents the first judicial comment on abortion clinic blockades since the enactment of FACE. The ruling constitutes an important milestone in the Act's progress

214. H.R. REP. NO. 306.

215. *Hearing, supra* note 114, at 14 (statement of Janet Reno, Attorney General of the United States); *see also supra* note 122 (quoting Attorney General Reno on the nationwide scope of the abortion protests).

216. Coyle, *supra* note 212, at 37.

217. 140 CONG. REC. S5596 (daily ed. May 12, 1994).

218. *Id.* at S5628 (presenting results of vote in the Senate on adoption of House Conference Report 488, 69 yeas and 30 nays, with one Senator not voting); *see also id.* at H3122-23 (recording the vote in the House of Representatives on the Conference Report, 236 yeas and 181 nays, with 15 Representatives not voting).

219. 114 S. Ct. 2516 (1994).

220. *Id.*

221. The three cases heard and decided by the Supreme Court since January 1993 are *Bray*, 113 S. Ct. at 753; *Scheidler*, 114 S. Ct. at 798; and *Madsen*, 114 S. Ct. at 2516.

toward judicial validation because it involved the same conduct that FACE criminalizes: physical obstruction of abortion clinic entrances.

IV. THE *MADSEN* DECISION: THE FIRST STEP IN PRESERVING FACE

The petitioners in *Madsen*²²² challenged the constitutionality of a Florida state court injunction that banned abortion protests.²²³ The injunction restricted the time, manner, and place of demonstrations outside a health clinic in Melbourne, Florida owned by the respondents.²²⁴ The petitioners based their constitutional challenge to the court order mainly on a violation of their First Amendment right to freedom of speech.²²⁵ However, the Court rejected the petitioners' First Amendment arguments in part and upheld a provision of the injunction banning demonstrations and picketing within a thirty-six foot "buffer zone" around the clinic entrance.²²⁶

222. *Madsen*, 114 S. Ct. at 2516. The petitioners here were three of the named individual petitioners in the case heard by the Florida Supreme Court: Judy Madsen, Ed Martin, and Shirley Hobbs. See *Operation Rescue*, 626 So. 2d at 679.

223. *Madsen*, 114 S. Ct. at 2521.

224. *Id.* The Court noted that it granted certiorari because of a conflict between *Operation Rescue*, upholding the injunction, and a decision by the United States Court of Appeals for the Eleventh Circuit striking down the same injunction. *Id.* at 2523 (comparing *Operation Rescue* with *Cheffer v. McGregor*, 6 F.3d 705 (1993)). In *Cheffer*, the circuit court struck down the injunction, reasoning that "[t]he clash . . . is between an actual prohibition of speech and a potential hinderance to the free exercise of abortion rights." *Cheffer*, 6 F.3d at 711.

225. *Madsen*, 114 S. Ct. at 2523. The petitioners brought several additional challenges to the injunction. First, they claimed that it was vague and overbroad because the injunction was applied to all persons or groups acting "in concert" with the petitioners. *Id.* at 2530. Second, they objected to the "in concert" provision as an unconstitutional limit on their freedom of association. *Id.*

The Court rejected the claims, reasoning that the petitioners lacked standing to sue on behalf of parties not before the Court. *Id.* The Court held that in any case the provision is neither vague nor overbroad, "but is simply directed at unnamed parties who might later be found to be acting 'in concert' with the named parties." *Id.* With respect to the restriction of the petitioners' freedom of assembly, the Court held that this First Amendment guarantee "does not extend to joining with others for the purpose of depriving third parties of their lawful rights," thus indirectly affirming that women have a legal right to seek medical services. *Madsen*, 114 S. Ct. at 2530.

226. *Id.*

To evaluate a possible infringement of the First Amendment rights of the petitioners, the Court adopted the Florida Supreme Court's interpretation of the injunction as addressing activities in a traditional public forum.²²⁷ Next, the Court followed Florida's lead in refusing to apply the strict scrutiny level of analysis required for a content-based restriction of free speech.²²⁸ Instead, it agreed with the Florida Supreme Court that the restrictions against the abortion protestors were content-neutral.²²⁹ After a detailed analysis of content-neutrality, the Court decided that the injunction was unbiased because it did not discriminate against abortion protestors based on their anti-abortion beliefs.²³⁰ Consequently, the Court concluded that it should apply a lesser level of scrutiny in judging the injunction's validity.²³¹

227. *Id.* at 2522; *Operation Rescue*, 626 So. 2d at 671. The Florida Supreme Court concluded that petitioners' protests took place on "public streets, sidewalks, and rights-of-way," all of which fall within the definition of a traditional public forum. *Id.* at 671 (citing *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

228. *Madsen*, 114 S. Ct. at 2522. The Florida court stated that under strict scrutiny the state must prove that the restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Operation Rescue*, 626 So. 2d at 671 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

229. *Madsen*, 114 S. Ct. at 2523.

230. *Id.* The Court reasoned that "[a]n injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group." *Id.* The Court concluded that the fact that the injunction covered only people who were against abortion did not prove it was content-based, and therefore held that it was content-neutral. *Id.* at 2524. In addition, the Court found no evidence in the record that a Florida court would not issue a similar restraint for any such conduct, whether or not related to abortion. *Id.* at 2523.

231. *Madsen*, 114 S. Ct. at 2524; *Operation Rescue*, 626 So. 2d at 671. The level of scrutiny identified by the Florida Supreme Court that covers content-neutral restrictions on activities in a traditional public forum is intermediate. *Id.* An intermediate level of scrutiny asks whether the restrictions are "narrowly-tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* (using the standard formulated in *Perry* for a lesser level of scrutiny).

Under the test the Court developed for a content-neutral injunction,²³² it first held that the thirty-six foot buffer zone around the clinic entrances and its driveway did not infringe on the protestors' First Amendment right to free speech.²³³ Subsequently, the Court found the limitations in the injunction on the high noise levels near the clinic to be constitutional.²³⁴

The other contested provisions of the injunction were struck down as violating the First Amendment rights of the abortion protestors.²³⁵ The provisions that did not pass muster included a thirty-six foot protest-free area on private property to the north and west of the clinic, and a 300-foot zone in which protestors could not approach persons arriving at the clinic.²³⁶ In addition, the Court struck down a provision that would have created a 300-foot zone around staff residences where protestors were banned from demonstrating or using bullhorns.²³⁷ The Court held that

232. The Court's new test for content-neutral injunctions is more stringent than the test in *Perry* adopted by the Florida Supreme Court to decide the constitutionality of the injunction. See *Madsen*, 114 S. Ct. at 2524. The Court reasoned that an injunction requires closer scrutiny than a similarly content-neutral statute because court-made orders carry a greater risk of discrimination than generally applicable statutes. *Id.* Thus, the test the Court formulated requires determining "whether the challenged provisions . . . burden no more speech than necessary to serve a significant government interest." *Id.* at 2525 (citations omitted).

Both Justices Scalia and Stevens agreed with the majority's conclusion that the injunction was content-neutral, in contrast to the holding of the Eleventh Circuit in *Cheffer* that the injunction was content-based. See *id.* at 2531 (citing *Cheffer*, 6 F.3d at 711). But both disagreed with the majority and with each other concerning the correct level of scrutiny to be applied to an injunction that does not discriminate on the basis of the expressive message of the protestors. *Madsen*, 114 S. Ct. at 2525, 2531 (Stevens, J., concurring in part and dissenting in part), 2534 (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Stevens would apply a more lenient standard. *Id.* at 2531 (Stevens, J., concurring in part and dissenting in part). Justice Scalia, on the other hand, ridicules the majority's standard as "intermediate-intermediate" and says it is "frankly too subtle for me to describe." *Id.* at 2538 (Scalia, J., concurring in the judgment in part and dissenting in part). Instead, he would apply strict scrutiny to the injunction because, among other reasons, discriminatory restrictions on speech are as much a risk in granting injunctive relief as in passing a statute. *Id.* Thus, according to Justice Scalia, the majority's distinction between a content-neutral injunction and a similarly content-neutral statute is irrelevant. *Id.*

233. *Madsen*, 114 S. Ct. at 2528.

234. *Id.*

235. *Id.* at 2529-30.

236. *Id.*

237. *Id.*

these provisions “sweep more broadly than necessary” to achieve the aims²³⁸ of the injunction.²³⁹

While the six to three²⁴⁰ Supreme Court decision in *Madsen* barring protestors from a thirty-six foot clinic buffer zone might constitute a temporary setback to the anti-abortion movement,²⁴¹ it does not significantly affect the anti-abortionists long-term goal of shutting down abortion clinics across the country.²⁴² More important, the reasoning in *Madsen*, though instructive as to the use of injunctive relief against abortion protestors, is presumptively not applicable to a discussion of the possible infringement of First Amendment rights in the context of a statute such as FACE. The Court itself carefully made a distinction between an injunction and a statute in deciding what level of scrutiny to apply in judging the validity of an injunction.²⁴³ As Senator Kennedy aptly pointed out a month and a half prior to the Supreme Court’s ruling in *Madsen*, its outcome has no direct bearing on the constitutionality of FACE because the two contexts differ.²⁴⁴ The *Madsen* injunction creates a speech-free buffer zone, whereas FACE provides penalties for specific protest activities.²⁴⁵

238. The Court agreed with the Florida court’s holding that the protestors’ obstruction of clinic entrances affected four significant governmental interests. *Madsen*, 114 S. Ct. at 2526. These interests included protecting a woman’s access to legal medical services, guarding the public safety, ensuring unobstructed traffic, and protecting property rights of private citizens. *Id.*; see also *Operation Rescue*, 626 So. 2d at 672 (discussing government interests).

239. *Madsen*, 114 S. Ct. at 2530.

240. Chief Justice Rehnquist wrote the majority opinion, in which Justices Blackmun, O’Connor, Souter, and Ginsburg joined. *Id.* at 2520. Justice Souter concurred in the opinion; Justice Stevens concurred in part and dissented in part; and Justice Scalia concurred in the judgement in part and dissented in part in which Justices Kennedy and Thomas joined. *Id.*

241. Craig Crawford, *Justices’ Decision Deals Abortion Foes a Setback*, SUN-SENTINEL, July 1, 1994, at 1A. The article also quoted several pro-choicers who considered the decision a victory for abortion advocates. *Id.* For example, the director of a clinic in Lauderhill, Florida that performs abortions was quoted as saying she was “very gratified” by the decision and hoped the local authorities will now enforce the laws against clinic entrance obstruction. *Id.*

242. *Operation Rescue*, 626 So. 2d at 667 n.3; see *supra* notes 10-11 and accompanying text.

243. *Madsen*, 114 S. Ct. at 2524; see *supra* note 230.

244. 140 CONG. REC. S5596 (daily ed. May 12, 1994).

245. According to Senator Kennedy, in *Madsen* the Court ruled on the constitutionality of an injunction banning *all* protest activities within a specified buffer zone, even if the activity does not block the clinic entrance. *Id.* The Senator contrasted this sweeping prohibition with the narrowly tailored ban in FACE, which only forbids the physical

Indirectly, however, any decision concerning the abortion issue is instructive as to the current position of the Supreme Court. The *Madsen* decision, reaffirming a woman's right to unobstructed access to abortion services, may indeed signal the face of things to come. As such, the Court's evolving position on the abortion issue may persuade anti-abortion groups to refrain from mounting a free speech challenge to FACE's constitutionality.

V. CONCLUSION: OPERATION RESCUE—AN EPILOGUE

Less than a week after the United States Supreme Court ruled in *Madsen* in favor of abortion advocates, leaders of Operation Rescue and two other anti-abortion groups organized what was billed as a massive protest against FACE in Little Rock, Arkansas.²⁴⁶ Instead, police officers and pro-choice supporters outnumbered anti-abortionists at the small gathering to mark the start of the three-day "Summer of Justice" demonstrations, as the challenge to FACE fizzled in the rain.²⁴⁷

The protest was the first nationally-mounted anti-abortion demonstration since the enactment of FACE, whose purpose is to stem the rising violence during abortion clinic blockades.²⁴⁸ The resulting peaceful encounter in Little Rock might have been a harbinger of the success of FACE in discouraging Operation Rescue and its followers from using force to eliminate abortion as an option for American women. More likely, however, is that the recent spate of fatal shootings at clinic entrances²⁴⁹ highlights the usefulness of FACE as a prosecutory tool and not as the deterrent to violence envisioned by its congressional sponsors.

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obstruction of entrances. *Id.* He also pointed out that the petitioners conceded the validity of the parts of the injunction that banned clinic entrance blockades. *Id.* The Senator concluded that the issue of clinic entrance blockades was not before the Court in *Madsen* and therefore its outcome would not affect the more specific prohibitions in FACE. *Id.*

246. *60 Join Protest at 2 Arkansas Abortion Clinics*, N.Y. TIMES, July 8, 1994, at A18 [hereinafter *60 Join Protest*].

247. *Id.*; see also *Arkansas: No Arrests as Pro-Life Demonstrations Begin*, Abortion Report, *supra* notes 20, 28 (daily ed. July 8, 1994). The spokesperson for the local police department commented that the anti-abortion groups did not draw enough supporters for the confrontation they planned. *60 Join Protest*, *supra* note 246, at A18. "It looks like they haven't gotten enough people here to do anything else than picket," the spokesperson said. *Id.* (quoting Lieutenant Charles Holladay).

248. See *supra* notes 157-59 and accompanying text.

249. See *supra* notes 45-55 and accompanying text.

