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"FACE"-ING THE CONSTITUTION: THE BATTLE OVER THE FREEDOM OF ACCESS TO CLINIC ENTRANCES SHIFTS FROM REPRODUCTIVE HEALTH FACILITIES TO THE FEDERAL COURTS*

The Freedom of Access to Clinic Entrances Act (FACE)[1] protects women, reproductive health providers, and clinic operators against "blockades and invasions of medical facilities, arson and other destruction of property, assaults, death threats, attempted murder and murder."[2] As

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* The views expressed herein are those of the author and do not necessarily reflect the policies or views of the *Catholic University Law Review*, its editors and staff, the Columbus School of Law, or the Catholic University of America.

1. Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (codified at 18 U.S.C. § 248 (1994)). FACE provides civil and criminal penalties against one who:

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. § 248(a)(1).

2. H.R. CONF. REP. NO. 103-488, at 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 724, 724 [hereinafter HOUSE CONFERENCE REPORT].

Acts of force are prohibited under FACE, thus making it a federal offense to physically assault someone, with the intent to injure, intimidate, or interfere with that person because she or he is obtaining or providing reproductive health services. 18 U.S.C. § 248(a)(1) (1994); *see also* S. REP. NO. 103-117, at 22 (1993) (noting that the murder of abortion provider Dr. David Gunn would have been an act covered by FACE) [hereinafter SENATE REPORT].

In March 1993, Dr. David Gunn was shot three times by anti-abortion advocate Michael Griffin in front of the clinic where he performed abortions. *See* Larry Rohter, *Doctor is Slain During Protest Over Abortions*, N.Y. TIMES, Mar. 11, 1993, at A1, B1. Since Dr. Gunn's murder, four people who were involved in some way with providing abortion services also have been killed. In July 1994, Dr. John Britton, a physician who performed abortions, and his escort, James Barrett, were shot outside a clinic in Pensacola, Florida, by Paul Hill, a former minister turned anti-abortion activist. *See* Ronald Smothers, *Protestor is Arrested in Pensacola's 2d Clinic Killing*, N.Y. TIMES, July 30, 1994, at A1. Most recently, in December 1994, John C. Salvi III went on a shooting rampage starting at two Massachusetts clinics where he killed two receptionists, Shannon Lowery and Leanne Nicholas, and wounded five people, and ending in a Norfolk, Virginia, clinic where he "sprayed the building with bullets," but wounded no one. Christopher Daly, *Suspect in Clinic Shootings Denies U.S. Charges*, WASH. POST, Jan. 7, 1995, at A3.

There has been much debate over the use of violence within the anti-abortion movement. *See* Tamar Lewin, *A Cause Worth Killing For? Debate Splits Abortion Foes*, N.Y.

evidenced by the types of activity the statute prohibits, FACE is not about the legality of abortion: it is about providing citizens with the opportunity to freely enter a reproductive health clinic without fear of bodily harm or threats.[3] FACE is a legislative response to "the growing violence accompanying the debate over the continued legality and availability of abortion and other reproductive health services."[4]

TIMES, July 30, 1994, at A1. Three months prior to the murders of Dr. Britton and James Barrett by Paul Hill, about 100 anti-abortion leaders met to discuss the appropriate means of engaging in the abortion debate. *See id.* Paul Hill was among those present, and although he did not speak a lot at the conference, his public advocacy of justifiable homicide—that killing doctors who perform abortions is mandated by the Bible—sparked serious debate. *See id.* The Rev. Flip Benham, Operation Rescue National's Director, vehemently disagreed with Hill's position, stating that "I think what [Hill is] saying is heresy, it's sin, it's murder, it's wrong, and it solves nothing, [and it] only makes things worse." *Id.* Six months later, Rev. Benham acknowledged that "[t]here is little that federal marshalls or anyone else can do to halt this murder and violence . . . [w]e will not have peace outside the womb until peace is restored within the womb." Jill Smolowe, *Fear in the Land*, TIME, Jan. 16, 1994, at 34. Some anti-abortion groups convey that while they will not mourn the death of an abortion doctor, they do not condone the killing of one. *See* Rohter, *supra*, at B1. A few pro-life leaders have attempted to eliminate situations where violence may occur all together. For instance, after the shootings by John Salvi, Boston's Cardinal Law requested a moratorium on all protests outside abortion clinics in Boston to prevent "anything which might engender anger or some other form of violence," and designated five churches for prayer vigils against abortion. Smolowe, *supra*, at 34.

Under FACE, prohibited threats of force include threats to harm another because that person is obtaining or providing reproductive health services. *See* 18 U.S.C. § 248(a)(1); *see also infra* note 10 (describing in detail the types of threats abortion providers have experienced).

Physical obstruction is unlawful when it is engaged in with the intent to injure, intimidate or interfere with another who is either providing or obtaining reproductive health services by making it unreasonably difficult or dangerous to enter or exit a reproductive health clinic. *See* 18 U.S.C. § 248(a)(1) & (d)(4); *see also* SENATE REPORT, *supra*, at 7-11 (describing clinic blockades between 1977 and April 1993). The definition of physical obstruction includes clinic blockades, where activists barricade the doors of a clinic by chaining people or disabled cars to the entrances. *See id.* at 7-11, 23; *see also infra* note 8 (discussing the types of physical obstruction tactics employed by protestors).

Intentional damage or destruction of property at a reproductive health facility encompasses arson, bombings, chemical attacks, and other forms of vandalism. *See* 18 U.S.C. § 248(a)(3); *see also* SENATE REPORT, *supra*, at 5-7, 23; *see also infra* note 7 (providing examples of damage and destruction of clinic property).

3. *See* SENATE REPORT, *supra* note 2, at 3 (finding that violent conduct was interfering with access to clinics, and consequently interfering with the "constitutional right of a woman to choose to terminate her pregnancy"); Evelyn Figueroa & Mette Kurth, Recent Development, Madsen *and the FACE Act: Abortion Rights or Traffic Control?*, 5 UCLA WOMEN'S L.J. 247, 274 (1994) (advocating that FACE is not about the right to an abortion, but instead is about providing a federal remedy to women who seek access to reproductive health, but are denied because of clinic blockades).

4. H.R. REP. NO. 103-306, at 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 699, 699 [hereinafter HOUSE REPORT].

The outbreak of violence directed at clinic health providers, their buildings, and even their patients developed into an effective tactic for some groups protesting the legality of abortion.[5] Between 1977 and April 1993, reproductive health providers reported over 1,000 acts of violence and more than 6,000 clinic blockades.[6] Specifically, Congress was confronted

5. *See* SENATE REPORT, *supra* note 2, at 3-11 (describing the "nationwide campaign of anti-abortion blockades, invasions, vandalism and outright violence" that compelled Congress to pass the FACE legislation); *see also infra* notes 2, 5-10 (providing examples of the types of violent and obstructive activities that prompted FACE).

In 1993, the LOS ANGELES TIMES chronicled trips by four abortion providers to Washington D.C. to persuade Congress to pass FACE to protect doctors and clinics from anti-abortion violence. *See Doctors Urge End of Abortion Foes' Violence*, L.A. TIMES, Oct. 19, 1993, at A14. One physician asserted that anti-abortion groups terrorized him by putting nails underneath his car tires, smashing his car windows, placing his photo on a "Wanted" poster that accused him of murdering children, and sending him pictures of his parents taken in public places. *See id.*

6. *See* SENATE REPORT, *supra* note 2, at 3. Congress found in 1993 that such acts included "at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder. In addition, over 6,000 clinic blockades and other disruptions have been reported since 1977." *Id.*

with acts of trespass and vandalism on clinic property,[7] physical obstruction of clinic entrances,[8] attempted murder,[9] and threats of violence.[10]

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7. Arson and bombings became quite prevalent; at the time FACE was introduced there were approximately 200 attempted or completed acts of arson or bombing, causing millions of dollars in property damage, and halting all clinic services to patients. *See* SENATE REPORT, *supra* note 2, at 5; *see also infra* note 28 (describing types of health services other than abortions that clinics provide).

In addition, chemical attacks were on the rise. *See* SENATE REPORT, *supra* note 2, at 5. A common tactic involved trespassing onto clinic property and drilling or chopping holes in the walls in order to spray butyric acid into the clinic. *See id.* at 6. In addition to producing an unbearable stench, butyric acid induces nausea, vomiting, burning of the eyes and skin, and difficulty breathing. *See id.*

8. Physical obstruction can occur by people using their bodies to effectuate a human barricade, either by sitting, lying down, or standing in front of clinic entrances or exits and refusing to let others pass. *See* Volunteer Med. Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 221 (6th Cir. 1991) (describing a human blockade outside of abortion clinic); Women's Health Care Servs., P.A. v. Operation Rescue-Nat'l, 773 F. Supp. 258, 262 (D. Kan. 1991), *rev'd*, 24 F.3d 107, *vacated*, 25 F.3d 1059 (10th Cir. 1994) ("When employing the tactic of physically blockading the clinics, Operation Rescue has succeeded in its avowed intent to 'shut them down.'"); SENATE REPORT, *supra* note 2, at 7 (describing the mechanics of a human blockade).

In addition to human blockades, anti-abortion protestors often will strategically place a disabled vehicle in front of a clinic entrance, and handcuff or weld some willing advocates into the car by means of an "interlocking steel apparatus." United States v. Wilson, 73 F.3d 675, 677 (7th Cir. 1995), *cert. denied sub nom.* Skott v. United States, 65 U.S.L.W. 3242 (U.S. Oct. 7, 1996) (No. 95-1523); *see* United States v. Soderna, 82 F.3d 1370, 1373 (7th. Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141). Fire departments must deploy firefighters armed with hydraulic equipment and blow torches to extricate protestors from the vehicles. *See Wilson*, 73 F.3d at 677.

9. *See* SENATE REPORT, *supra* note 2, at 3; *see also* Daly, *supra* note 2 (illustrating the recent shooting spree by John Salvi, which resulted in five counts of attempted murder). One high-profile case involved Dr. George Tiller, a physician who was shot in both arms as he left a clinic in Kansas. *See* Seth Faison, *Abortion Doctor Wounded Outside Kansas Clinic*, N.Y. TIMES, Aug. 20, 1993, at A12. Assaults on clinic directors and employees often resulted as a consequence of clinic invasions, whereby providers were injured as anti-abortion demonstrators attempted to drag them out of the clinics. *See* SENATE REPORT, *supra* note 2, at 4-5.

10. Dr. Gunn's life was repeatedly threatened before his murder; he was featured on a "Wanted" poster bearing his name, photo, home address, and work schedule. *See* SENATE REPORT, *supra* note 2, at 4. One doctor received written threats personally delivered to his home, one of which stated, "Those babies didn't know when they were dying by your butcher knife. So now you will die by my gun in your head very soon—and you won't know when—like the babies don't. Get ready your [sic] dead." *Id.* at 10 (emphasis omitted). Even spouses of abortion providers are threatened. *See id.* One member of an anti-abortion group confronted a doctor's wife and shouted, "'Aren't you afraid I'm going to kill you?'" *Id.* In addition, intimidating messages were left on the wife's voice mail at work, insinuating that she was being followed. *See id.*

After focusing on John Salvi's rampage, which took place at three separate abortion clinics and left two people dead and five others wounded, some Massachusetts pro-life groups "admit[ted] a possibility they have long resisted: that 'peaceful' protests using such incendiary epithets as murderer and baby killer may create a climate for acts of lethal violence." Smolowe, *supra* note 2, at 34.

Faced with these types of violent, restrictive, and intimidating activities, Congress recognized the need for national legislation to protect and promote public health and safety.[11] FACE was passed to counter such conduct directed against abortion providers, their patients, and facilities.[12] FACE discourages these activities by making it a federal crime to engage in certain violent, threatening, obstructive, or destructive conduct aimed at those seeking to provide or gain access to reproductive health services.[13]

Since the bill's introduction in Congress, FACE has undergone legal challenges in federal courts across the country.[14] The primary allegations

11. *See* HOUSE REPORT, *supra* note 4, at 703; SENATE REPORT, *supra* note 2, at 3-11. FACE's sponsors in both the House and Senate cited the Feminist Majority Foundation's study of violence directed at abortion clinics and providers as a confirmation of the necessity of federal legislation. *See* 139 CONG. REC. S15,658 (daily ed. Nov. 16, 1993) (statement of Sen. Kennedy); *see also* Ana Puga, *Half of Abortion Clinics in Survey Report Hostile Acts*, BOSTON GLOBE, Nov. 5, 1993, at 6 (highlighting the use of the Feminist Majority Foundation's study in both House and Senate discussion of FACE).

12. *See* HOUSE REPORT, *supra* note 4, at 703-04; SENATE REPORT, *supra* note 2, at 3-11.

13. *See* 18 U.S.C. § 248(a)(1) (1994).

14. *See generally* United States v. Soderna, 82 F.3d 1370 (7th Cir.) (finding that Congress has the authority to enact FACE under the Commerce Clause, and that FACE does not infringe upon First Amendment protections), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); United States v. Dinwiddie, 76 F.3d 913 (8th Cir.) (upholding FACE under the Commerce Clause and the First Amendment), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); United States v. Wilson, 73 F.3d 675 (7th Cir. 1995) (finding that Congress had the authority to enact FACE under the Commerce Clause), *cert. denied sub nom.* Skott v. United States, 65 U.S.L.W. 3242 (U.S. Oct. 7, 1996) (No. 95-1523); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) (upholding the constitutionality of FACE under the Commerce Clause, First, Eighth, and Tenth Amendments, and the Religious Freedom Restoration Act (RFRA)); Woodall v. Reno, 47 F.3d 656 (4th Cir.) (upholding FACE as not violative of the First Amendment under the reasoning of its decision in *American Life League*), *cert. denied*, 115 S. Ct. 2577 (1995); American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.) (upholding FACE under the Commerce Clause, First Amendment, and RFRA), *cert. denied*, 116 S. Ct. 55 (1995); Hoffman v. Hunt, 923 F. Supp. 791 (W.D.N.C. 1996) (finding FACE unconstitutional because Congress lacks the authority to enact under both the Commerce Clause and the Fourteenth Amendment, and also finding that FACE's regulation of speech is overbroad in violation of the First Amendment); United States v. Scott, 919 F. Supp. 76 (D. Conn. 1996) (upholding FACE on Commerce Clause grounds); United States v. Lucero, 895 F. Supp. 1421 (D. Kan. 1995) (upholding the constitutionality of FACE on Commerce Clause and First Amendment principles); United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995) (finding FACE constitutional under the Commerce Clause and the First Amendment); United States v. Hill, 893 F. Supp. 1034 (N.D. Fla. 1994) (upholding FACE under the Commerce Clause); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994) (upholding FACE under the First Amendment, the Commerce Clause, and RFRA); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994) (finding FACE not violative of the First Amendment); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994) (finding FACE constitutional under the First Amendment and the Commerce Clause, and concluding that FACE does not violate RFRA).

are that FACE: exceeds Congress's Commerce Clause authority;[15] offends the First Amendment because it is a viewpoint-based regulation of free speech; proscribes some types of peaceful protest;[16] and is overbroad and vague.[17] It has also been argued that FACE violates the Religious Freedom Restoration Act (RFRA)[18] and the Free Exercise Clause princi-

15. *See infra* notes 95-134 and accompanying text (examining Commerce Clause jurisprudence and challenges to Congress's authority pursuant to the Clause to properly enact FACE).

16. *See infra* notes 154-362 and accompanying text (outlining and explaining First Amendment free speech issues, and the allegations that FACE violates First Amendment guarantees).

17. *See infra* notes 135-53 and accompanying text (examining overbreadth and vagueness doctrines and their application to FACE).

18. 42 U.S.C. § 2000bb-1 (1994). The pertinent section of RFRA provides that:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . . [g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.

Id. § 2000bb-1(a)-(b). The findings section of RFRA indicate that the Act was passed in response to the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), in which the Court "virtually eliminated the requirement that government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a). RFRA was Congress's way of restoring the compelling interest test that had been established in two landmark free exercise cases, *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See* 42 U.S.C. § 2000bb(b); *American Life League*, 47 F.3d at 655 (providing some cursory background information on RFRA before delving into its application to FACE).

RFRA claims have been addressed in a number of FACE cases. *See* Cheffer v. Reno, 55 F.3d 1517, 1522 (11th Cir. 1995) (rejecting the argument that FACE aims to silence the religious tenet that abortion is murder and therefore is violative of RFRA); *American Life League*, 47 F.3d at 654-56 (finding that FACE meets RFRA's compelling interest balancing test); United States v. Brock, 863 F. Supp. 851, 866 (E.D. Wis. 1994) (concluding that even if FACE substantially burdened religion, which the court did not address because it was not explicitly argued, FACE meets the compelling governmental interest test), *aff'd sub nom.* United States v. Soderna, 82 F.3d 1370 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); Riely v. Reno, 860 F. Supp. 693, 709 (D. Ariz. 1994) (noting that plaintiffs failed to allege that "their religion advocates the use of . . . physical obstruction to make passage to a facility unreasonably difficult or hazardous" as required by RFRA); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1430 (S.D. Cal. 1994) (finding that although it was not contended that FACE substantially burdened the exercise of protestors' religion, Congress still had a compelling governmental interest that was met by a narrowly tailored statute).

To prevail under RFRA, a plaintiff first must demonstrate that the government substantially burdened his or her exercise of religion. *See* 42 U.S.C. § 2000bb-1. If such a burden is established, the restriction will be upheld only if the government can demonstrate a compelling governmental interest that cannot be met through less restrictive means. *See id.* If a law is neutral and does not create a substantial hardship on the exercise of one's religion, then RFRA is not applicable. *See American Life League*, 47 F.3d at 654 (explain-

ples behind that statute.[19] All but two courts have upheld the constitu-

ing that the threshold inquiry under RFRA is whether a religious practice was substantially burdened by a regulation).

As an initial matter, FACE does not substantially burden religion because the exercise of religion does not require acts or threats of force, physical obstruction, or destruction of property. *See Cheffer*, 55 F.3d at 1522 (observing that protestors did not assert that "the exercises of their religion requires them to use physical force or threats of physical force to prevent abortions"); *Council for Life Coalition*, 856 F. Supp. at 1430 (finding that the plaintiffs did not seriously contend that the conduct prohibited by FACE was part of their religion). *But see American Life League*, 47 F.3d at 655 (accepting pro-life group's assertion that their religion required them to physically obstruct clinic entrances through peaceful picketing).

Assuming, arguendo, that the threshold showing mandating that FACE substantially burdens religion is made, FACE meets RFRA's compelling interest test. *See id.* Congress has compelling interests in prohibiting the use of force and clinic blockades to intimidate women from exercising the constitutional right to obtain an abortion, in protecting the safety of reproductive health providers who work at the clinics, in safeguarding the health of patients who seek services at clinics, and in prohibiting destruction of property and vandalism. *See Council for Life Coalition*, 856 F. Supp. at 1430. The court in *Council for Life Coalition* cited several reasons why the compelling governmental interest test is met: (1) FACE prohibits violent and obstructive behavior that is unlawful under other state and federal criminal laws; (2) this behavior has a deleterious effect on a woman's ability to exercise her fundamental right to choose to have an abortion; (3) this behavior has resulted in medical risks for women seeking clinic services; and (4) the proscribed conduct affects interstate commerce. *See id.*

Finally, Congress narrowly tailored FACE to address "a narrow and carefully proscribed set of actions that contribute directly to the compelling problems for which it sought to provide a remedy," therefore only unprotected conduct and threatening activity against persons providing or seeking reproductive health services is prohibited. *Id.*; *see American Life League*, 47 F.3d at 656.

It should be noted that the Court has granted certiorari to determine RFRA's constitutionality. *See* Flores v. City of Boerne, 83 F.3d 421 (5th Cir. 1996) (upholding RFRA as a valid exercise of Congress's authority under the Fourteenth Amendment, and not violative of the separation of powers, the Establishment Clause of the First Amendment, and the Tenth Amendment), *cert. granted*, 65 U.S.L.W. 3017 (U.S. Oct. 15, 1996) (No. 95-2074). *See generally* Jonathan Keiffer, Comment, *A Line in the Sand: Difficulties in Discerning the Limits of Congressional Power as Illustrated by the Religious Freedom Restoration Act*, 44 U. KAN. L. REV. 601, 610 (1995) (mentioning prominent arguments against RFRA's constitutionality, such as issues of federalism and separation of powers, but focusing on and concluding that RFRA was improperly enacted because Congress lacked purported authority under section 5 of the Fourteenth Amendment).

19. *See* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

A few claimants have argued that FACE violates their rights under the Free Exercise Clause of the First Amendment because FACE restricts the ability of pro-life citizens to protest abortion based on their religious beliefs. *See Cheffer*, 55 F.3d at 1522 (concurring with the Fourth Circuit that FACE does not violate the Free Exercise Clause because it is a generally applicable statute and neutral towards religion); *American Life League*, 47 F.3d at 656 (finding that the Free Exercise Clause does not "shield conduct violating a criminal law that protects people and property from physical harm"); *Council for Life Coalition*, 856 F. Supp. at 1430 (finding that FACE is neutral toward religion and does not violate the Free Exercise Clause).

tionality of FACE.[20] Of the two district courts that have held that FACE is unconstitutional, one was overturned on appeal.[21] The Supreme Court

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A law that is neutral toward religion and is of general applicability, regardless of the secondary effects it may cause, does not offend the Free Exercise Clause. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). Such a neutral law does "not [need to] be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* If the law fails the neutrality or general application test, the statute must be justified by a compelling governmental interest and also be narrowly tailored to further that interest. *See id.* (noting that both the neutrality and general applicability elements are entwined, and that if one element fails a cursory examination, it is likely the other will not stand).

Neither the legislative history, nor the text of the statute, suggests that FACE discriminates against a particular religion or against religion in general. *See Council for Life Coalition*, 856 F. Supp. at 1430. Rather, the conduct is prohibited because of the harm it inflicts, regardless of the violator's religious background or beliefs. *See American Life League*, 47 F.3d at 654. Consequently, under the Free Exercise Clause analysis, FACE does not enter into the compelling interest examination. *See id.*

20. *See* United States v. Soderna, 82 F.3d 1370, 1373, 1375 (7th Cir.) (finding that Congress has the authority to enact FACE under the Commerce Clause, and that FACE does not infringe on First Amendment protections), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); United States v. Dinwiddie, 76 F.3d 913, 919, 922 (8th Cir.) (upholding FACE under the Commerce Clause, and finding that FACE does not violate the First Amendment), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); United States v. Wilson, 73 F.3d 675, 688 (7th Cir. 1995) (finding that Congress had the authority to enact FACE under the Commerce Clause), *cert. denied sub nom.* Skott v. United States, 65 U.S.L.W. 3242 (U.S. Oct. 7, 1996) (No. 95-1523); Cheffer v. Reno, 55 F.3d 1517, 1519-24 (11th Cir. 1995) (upholding the constitutionality of FACE under the Commerce Clause, First, Eighth and Tenth Amendments, and RFRA); Woodall v. Reno, 47 F.3d 656, 657-58 (4th Cir.) (upholding FACE as not violative of the First Amendment under its reasoning in *American Life League*), *cert. denied*, 115 S. Ct. 2577 (1995); American Life League, Inc. v. Reno, 47 F.3d 642, 647, 652, 656 (4th Cir.) (upholding FACE under the Commerce Clause, First Amendment, and RFRA), *cert. denied*, 116 S. Ct. 55 (1995); United States v. Scott, 919 F. Supp. 76, 78 (D. Conn. 1996) (upholding FACE on Commerce Clause grounds); United States v. Lucero, 895 F. Supp. 1421, 1423-24 (D. Kan. 1995) (upholding the constitutionality of FACE on Commerce Clause and First Amendment principles); United States v. White, 893 F. Supp. 1423, 1432-37 (C.D. Cal. 1995) (finding FACE constitutional under the Commerce Clause and First and Fourteenth Amendments); United States v. Hill, 893 F. Supp. 1034, 1036-38 (N.D. Fla. 1994) (upholding FACE under the Commerce Clause); Riely v. Reno, 860 F. Supp. 693, 700-10 (D. Ariz. 1994) (upholding FACE under the First, Fifth, and Eighth Amendments, the Commerce Clause, and RFRA); Cook v. Reno, 859 F. Supp. 1008, 1010-11 (W.D. La. 1994) (finding FACE not violative of the First Amendment); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1426-31 (S.D. Cal. 1994) (finding FACE constitutional under the First Amendment, the Commerce Clause, and concluding that FACE does not violate RFRA).

21. *See* Hoffman v. Hunt, 923 F. Supp. 791, 816-22 (W.D.N.C. 1996) (finding FACE unconstitutional); *infra* notes 118, 125 (discussing the court's rationale in finding that Congress exceeded the scope of both its Commerce Clause and Fourteenth Amendment authority when it held that FACE was unconstitutional); *infra* note 143 (examining the *Hoffman* court's decision in finding FACE unconstitutional because of its overbreadth). Another decision striking down FACE as unconstitutional ultimately was reversed. *See* United States v. Wilson, 880 F. Supp. 621 (E.D. Wis.), *rev'd*, 73 F.3d 675 (7th Cir. 1995), *cert. denied sub nom.* Skott v. United States, 65 U.S.L.W. 3242 (U.S. Oct. 7, 1996) (No. 95-

rejected, without comment, three petitions for certiorari;[22] two petitions are still pending.[23]

This Comment analyzes FACE and the constitutional issues that arise under FACE by examining the federal courts' treatment of the statute. This Comment first demonstrates the inadequacy of protection available to abortion clinic patients, providers, and operators prior to FACE. Second, this Comment summarizes the major provisions of FACE. This Comment then explores the Commerce Clause and the First Amendment principles of vagueness and overbreadth jurisprudence, and delineates the federal courts' analyses and reasoning in upholding FACE's constitutionality. Finally, this Comment sets forth the proper First Amendment analysis with respect to the regulation of both speech and speech-related conduct. This Comment contends that courts are not engaging in a precise First Amendment methodology when reviewing FACE. This Comment concludes with a thorough First Amendment examination of both FACE's speech and speech-related conduct provisions.

I. The Need For National Legislation to Protect Abortion Clinic Patients, Providers, and Operators from the Violence and Physical Obstruction Engaged in by Abortion Opponents

Since the landmark decision of *Roe v. Wade*[24] in 1973, the controversy over the legality of abortion has elicited a sincere, but increasingly volatile, response from advocates who disagree with the holding of *Roe* and believe that political and judicial responses inadequately address the viewpoint that abortion is murder.[25] The frustration of certain anti-abor-

1523); *infra* notes 118, 125 (discussing the *Wilson* district court's Commerce Clause application of FACE).

22. *See Wilson*, 73 F.3d at 683 (holding that Congress had proper Commerce Clause authority to enact FACE); *Woodall*, 47 F.3d at 657-58 (upholding the district court's ruling that FACE is constitutional based on First Amendment free speech issues, but vacating and remanding without consideration the issue of prior restraint because the controversy was not ripe for review); *American Life League*, 47 F.3d at 645 (finding that FACE does not violate the First Amendment, Commerce Clause, or RFRA).

23. *See Soderna*, 82 F.3d at 1370 (finding that Congress has the authority to enact FACE under the Commerce Clause, and that FACE does not infringe on First Amendment protections), *Dinwiddie*, 76 F.3d at 913 (upholding FACE under the Commerce Clause, and finding that FACE does not violate the First Amendment).

24. 410 U.S. 113 (1973) (holding that the right to choose to have an abortion is part of the right to privacy and is therefore a fundamental right).

25. Pro-choice groups have precedent on their side, consequently, they are more concerned with maintaining the status quo. *See* Laurence H. Tribe, Abortion: The Clash of Absolutes 7 (1992). Professor Tribe observed that because the "legal status of abortion [was] snatched from the political dueling ground by the Court's 1973 *Roe* decision, the public stage was left largely to those who believed most strongly that abortion was wrong

tion activists resulted in over 100 clinic bombings or arsons, over 300 clinic invasions, and over 400 incidents of vandalism by the time the bill was introduced in March of 1993.[26] Participants in clinic blockades "trespass onto clinic property and physically barricade entrances and exits by sitting or lying down or by standing and interlocking their arms."[27] Clinic staff and patients are forced to break through this human barricade to enter or exit clinics, or wait until law enforcement effectively can control the situation.[28] The killing of Dr. David Gunn, an abortion provider, by anti-abortion activist Michael Griffin provided a poignant example to

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absolutely." *Id.* Pro-life groups, however, face an uphill battle of persuading the Court and Congress to effectively make abortion illegal. *See id.* Randall Terry, Operation Rescue's founder, has urged its members to disregard court orders and flood the jails and court dockets in an effort to persuade the judiciary to stop enforcing pro-choice law. *See* SENATE REPORT, *supra* note 2, at 11. The field director of Operation Rescue National stated "[w]e may not get laws changed or be able to change people's minds, * * * [b]ut if there is no one willing to conduct abortions, there are no abortions." *Id.* (omission in original). Such behavior appeared to be working. *See* John Balzar, *Abortion Foes Test the Limits*, L.A. TIMES, Sept. 30, 1993, at A1, A20 (marking a decline in abortion training at medical schools because of the threats and escalation of violence).

One anti-abortion activist became so involved with the struggle to protest abortion that he became a self-proclaimed fanatic. *See id.* at A1. Serving a seven year sentence for a clinic bombing, he wrote in his newsletter: "I had to make sure before I approached the abortuaries at night with gasoline and explosives that I was walking in love, not just anger. . . . I'm a very narrow-minded, intolerant, reactionary, Bible-thumping fundamentalist . . . a zealot and a fanatic!" *Id.*

It must be recognized, however, that the millions of Americans who are pro-life do not condone the violence and scare tactics of certain extremists in the anti-abortion movement. *See Soderna*, 82 F.3d at 1376 (recognizing that the vast majority of those who oppose abortion would not be affected by FACE because they engage in peaceful protest activity).

26. *See* 139 CONG. REC. S3523-25 (daily ed. March 23, 1993) (statement of Sen. Kennedy introducing the bill); *supra* notes 2-10 and accompanying text (describing the conduct that prompted Congress to introduce legislation to protect the rights of abortion providers and patients).

27. SENATE REPORT, *supra* note 2, at 8. According to Operation Rescue literature, a "rescue" is defined as "'physically blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims.'" National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1488 (E.D. Va. 1989) (alteration in original) (quoting *Operation Rescue, National Day of Rescue—October 29, 1988* (1988)), *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, 506 U.S. 263 (1993) (plurality opinion). A clinic "invasion" consists of numerous anti-abortion activists "storming and entering clinics that are in the process of offering services to patients." HOUSE REPORT, *supra* note 4, at 704.

28. *See* Women's Health Care Servs., P.A. v. Operation Rescue-Nat'l, 773 F. Supp. 258, 262 (D. Kan. 1991), *rev'd*, 24 F.3d 107, *vacated*, 25 F.3d 1059 (10th Cir. 1994). The court recognized that protestors successfully "frustrate or delay effective police action." *Id.* When arrested, protestors refused to provide their names and "move[d] in a slow motion, heel-to-toe fashion, thereby greatly delaying the speed with which officers [could] clear the entryways." *Id.* The Wichita, Kansas, clinic was closed for a week until federal marshals arrived to assist local police. *See The Freedom of Access to Clinic Entrances Act of 1993: Hearing before the Committee on Labor and Human Resources United States Sen-*

Congress, illustrating that the violence and threats had escalated to the point that additional legal remedies were urgently needed.[29]

A. State Law is too Local in Jurisdiction and Enforcement Powers

Abortion providers and clinic operators first looked to state law for assistance in dealing with clinic blockades, bombings, and other disruptions.[30] The nationwide organizational efforts of anti-abortion groups such as Operation Rescue,[31] however, often overwhelmed local law enforcement officials who were ill-equipped to deal with the demonstrators' tactics.[32] Moreover, lack of consistency in existing state and local crimi-

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ate on S. 636, 103d Cong. 14 (1993) (statement of Attorney General Janet Reno) [hereinafter "*Hearing*"].

It is important to realize that reproductive health services other than abortion are affected by blockades. *See* HOUSE REPORT, *supra* note 4, at 706; SENATE REPORT, *supra* note 2, at 14. For instance, the executive director of a clinic that was destroyed in an arson fire testified that the clinic had provided services such as "prenatal care and delivery, childhood immunizations, diagnosis and treatment of sexually transmitted infection, and contraceptive services." SENATE REPORT, *supra* note 2, at 5.

When a clinic is subjected to a blockade, invasion, or property destruction that temporarily or permanently closes down the facility, the impact is felt by every patient regardless of the services required. *See* HOUSE REPORT, *supra* note 4, at 701 (providing an example of a pregnant woman seeking pre-natal care who was denied access to a clinic because of a blockade and could not keep her appointment). The *Senate Report* noted that the Washington Supreme Court in *Bering v. Share*, 721 P.2d 918, 923 (Wash. 1986), found that a blockade had "interfered with ill patients, placing a pregnant woman possibly suffering from toxemia in acute medical danger, and delaying a patient who was miscarrying a wanted pregnancy and bleeding badly." *See* SENATE REPORT, *supra* note 2, at 15. Abortion patients also run the risk of serious complications when going through a multi-day abortion procedure which involves the use of laminaria sticks. *See id.* The sticks dilate the cervix, and must be timely removed to avoid "infection, bleeding and other potentially serious complications." *Id.* at 16. Because clinics often offer a range of services, and are not limited to only performing abortions, FACE encompasses both pregnancy-related and abortion-related services through its definition of reproductive health services as "medical, surgical, counseling, or referral services relating to the human reproductive system." 18 U.S.C. § 248 (e)(5).

29. *See supra* notes 2-11 and accompanying text (discussing Dr. Gunn's murder and other violence directed at abortion providers, and the need for national legislation).

30. *See* SENATE REPORT, *supra* note 2, at 19-20. Congress, however, found that state and local laws were inadequate because (1) the problem is national in scope; (2) even if applicable local laws, such as those against trespass, vandalism, and assault, are utilized, their penalties are so insignificant that they have very little deterrent effect; and (3) state injunctive authority ends at state lines and therefore has no effect in other states. *See id.*

31. Operation Rescue is one of the largest and best-known pro-life groups in the country, whose organizational purpose is to prevent abortions and eventually to see *Roe v. Wade* overturned so that abortion is illegal. *See National Org. for Women*, 914 F.2d at 584.

32. *See* SENATE REPORT, *supra* note 2, at 7-10 (describing local law enforcement officials' difficulties dealing with clinic blockades). For example, local law enforcement often does not have the ability to handle a large number of protestors. *See id.* at 9. During the "Summer of Mercy" in 1991, Operation Rescue repeatedly targeted abortion clinics in

nal laws failed to provide predictability in prosecution or punishment.[33] Such predictability is useful when attempting to deter violence and blockades surrounding clinics nationwide.[34] Providers periodically found state and local law enforcement ineffective because of its sympathies with the pro-life message.[35] For instance, local governments sometimes refrained from prosecuting to the fullest extent, if at all, those who violated state and local laws[36] by infringing upon the rights of abortion providers and patients.[37] The patchwork of state and local laws unraveled, becoming a weak and at times non-existent response to the nationwide campaign of clinic blockades engaged in by certain pro-life groups.[38]

Wichita, Kansas, by obstructing access to the clinics and trespassing. *See Women's Health Care Servs.*, 773 F. Supp. at 265-66. Operation Rescue "virtually overwhelmed the resources of the city's relatively small police forces to respond with dispatch and effectiveness." *Id.*

33. *See* HOUSE REPORT, *supra* note 4, at 707 (recognizing that state and local laws "failed to provide the certainty of prosecution, conviction and punishment necessary to deter these activities on a nationwide scale").

34. *See* HOUSE REPORT, *supra* note 4, at 707. Jurisdictional problems were quite evident to state and local government officials who tried to enforce the law against conduct organized and conducted across state lines. *See* SENATE REPORT, *supra* note 2, at 13. Cities simply had "'no practical ability to charge or seek injunctions against persons in other states who may have planned the disturbance[s]; even if the states involved were willing to extradite, the process would consume months.'" *Id.* (quoting testimony of David R. Lasso, City Manager, Falls Church, Virginia).

35. *See* SENATE REPORT, *supra* note 2, at 19 (noting that in some instances, local officials consciously disregarded anti-abortion violence and blockades based on personal agreement with the protestors' objectives); Georgia M. Sullivan, Note, *Protection of Constitutional Guarantees Under 42 U.S.C. Section 1985(3): Operation Rescue's "Summer of Mercy,"* 49 WASH. & LEE L. REV. 237, 258 (1992) (describing state and local government support of Operation Rescue during the Wichita clinic blockades). The Governor of Kansas spoke at an Operation Rescue rally and expressed her support of the pro-life movement. *See id.* Moreover, the Mayor of Wichita, and the local United States Attorney "praised Operation Rescue for its noble cause." *Id.*

36. *See* SENATE REPORT, *supra* note 2, at 19. In response to questions of selective enforcement of state and local laws, a county sheriff in Texas replied "the law of the Supreme Court, and in this case the United States of America and any other State in the Union that makes it legal to murder babies, is wrong." *Id.* When asked whether he would enforce the law, he replied that he would not. *See id.*

37. *See* Women's Health Care Servs., P.A. v. Operation Rescue-Nat'l, 773 F. Supp. 258, 266 (D. Kan. 1991) (observing that "significant questions exist as to the lack of zeal displayed by the City of Wichita in defending the legal rights of the plaintiffs and their patients"), *rev'd* 24 F.3d 107, *vacated*, 25 F.3d 1059 (10th Cir. 1994).

38. *See* HOUSE REPORT, *supra* note 4, at 7 (stating that "throughout the country, pro-life groups have organized blockades designed to bar access to reproductive facilities and overwhelm local law enforcement"); SENATE REPORT, *supra* note 2, at 7-9 (describing state and local authorities' inability to effectively combat clinic blockades); *supra* notes 26-37 and accompanying text (explaining why state and local laws were ineffective remedies for abortion providers and clinic operators).

Frustrated by the deficiencies of state and local laws, abortion providers and operators looked to federal statutes for relief.[39] Pro-choice groups and reproductive health organizations successfully began filing actions for injunctive relief against interference with their activities under a nineteenth century civil rights statute known as the Ku Klux Klan Act (KKK Act).[40]

B. The Inapplicability of the KKK Act

The KKK Act, codified at 42 U.S.C. § 1985(3), is a civil rights law from the Reconstruction Era enacted in response to the Ku Klux Klan's fierce and savage race-based resistance to post Civil War reforms.[41] The Act prohibits conspiracies to deprive a person, or class of persons, of equal protection under the law.[42] Abortion providers and pro-choice organizations argued that § 1985(3) was applicable to modern day anti-abortion violence and intimidation, in that there existed a recognizable class-based

39. *See Hearing*, *supra* note 28, at 14-15 (statement of Attorney General Janet Reno) (explaining that although federal law was available, notably 42 U.S.C. § 1985(3) as an injunctive remedy, the Supreme Court held that it was inapplicable to abortion providers and patients).

40. Ch. 22 § 2, 17 Stat. 13 (1871) (codified in part at 42 U.S.C. §§ 1983, 1985 (1994)); *see* Volunteer Med. Clinic, Inc. v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991) (upholding an injunction issued under the KKK Act to restrain violent anti-abortion activity); National Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), *rev'd in part and vacated in part sub nom.* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) (plurality opinion); New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989).

41. *See* Randolph M. Scott-McLaughlin, Bray v. Alexandria Women's Health Clinic: *The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357, 1363-64 (1992). The author examined the legislative history of the Civil Rights Act of 1871, and concluded that "[t]he evidence revealed that the Klan used violence and terror against blacks, supporters of blacks, and Republicans in an effort to undo the gains of the Reconstruction era." *Id.* at 1364.

42. *See* 42 U.S.C. § 1985(3). The provision used by abortion providers and clinic operators states:

> 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 . . . . 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.

Id.

discrimination aimed at women because only they can bear children.[43] Federal courts often responded by issuing injunctions under § 1985(3) to prohibit violent and obstructive anti-abortion activity.[44] Courts concluded that violent opposition to abortion could constitute class-based discrimination against women, and a denial of women's constitutional right to interstate travel to obtain an abortion.[45]

In *Bray v. Alexandria Women's Health Clinic*,[46] however, the Supreme Court severely limited the remedies available to abortion providers, holding that § 1985(3) did not apply to anti-abortion protestors.[47] Under § 1985(3), "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [must be] behind the conspirators' action,"[48] and the

43. *See Volunteer Med. Clinic*, 948 F.2d at 225 (deciding the issue on first impression, the court found sufficient evidence of "class-based animus" to support an action under § 1985(3)); *National Org. for Women*, 914 F.2d at 585 (affirming the district court's findings that defendants' activities denied women seeking abortions of their constitutional right to travel, and that women constitute a protected class under § 1985(3)); *New York State Nat'l Org. for Women*, 886 F.2d at 1359 (finding that Operation Rescue's anti-abortion activities fell under § 1985(3) "because defendants' conspiracy is focused entirely on women seeking abortions," and "reveal[ed] an attitude or animus based on gender"). *But see infra* notes 46-53 and accompanying text (describing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) (plurality opinion), that overruled these decisions).

44. *See supra* note 43 (listing cases holding that abortion providers and clinic operators had established a claim under § 1985(3)).

45. *See Volunteer Med. Clinic*, 948 F.2d at 224-25; *National Org. for Women*, 914 F.2d at 585; *New York State Nat'l Org. for Women*, 886 F.2d at 1359-60. This argument, previously successful, was rejected by the Supreme Court in Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) (plurality opinion).

46. 506 U.S. 263 (1993).

47. *See id.* at 268. Although the applicability of the second clause of § 1985(3), otherwise known as the hindrance clause, was not considered in *Bray*, the holding regarding the first clause, known as the deprivation clause, rendered the KKK Act as a whole to be limited and inadequate as a remedy against abortion clinic blockades. *See* SENATE REPORT, *supra* note 2, at 18; *see also Hearing*, *supra* note 28, at 14-15. The United States Attorney General stated that the first clause can be used only in rare circumstances and that although the second clause's applicability is questionable, at most "it will only provide a cause of action where demonstrators have so overwhelmed local authorities as to prevent them from providing the equal protection of the laws." *Id.* at 15. *But see* Todd C. Coleman, Note, *Hindering the Applicability of 42 U.S.C. § 1985(3) to Abortion Protests:* Bray v. Alexandria Women's Health Clinic, 27 CREIGHTON L. REV. 525, 548-49 (1994) (agreeing with and elaborating on Justice Stevens' dissent that determined that the class-based animus requirement should only apply to the deprivation clause, and not the hindrance clause).

48. *Bray*, 506 U.S. at 268 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)). Prior to 1971, § 1985(3) only reached conspiracies that involved state action. In *Griffin*, the Supreme Court recognized that § 1985(3) provides a remedy for private conspiracies in addition to government sponsored action, as long as there is class-based animosity underlying the private citizen's actions. *See* 403 U.S. at 96-97. The Court included the caveat that behind the conspirator's actions there must lie "some racial, or perhaps other class-based, invidiously discriminatory animus" in order to prevent the statute from being used as a general federal tort remedy. *Id.* at 102. This requirement is consistent with the sponsors'

conspiracy must be actively directed at rights that are protected from private and governmental interference.[49] The Court held that the pro-choice respondents did not establish either of these elements.[50]

The Court did not find discrimination based on gender, and pointedly refused to equate the right of women to choose reproductive health services with the types of racial discrimination § 1985 was designed to address.[51] The Court also declined to find that pro-life groups strived to

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intent for the KKK Act, as the law was to be a restriction on those who prevent or deprive others of equal rights under the law. *See id.* at 100.

49. *See Bray*, 506 U.S. at 268. The Fourteenth Amendment only refers to government interference, not individual actions: "No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1 (emphasis added). Certain rights, however, are protected from private hindrances as well as governmental interference. *See Griffin*, 403 U.S. at 96-97.

Subsequent to *Griffin*, the Court had further clarified the use of § 1985(3) as a civil remedy against private individuals in *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 833 (1983). *Carpenters* made it evident that § 1985(3) applies only to private conspiracies "aimed" at depriving a class of persons of a constitutional right that is "protected against private, as well as official, encroachment." *Id.* at 833.

50. *See Bray*, 506 U.S. at 268.

51. *See id.* The Court declined to accept the following gender discrimination rationale advanced by the abortion rights groups: because only women can become pregnant and consequently have abortions, interference with that activity was class-based discrimination predicated on gender bias. *See id.* at 271. The majority opined that the impetus behind active opposition to abortion "does not remotely qualify for such harsh description, and for such derogatory association with racism." *Id.* at 274.

In dissent, however, Justice Stevens emphasized that the congressional intent behind the KKK Act was to protect citizens from "theft of their constitutional rights by organized and violent mobs across the country." *Id.* at 309 (Stevens, J., dissenting).

One commentator contends, along the same lines as the plaintiffs in *Bray*, that clinic blockades and shutdowns do demonstrate a discrimination against a woman's right to privacy, in which the right to abortion is found. *See* Sullivan, *supra* note 35, at 248-49. The author asserts that no attempt is made by pro-life groups to infringe on a man's right to privacy, because a man cannot become pregnant. *See id.* Therefore, only women's privacy rights, and thereby women, are subjected to discriminatory tactics. *See id. But see* Carolyn J. Lockwood, Comment, *Regulating the Abortion Clinic Battleground: Will Free Speech be the Ultimate Casualty?*, 21 OHIO N.U. L. REV. 995, 1029-39 (1995) (agreeing with the *Bray* decision that women are not a protected class under § 1985(3), that there is no class-based animus aimed toward women by the pro-life movement, and that there are no rights present in the abortion clinic access situation that are protected against private conspiracies).

deprive women of the constitutional right to interstate travel,[52] a right that in some circumstances is protected against private interference.[53]

C. The Questionable and Ineffective use of RICO

Reproductive health providers and clinic operators have also used the Racketeer Influenced and Corrupt Organizations (RICO) statute,[54] as a means of counteracting violent demonstrators and trespassers.[55] RICO has proven, however, to be too unpredictable and incompatible to relieve reproductive health patients and providers from the types of conduct anti-abortion activists subject them to.[56]

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52. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274-77 (1993) (plurality opinion). The right to interstate travel is not explicitly found in the Constitution; however, the Court does treat it as a fundamental right. *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (finding that, although not written in the Constitution, the right to travel is fundamental, and has its roots in "the nature of our Federal Union and our constitutional concept of personal liberty [which] unite to require that all citizens be free to travel throughout the length and breadth of our land").

Justice Scalia, writing for the *Bray* plurality, asserted that the "'intent to deprive of a right' requirement demands that the defendant do more than merely be aware of a deprivation of right that he causes . . . he must act at least in part for the very purpose of producing it." *Bray*, 506 U.S. at 276. The Court stated that because pro-life groups oppose abortion in all circumstances, it is irrelevant to their activities that the abortion is performed in the protestors' home state or after interstate travel. *See id.*

53. *See Bray*, 506 U.S. at 274. The *Griffin* Court found that the right to interstate travel was one that in some circumstances would be protected against private, as well as state, interference. *See Griffin*, 403 U.S. at 105-06. The *Bray* plurality clarified this concept by declaring that the right to obtain an abortion, as an element of the broader right of privacy, is not one which is afforded protection against private action. *See Bray*, 506 U.S. at 278. Moreover, the Court acknowledged that the right to free speech is not "protected against private, as well as official, encroachment." *Id.* It would be anomalous, Justice Scalia noted, to afford the right to abortion a preferred status over the First Amendment guarantee of freedom of speech. *See id.*

54. 18 U.S.C. §§ 1961-68 (1994). Congress passed RICO in 1970 to target organized crime activities. *See* Pub. L. No. 91-452, 84 Stat. 922 (1970).

55. *See* Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1357 (3d Cir. 1989) (upholding a jury verdict of a RICO violation based on intimidation, harassment, and destruction of property). *But see* National Org. for Women, Inc. v. Scheidler, 765 F. Supp. 937, 941 (N.D. Ill. 1991) (refusing to find that pro-life defendants were part of a national conspiracy to close abortion clinics through a pattern of racketeering activity because no income was derived from the activity), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994) (finding that the plaintiffs may maintain a cause of action without a showing of economic motive on behalf of the organization alleged to have violated RICO).

56. In *Scheidler*, the Court held that RICO does not require an economically motivated enterprise, but left open the question of whether there would be a First Amendment violation if RICO were applied to the anti-abortion movement. *See* 510 U.S. at 262 n.6; *see also infra* note 65 (discussing First Amendment speech issues under RICO as applied to abortion protestors).

After the decision in *National Organization for Women, Inc. v. Scheidler*, Congress still discounted RICO as an effective remedy for abortion providers, patients, and clinic opera-

Enacted as part of RICO, 18 U.S.C. § 1962(c) makes it unlawful for a person to be employed by or associated with an enterprise[57] "engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."[58] The term "enterprise" implies a business or other type of profit-motivated venture.[59] As pro-choice plaintiffs attempted to use § 1962(c) to obtain relief, courts confronted the issue of whether the pro-life "enterprise" must be shown to be economically motivated.[60] Many courts found that contributions and donations were inadequate under the statute to prove that pro-life organizations were financially and commercially motivated, thereby qualifying as an "enterprise" under RICO.[61]

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tors. *See* 140 CONG. REC. S5596 (daily ed. May 12, 1994) (statement of Sen. Kennedy) (noting that the Supreme Court decision demonstrated that RICO was no substitute for national legislation specifically drafted to deal with the problems experienced by abortion providers and patients).

57. The Act defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

58. *Id.* § 1962(c). The Act defines racketeering activity to include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable under State law and punishable by imprisonment for more than one year." *Id.* § 1961(1)(A). A pattern of racketeering activity under RICO requires at least two predicate acts of racketeering activity. *See id.* § 1961(5).

59. *See supra* note 57 (containing the definition of "enterprise" under RICO).

60. Circuit courts disagreed on the issue of whether RICO required a profit motive. *See Scheidler*, 968 F.2d at 629 (reasoning that "non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO"); United States v. Ivic, 700 F.2d 51, 63 (2d Cir. 1983) (interpreting RICO as requiring a profit motive); United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980) (requiring a profit motive). *But see McMonagle*, 868 F.2d at 1350 (finding that lack of economic motivation by an enterprise is not necessary to sustain an action under RICO).

The Second, Seventh, and Eighth Circuits interpreted RICO to mean that the enterprise must have economic motivation, and consequently found that pro-life defendants and organizations were political and not profit-driven entities. *See Scheidler*, 968 F.2d at 629 (holding that the emphasis on business in RICO supports the conclusion that only economically motivated enterprises are covered under RICO); *Ivic*, 700 F.2d at 62-63 (asserting that because RICO was crafted to apply to illegitimate businesses and the infiltration of legitimate establishments by organized crime, an economic motive requirement is implicit in the statute); *Anderson*, 626 F.2d at 1372 (holding that Congress only intended RICO to cover enterprises that had an identifiable economic goal as a business purpose).

The Third Circuit did not construe RICO to require a profit-based enterprise. *See McMonagle*, 868 F.2d at 1350. In a footnote, the court recognized that the defendants' anti-abortion activities were not motivated by an economic purpose, yet stated that economic motivation is not a required element of a valid claim under RICO. *See id.* at 1349 n.7.

61. *See* National Org. for Women, Inc. v. Scheidler, 765 F. Supp. 937, 944 (N.D. Ill. 1991) (observing that the pro-life organization's purpose is political in nature, despite re-

Resolving a split in the circuit courts on this issue, the Supreme Court interpreted RICO as not requiring that an enterprise be economically motivated in *National Organization for Women, Inc. v. Scheidler*.[62] Although the language of RICO suggests that an enterprise must possess a profit-driven motivation, the Court found that the statutory language expressly includes enterprise activities which "affect" interstate commerce, and thereby eliminated the direct profit motivation inference behind the term "enterprise."[63]

Because the Court simply restricted the opinion to find that economic motivation is not required under RICO, this holding does not necessarily translate into a finding that certain violent and obstructionist conduct by abortion protestors are RICO violations.[64] Indeed, First Amendment concerns arise when abortion providers and clinic operators attempt to use RICO's § 1962(c) to state a claim against individual members of pro-life groups.[65] Further, the complex nature of RICO litigation, and the

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ceiving donations from pro-life supporters), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994).

Under § 1962(a), income must be "derived, directly or indirectly, from a pattern of racketeering activity." 18 U.S.C. § 1962(a). In *Scheidler*, the district court dismissed the § 1962(a) claim because donations given to the defendant's group did not meet the requirement of direct or indirect derivation of income from racketeering. *See* 765 F. Supp. at 941.

62. 510 U.S. 249 (1994). In 1986, the National Organization for Women attempted to use RICO as a remedy against clinic blockades. *Scheidler*, 765 F. Supp. at 941. By alleging that members of an anti-abortion group were involved in trespassing, blocking ingress and egress to clinics, and damaging clinic property, the plaintiffs tried to establish a national conspiracy to close abortion clinics through a pattern of racketeering. *See id* at 938-39. The district court dismissed the claim. *See id.* at 941. The decision was affirmed on appeal by the Seventh Circuit, holding that the plaintiffs did not establish that the defendants' anti-abortion activities were profit-motivated as required by RICO. *See Scheidler*, 968 F.2d at 629-30.

63. *See Scheidler*, 510 U.S. at 258. The Court acknowledged that "predicate acts, such as the alleged extortion, may not benefit the protestors financially but still may drain money from the economy by harming businesses such as the clinics." *Id.* at 260.

64. *See id.* at 262. The Court's holding simply stood for the proposition that abortion providers do not have to show that anti-abortion groups are economically motivated to state a claim under RICO. *See id.*

65. RICO's usefulness to abortion clinic operators was further eroded by footnote 6 of the *Scheidler* majority opinion. *See id.* at 262 n.6. The Court implied that a legitimate argument could be made that the application of RICO to abortion protestors could affect protected First Amendment speech. *See id.* Justice Souter's concurrence also pronounced that the Court's holding would not bar First Amendment challenges to RICO's application in cases brought by pro-life plaintiffs. *See id.* at 263 (Souter J., concurring).

On remand, certain paragraphs of plaintiffs' third amended complaint were stricken because of First Amendment considerations. National Org. for Women v. Scheidler, 897 F. Supp. 1047, 1088 (N.D. Ill. 1995). The district court identified the issue as whether certain words used by the defendants were "fighting words," that is "speech that calls for or tends to produce or incite violence." *Id.* at 1084. Fighting words are excluded from First Amendment protection. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see*

fact that Congress specifically drafted RICO to deal with activities associated with organized crime, create difficulties when clinic providers and operators attempt to bring actions for destruction of clinic property, physical obstruction of clinic entrances, or assault.[66]

II. FACE: A SUMMARY OF THE MAJOR PROVISIONS

In response to growing concern about the violent nature of clinic blockades, bombings, force, and threats of force faced by women and reproductive health providers, both Houses of Congress introduced legislation in 1993.[67] Congress laid the foundation to enact the legislation through

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also Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (precluding speech that incites imminent unlawful conduct from First Amendment protection). To fall under this exclusion, the speech must be likely to immediately incite unlawful conduct. *See id.* at 447. When examining the complaint, the court reviewed the allegations with an eye to whether the defendants' speech was "so closely linked in time and place to the violence that the law must intervene and prohibit the provocation from occurring." *Scheidler*, 897 F. Supp. at 1086. In several instances, the court did not find so, and consequently found protected First Amendment speech contained in the plaintiffs' complaint allegations. *See id.* at 1088; *see also* Carole Golinski, *In Protest of* NOW v. Scheidler, 46 ALA. L. REV. 163, 184 (1994) (asserting that "in assessing individual liability of organization members, it is a sound constitutional principle that civil liability cannot be imposed merely because an individual belongs to a group in which some members have committed acts of violence"); Steven E. Soule & Karen R. Weinstein, Recent Development, *Racketeering, Anti-Abortion Protesters, and the First Amendment*, 4 UCLA WOMEN'S L.J. 365, 387 (1994) (discussing the First Amendment issues that arise under RICO where (1) unlawful acts are only committed by a few members of a pro-life organization who do not condone or sanction such behavior, and (2) some of RICO's predicate acts are protected conduct under the First Amendment).

66. A defendant must have committed two predicate acts in order to be prosecuted under RICO. *See* 18 U.S.C. § 1961(5) (1994). Predicate acts include such crimes as bribery, gambling, extortion, and drug dealing. *See id.* § 1961(1)(A). These types of acts are extremely uncommon in anti-abortion conduct situations and therefore would not easily create RICO liability. *See* 140 CONG. REC. 5596 (1994) (statement of Sen. Kennedy). Senator Kennedy explained that even though the Supreme Court's decision in *Scheidler* was not completely unfavorable to clinic operators and staff, because the types of anti-abortion conduct surrounding clinics do not constitute a RICO predicate act, the statute did not provide an adequate substitute for FACE in addressing violent and obstructive anti-abortion activity. *See id.* Even the attorney for the plaintiffs in the *Scheidler* case stated that "most clinics won't be able to use RICO." Paul M. Barrett, *New Legal Weapon in Abortion Fight Is Hard to Use and Hard to Enforce*, WALL ST. J., Jan. 28, 1994, at B1 (quoting Fay Clayton, lead attorney for NOW); *see also* Charles W. Hall & Robert O'Harrow Jr., *Abortion Clinic Violence Probe Was Over at the Start*, WASH. POST, Jan. 26, 1996, at B1 (reporting on a federal grand jury's investigation that found no direct evidence of a pro-life national conspiracy involving abortion clinic violence under RICO). *But see* Susan A. Ronn, Comment, *"FACE"-ing RICO: A Remedy for Antiabortion Violence?*, 18 SEATTLE U. L. Rev. 357, 378-81 (1995) (acknowledging and addressing the First Amendment issues present when applying RICO to protests surrounding abortion clinics, but contending that RICO is an effective solution to counter the violence and obstruction surrounding clinics).

67. Representatives Charles Schumer (D-NY) and Constance Morella (R-MD) introduced House Bill 796 on February 3, 1993. H.R. 796, 103d Cong. (1993). Senator Edward

its Commerce Clause authority by outlining the interstate nature of the violent and coercive activity.[68] Furthermore, Congress attempted to allay the fears of peaceful pro-life protestors who expressed concern that their

M. Kennedy (D-MA) introduced Senate Bill 636 on March 23, 1993. S. 636, 103d Cong. (1993).

Advocates on each side of the abortion controversy testified: Dr. Pablo Rodriguez, Medical Director of Planned Parenthood of Rhode Island, recalled death threats and trespassing incidents; Willa Craig, the Executive Director of Blue Mountain Clinic in Missoula, Montana, recounted the escalating violence centered around the clinic, culminating in an act of arson that destroyed it; Joan Appleton of Pro-Life Action Ministries stressed that the bill would jeopardize sidewalk counseling and thus curtail informed consent; Nicholas Nikas, American Family Association, advocated that the bill was unconstitutional on its face and would severely chill First Amendment rights. *Hearing*, *supra* note 28, at 48-72, 108-10, 122-43.

The House and Senate voted on the final version of FACE in May of 1994. 140 CONG. REC. H3134 (daily ed. May 5, 1994); 140 CONG. REC. S5628 (daily ed. May 12, 1994). On May 5, 1994, by a roll call vote of 222-193, the House agreed to the Conference Report. 140 CONG. REC. H3134 (daily ed. May 5, 1994). The Senate also consented to it on May 12, 1994, by a roll call vote of 69-30. 140 CONG. REC. S5628 (daily ed. May 12, 1994). President Clinton signed the bill into law at a televised media event at the White House on May 26, 1994. The Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 695 is codified at 18 U.S.C. § 248 (1994).

68. Four basic findings support Commerce Clause application. First, Congress found that clinics operate within the stream of interstate commerce by purchasing and leasing medical business necessities and employing clinic physicians and staff from other states, and that the anti-abortion activities substantially affect clinic participation in interstate commerce. *See* HOUSE REPORT, *supra* note 4, at 705; *see also Hearing*, *supra* note 28, at 16 (statement of Attorney General Janet Reno). The Attorney General reaffirmed Congress's position that the provision of abortion services affected interstate commerce. *See id.* Because clinic operators "purchase or lease facilities, purchase and sell equipment, goods, and services, employ people, and generate income," the Attorney General maintained that there was a direct connection to interstate commerce. *Id.*

Second, Congress found that patients often must travel to other states to obtain reproductive health services because of the lack of such services in their location, and that clinic staff sometimes travel interstate to provide reproductive health services. *See* HOUSE REPORT, *supra* note 4, at 705; SENATE REPORT, *supra* note 2, at 31. Moreover, Congress found that rural clinics and doctors have been specifically targeted because the elimination of a single provider can virtually eradicate abortion services for women in that area. *See* HOUSE REPORT, *supra* note 4, at 705.

Third, Congress found that the obstruction of clinics and the violence surrounding them decreases the availability of abortion services on a national scale. *See* SENATE REPORT, *supra* note 2, at 12. Leaders of Operation Rescue testified that the organization's avowed purpose is to stop abortions from being performed. *See id.* at 11. Doctors who provide abortions are targeted as the "weak link" in the provision of abortion services; anti-abortion activist Randall Terry has stated his avowed intention to make abortion doctors' lives "a living hell." HOUSE REPORT, *supra* note 4, at 706. Another related method for achieving the goal of preventing abortions is to eliminate access to clinics by closing clinics down. *See* SENATE REPORT, *supra* note 2, at 11. The field director of Operation Rescue National declared "[w]e may not get laws changed or be able to change people's minds . . . [b]ut if there is no one willing to conduct abortions, there are no abortions." *Id.*

Finally, Congress found that the obstruction of clinic entrances is a national problem and thus cannot be effectively handled on a state level. *See* HOUSE REPORT, *supra* note 4, at

First Amendment rights would be jeopardized by inserting a section into FACE that provides that nothing in FACE limits First Amendment guarantees.[69]

FACE makes it a federal offense if any person:

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.[70]

FACE also renders it unlawful to intentionally damage or destroy the property of reproductive health facilities.[71] Congress cautiously modeled FACE's language after the language of several federal civil rights laws that prohibit similar activity and have survived constitutional challenges.[72] In addition, Congress defined the important terminology used in FACE to stave off attacks for vagueness.[73]

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707. Operation Rescue admittedly engaged in a national campaign to close abortion clinics. *See id.*

69. *See* 18 U.S.C. § 248(d)(1); HOUSE CONFERENCE REPORT, *supra* note 2, at 725-26. Congress provided that nothing in the statute shall be construed to "prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment." 18 U.S.C. § 248(d)(1). Subsection (d) of the Rules of Construction also provide that FACE was not designed to create new remedies or limit existing ones for interference with protected First Amendment activities outside clinic entrances, provide for exclusive criminal penalties or civil remedies, or preempt state or local laws prohibiting such conduct. *See id.* § 248(d)(2)-(3). Congress further emphasized that its intent was not to interfere with state and local laws that regulate the performance of abortions. *See id.* § 248(d)(4).

70. 18 U.S.C. § 248(a)(1). FACE prohibits the same conduct when one is interfering or attempting to interfere with a person's religious freedom, or is intentionally destroying property at a place of worship. *See id.* § 248(a)(2)-(3). The Act also carves out a parental and legal guardian exemption to the above prohibited conduct when such conduct is being directed solely at the minor child. *See id.* § 248(a)(3).

71. *See id.* § 248(a)(3); *see also supra* note 7 (describing types of property destruction and vandalism at abortion clinics).

72. *See* SENATE REPORT, *supra* note 2, at 25. FACE's language is modeled after several civil rights statutes, such as 18 U.S.C. § 245(b), which protects voting rights and jury service, and 42 U.S.C. § 3631, which prevents force or interference with a person's rights under the Fair Housing Act. *See id.*

73. Key terms are provided to assist the public, and law enforcement, and the courts in understanding what type of conduct is prohibited. Among the most important are the terms: "interfere with," which means to restrict someone's freedom of movement, 18 U.S.C. § 248(e)(2) (1994); "intimidate," defined as placing someone in "reasonable apprehension of bodily harm," *id.* § 248(e)(3); and "physical obstruction," which includes making passage into or out of a clinic either impassable or "unreasonably difficult or hazardous," *id.* § 248(e)(4).

Although Congress did not define what type of speech constitutes a threat of force in FACE, legislative history is instructive. *See* HOUSE REPORT, *supra* note 4, at 708 (stressing

The Act provides for both criminal penalties and civil remedies.[74] A first time criminal offender may be fined in accordance with the title, imprisoned up to one year, or both.[75] A subsequent offender with a prior FACE conviction may be fined in accordance with the title, imprisoned up to three years, or both.[76] More lenient guidelines apply to exclusively non-violent physical obstruction convictions: a first-time offender may be fined up to $10,000, imprisoned up to six months, or both.[77] A repeat non-violent physical obstruction offender may be fined up to $25,000, imprisoned up to eighteen months, or both.[78] However, if bodily injury results, the offender may be imprisoned for up to ten years.[79] If death results, any term of imprisonment, even a life sentence, may be imposed.[80]

A civil cause of action is available for a person harmed by conduct prohibited by FACE while seeking or providing reproductive health serv-

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that in order for a threat of force to violate FACE, it must be "real and meaningful"); SENATE REPORT, *supra* note 2, at 23 (stating that a threat under FACE is where "it is reasonably foreseeable that the threat would be interpreted as a serious expression of an intention to inflict bodily harm").

74. 18 U.S.C. § 248(b)-(c).

75. *See id.* § 248(b)(1).

76. *See id.* § 248(b)(2).

77. *See id.* § 248(b). *See* United States v. Unterberger, 97 F.3d 1413 (11th Cir. 1996). Examining a non-violent physical obstruction conviction, the Eleventh Circuit found that the Sixth Amendment did not guarantee a right to a jury trial when the maximum prison term for the violation was no greater than six months. *See id.* at 1415. The court held that the additional statutory penalty of a maximum fine of $10,000 was not severe enough to elevate the crime to "serious" which would have entitled the defendants to a jury trial. *See id.* at 1416. The *Unterberger* decision relied on a recent Supreme Court opinion, *United States v. Lewis*, 116 S. Ct. 2163 (1996), in reaching its conclusion. *See Unterberger*, 97 F.3d at 1416. *Lewis* reaffirmed the principle that there is no Sixth Amendment right to a jury trial when the defendant is charged with a "petty" offense, indicated solely by violations with a maximum authorized prison term of no more than six months. *See Lewis*, 116 S. Ct. at 2166. The *Lewis* Court emphasized that the legislature's proposed prison term for the offense is the only criterion to be used when determining whether a crime is serious or petty. *See id.* Other penalties that accompany the prison term, such as the fine in *Unterberger*, were not to be considered unless penalties are "so severe as to indicate that the legislature considered the offense serious." *Id.* at 2166-67. In *United States v. Soderna*, 82 F.3d 1370 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141), the Seventh Circuit also held that the defendants charged with a non-violent physical obstruction violation did not have a constitutional right to a jury trial under FACE. *See Soderna*, 82 F.3d at 1378. The court reasoned that under Supreme Court precedent, because the offense only allowed up to six months in jail, it is a petty offense. *See id.* The court was not persuaded that the additional statutory penalty of a maximum $10,000 fine was sufficient to increase the "severity of punishment well beyond that of the prison term." *Id.*

78. *See* 18 U.S.C. § 248(b)(2). These fines are deposited in the Crime Victims Fund. *See* HOUSE CONFERENCE REPORT, *supra* note 2, at 726.

79. *See* 18 U.S.C. § 248(b)(2) (1994).

80. *See id.*

ices.[81] In addition, either the United States Attorney General or a state attorney general may commence a civil action if there is reasonable belief that someone may be injured through a violation of the statute.[82] The plaintiff may be granted temporary, preliminary, or permanent injunctive relief,[83] as well as compensatory and punitive dam-

81. *See id.* § 248(c)(1)(A).

82. *See id.* § 248(c)(2)-(3). In an action initiated by the government, the court may assess civil penalties to "vindicate the public interest." *Id.* § 248(c)(2)(B).

83. *See id.* § 248(c)(1)(B). Quite often, both statutes and injunctions seek to regulate conduct that takes place in a public forum; therefore, protected speech may be subjected to time, place, and manner restrictions. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). A full discussion of the intricacies of First Amendment application to time, place, and manner restrictions is beyond the range of this Comment; however, a brief discussion of the Supreme Court's abortion "buffer-zone" injunction decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), is useful because FACE provides for federal injunctive relief. *See* Figueroa & Kurth, *supra* note 3, at 272 (declaring that both FACE and *Madsen* offer assistance to abortion clinic patients, providers, and operators: FACE providing federal injunctive relief and *Madsen* permitting state courts to issue protective injunctions).

The principle inquiry in examining a statute or injunction that affects the time, place, or manner of speech is content-neutrality, which is determined by whether government has regulated speech "'without reference to the content of the regulated speech.'" *Madsen*, 114 S. Ct. at 2523 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). Generally, a content-based regulation of speech in a public area will be upheld only if the regulation meets the compelling governmental interest standard, that is, the regulation must be narrowly tailored and necessary to meet a compelling governmental interest. *See Perry Educ. Ass'n*, 460 U.S. at 45. If a statute or injunction is content-neutral, the regulation's constitutionality is measured by the more modest substantial governmental interest standard of whether it is "narrowly tailored to serve a significant governmental interest," and "leave[s] open ample alternative channels for communication of the information." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). It has been recognized that the Court has also used the four pronged *United States v. O'Brien*, 391 U.S. 397 (1968) analysis when reviewing time, place, and manner restrictions. *See id.* at 298 (pointing out that *O'Brien*'s four part test for evaluating the regulation of speech-related conduct is very similar to the analysis of time, place, and manner regulations); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.47, at 1087 (4th ed. 1991) (stating that the Court has articulated two slightly different methods of treating time, place, and manner restrictions, one of which is laid out in *O'Brien*); *see also infra* notes 166-76 and accompanying text (describing the four-pronged *O'Brien* test).

Prior to *Madsen*, courts applied the substantial governmental interest standard to both statutes and injunctions that were found to be content-neutral and generally applicable. *See* Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 671-72 (Fla. 1993) (employing the substantial governmental interest standard to an anti-abortion protest injunction). *But see* Cheffer v. McGregor, 6 F.3d 705, 710 (11th Cir. 1993) (examining a similar protest injunction, the court applied the compelling governmental interest standard and struck down the injunction). The Supreme Court in *Madsen*, however, increased the level of scrutiny required for a content-neutral injunction, which applies to a select individual or group, as opposed to a content-neutral statute, which applies to the general public. *See Madsen*, 114 S. Ct. at 2524-25. The *Madsen* Court reasoned that because injunctions, unlike statutes, may be applied in a discriminatory fashion, a more stringent First Amendment analysis was required for content-neutral injunctions. *See id.* The

ages.[84] The plaintiff has the option to choose, in lieu of actual compensatory damages, a statutory award of $5,000 per violation.[85]

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current standard of review provided by *Madsen* is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 2525; *see* Jennifer Wohlstadter, Note, Madsen v. Women's Health Center, Inc.: *The Constitutionality of Abortion Clinic Buffer Zones*, 25 GOLDEN GATE U. L. REV. 543, 573 (1995) (maintaining that although the new standard introduced by the Court in *Madsen* places more of a burden on abortion clinic providers and operators, the protestors' First Amendment rights are now better protected through the slightly higher standard of scrutiny).

When the regulation affects constitutionally protected activity, the injunction must be characterized by "'precision of regulation.'" *Madsen*, 114 S. Ct. at 2525 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). Each provision of the injunction must be scrutinized to determine if it is narrowly tailored and does not unduly burden more speech than necessary. *See id.* at 2526-30. The *Madsen* Court upheld limited noise restrictions and a 36-foot buffer zone around the clinic entrances and driveways, but struck down other provisions, such as the state court's prohibition of the display of signs, as overly restrictive and burdensome on free speech. *See id.*

In light of *Madsen*, an injunction issued under FACE will be upheld if it is precisely drafted so that it does not burden more speech than necessary to serve a significant governmental interest. *See id.* at 2530. A recently decided Eighth Circuit case upheld certain provisions of an injunction issued under FACE, finding constitutional: (1) a prohibition on the use or threat of force, intimidation, interference, and physical obstruction; (2) a 500-foot buffer zone surrounding the clinic; (3) restrictions on noise levels when voicing First Amendment protected speech; and, (4) the nationwide scope of the order. *See* United States v. Dinwiddie, 76 F.3d 913, 928-29. (8th Cir.), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615). The court found that these restrictions burdened no more speech than necessary to protect the patients and staff of reproductive health facilities. *See id.* at 928; *see also* United States v. Lindgren, 883 F. Supp. 1321, 1333 (D.N.D. 1995) (issuing injunctive relief under FACE that ordered the defendant to keep 100 feet away from clinic and clinic employees, including employees' homes, after a finding of threatening statements and physically obstructing clinic's driveway and private sidewalk).

The Court, however, is revisiting the abortion "buffer zone" issue as it pertains to anti-abortion protestors' First Amendment rights, recently hearing oral arguments in *Pro-Choice Network v. Schenck*, 67 F.3d 377 (2d Cir. 1995), *cert. granted*, 116 S. Ct. 1260 (1996). The Court is reviewing an injunction that established a fifteen-foot buffer zone surrounding the clinic and prohibiting protestors from "sidewalk counseling" clinic patients within the buffer zone, with the exception that two "counsellors" are allowed to enter the buffer zone to counsel patients entering or leaving the clinic. *Id.* at 387. The Second Circuit held that the injunction was content-neutral, and that its provisions did not burden more speech than necessary to further the substantial governmental interests requiring the issuance of the injunction. *See id.* at 393. The Court will determine under the *Madsen* standard whether the injunction is an unconstitutional infringement on First Amendment rights. *See Pro-Choice Network*, 67 F.3d at 377.

84. *See* 18 U.S.C. § 248(c)(1)(B). The court may also award attorneys fees and costs for expert witnesses. *See id.*

85. *See id.*

III. Federal Courts' Responses to Certain Constitutional Challenges to FACE

From its inception, FACE was challenged under the Constitution in *American Life League, Inc. v. Reno*.[86] Challenges in other federal courts quickly followed.[87] To date, district courts have explicitly examined FACE's constitutionality in twelve cases.[88] The Fourth, Seventh, Eighth, and Eleventh Circuits have subsequently upheld the constitutionality of FACE.[89]

Opposition to FACE is predominantly based on several constitutional arguments: FACE surpasses the range of Congress's Commerce Clause authority;[90] it infringes on fundamental First Amendment principles because it is a content-based statute;[91] it suppresses some peaceful expres-

86. 855 F. Supp. 137 (E.D. Va. 1994), *aff'd*, 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995). The American Life League, Inc., which promotes activities "relating to the human rights of persons born or unborn," conceded that its members interfere with abortion providers and intimidate patients by attempting to persuade women not to undergo an abortion procedure. *Id.* at 139-40. The organization stated, however, that it does not advocate the use of violence to protest abortion. *See id.* at 139.

87. *See supra* note 14 (listing cases in which the constitutionality of FACE was challenged).

88. *See* Hoffman v. Hunt, 923 F. Supp. 791 (W.D.N.C. 1996); United States v. Scott, 919 F. Supp. 76 (D. Conn. 1996); United States v. Lucero, 895 F. Supp. 1421 (D. Kan. 1995); United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995); United States v. Hill, 893 F. Supp. 1034 (N.D. Fla. 1994); United States v. Dinwiddie, 885 F. Supp. 1286 (W.D. Mo. 1995), *aff'd*, 76 F.3d 913 (8th Cir.), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); United States v. Wilson, 880 F. Supp. 621 (E.D. Wis.), *rev'd*, 73 F.3d 675 (7th Cir. 1995), *cert. denied sub nom.* Skott v. United States, 65 U.S.L.W. 3242 (U.S. Oct. 7, 1996) (No. 95-1523); United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994), *aff'd sub nom.* United States v. Soderna, 82 F.3d 1370 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994); *American Life League*, 855 F. Supp. at 137.

89. *See Soderna*, 82 F.3d at 1370; United States v. Dinwiddie, 76 F.3d 913 (8th Cir.), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); United States v. Wilson, 73 F.3d 675 (7th Cir. 1995), *cert. denied sub nom.* Skott v. United States, 65 U.S.L.W. 3242 (U.S. Oct. 7, 1996) (No. 95-1523); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995); Woodall v. Reno, 47 F.3d 656 (4th Cir.), *cert. denied*, 115 S. Ct. 2577 (1995); American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995).

90. *See Soderna*, 82 F.3d at 1373; *Dinwiddie*, 76 F.3d at 919; *Wilson*, 73 F.3d at 684; *Cheffer*, 55 F.3d at 1519; *American Life League*, 47 F.3d at 647; *Hoffman*, 923 F. Supp. at 805; *Scott*, 919 F. Supp. at 78-79; *Lucero*, 895 F. Supp. at 1423; *White*, 893 F. Supp. at 1432; *Hill*, 893 F. Supp. at 1036; *Riely*, 860 F. Supp. at 707; *Council for Life Coalition*, 856 F. Supp. at 1431; *see also infra* notes 95-134 and accompanying text (examining Commerce Clause challenges to FACE).

91. *See Soderna*, 82 F.3d at 1374-75; *Dinwiddie*, 76 F.3d at 921; *Cheffer*, 55 F.3d at 1518; *American Life League*, 47 F.3d at 648; *Lucero*, 895 F. Supp. at 1424; *White*, 893 F. Supp. at 1435-36; *Riely*, 860 F. Supp. at 700-02; *Cook*, 859 F. Supp. at 1010; *Council for Life Coalition*, 856 F. Supp. at 1427; *see also infra* notes 177-236, 278-323 and accompanying

sive conduct;[92] and finally, it is overbroad[93] and vague.[94] The following section will address only the allegation that Congress exceeded its Commerce Clause authority when enacting FACE, and the charge that FACE chills free speech because its language is both overbroad and vague. A full discussion of the argument that FACE violates the First Amendment, because it is a content-based regulation and also restricts some types of protected expressive conduct, is contained in Part V.

A. The Commerce Clause and its Application

1. Congress's Commerce Clause Authority to Regulate Interstate Commerce

One of the constitutional challenges to FACE is that Congress lacked the authority to pass the statute.[95] Since 1937, the Court has affirmed Congress's extensive regulation under the Commerce Clause, provided that there is a rational basis for finding that the regulated activity substantially affects interstate commerce.[96] Congress may regulate three cat-

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text (discussing content-based regulations and applying appropriate First Amendment analysis to FACE).

92. *See Soderna*, 82 F.3d at 1375; *Woodall*, 47 F.3d at 657; *American Life League*, 47 F.3d at 654; *Hoffman*, 923 F. Supp. at 820; *Lucero*, 895 F. Supp. at 1424; *White*, 893 F. Supp. at 1435-36; *Riely*, 860 F. Supp. at 700; *Council for Life Coalition*, 856 F. Supp. at 1428-29; *see also infra* notes 158-76, 260-332 and accompanying text (illustrating the proper First Amendment methodology when a statute incidentally affects some protected expressive conduct and applying such analysis to FACE).

93. *See Dinwiddie*, 76 F.3d at 921; *Cheffer*, 55 F.3d at 1518; *Woodall*, 47 F.3d at 657-58; *American Life League*, 47 F.3d at 652; *Hoffman*, 923 F. Supp. at 802; *Lucero*, 895 F. Supp. at 1424-25; *White*, 893 F. Supp. at 1437; *Riely*, 860 F. Supp. at 704; *Council for Life Coalition*, 856 F. Supp. at 1428-29; *see also infra* notes 139-43 and accompanying text (providing the overbreadth doctrine and its application to FACE).

94. *See Soderna*, 82 F.3d at 1376-77; *Dinwiddie*, 76 F.3d at 921; *Cheffer*, 55 F.3d at 1518; *Woodall*, 47 F.3d at 657-58; *American Life League*, 47 F.3d at 652; *Hoffman*, 923 F. Supp. at 802; *Lucero*, 895 F. Supp. at 1424-25; *White*, 893 F. Supp. at 1437; *Riely*, 860 F. Supp. at 704; *Council for Life Coalition*, 856 F. Supp. at 1428; *see also infra* notes 144-51 and accompanying text (discussing the void for vagueness doctrine and challenges that FACE is representative).

95. *See supra* note 90 (citing cases where a Commerce Clause challenge to FACE has been alleged).

96. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). Granting an enormous amount of discretion and power to Congress, the Court in *NLRB v. Jones & Laughlin Steel Corp.* held that the regulation of activities that have "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" is within the scope of Congress's power under the Commerce Clause. *Id. But see* United States v. Lopez, 115 S. Ct. 1624, 1634 (1995) (rejecting a statute as beyond the scope of Congress's Commerce Clause powers because the link between the regulated activity and interstate commerce was too attenuated).

egories of behavior[97] through its commerce power: (1) activities that use the channels of interstate commerce;[98] (2) activities that involve instrumentalities of, or persons and things in, interstate commerce, even if the impact originates from intrastate activities;[99] and (3) activities that substantially affect interstate commerce.[100] Therefore, one way that a statute enacted under the Commerce Clause is valid is if Congress rationally finds that the regulated activity substantially affects interstate commerce, and that the means chosen are reasonably adapted to achieve permissible ends.[101] This "rational basis" test provides the proper standard of judicial review when Congress exercises power under the Commerce Clause.[102]

Although Congress is not required to provide formal findings as to the substantial effects a particular activity has on interstate commerce, such findings assist judicial review when the connection to interstate commerce is ambiguous or challenged.[103] If Congress finds that a regulated activity affects interstate commerce, courts must defer to that finding, provided that it is supported by a "rational basis."[104] A landmark Commerce Clause case recently decided by the Court, however, must be taken into account when engaging in the rational basis test.[105]

United States v. Lopez[106] dealt a sharp and surprising blow to Congress's authority under the Commerce Clause,[107] and must be taken into

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

98. *See id.* at 1629; *see also Heart of Atlanta Motel*, 379 U.S. at 256-57 (upholding the constitutionality of Title II of the Civil Rights Act of 1964 which regulated establishments using goods and services that have travelled through the channels of interstate commerce).

99. *See Lopez*, 115 S. Ct. at 1629; *see also* Perez v. United States, 402 U.S. 146, 150 (1971) (noting that the second category includes protection of persons or things in interstate commerce).

100. *See Lopez*, 115 S. Ct. at 1629-30; *see also Jones & Laughlin Steel*, 301 U.S. at 37-38 (upholding federal regulation of labor disputes under the Commerce Clause because strikes or other disruptions could substantially burden interstate commerce despite the local nature of the activities).

101. *See Hodel*, 452 U.S. at 276.

102. *See id.* at 276-77.

103. *See Lopez*, 115 S. Ct. at 1631-32 (noting that although Congress is not required to make specific findings in order to properly enact legislation, such findings are helpful for courts when evaluating the "legislative judgment that the activity in question substantially affected interstate commerce").

104. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981).

105. *See* United States v. Lopez, 115 S. Ct. 1624 (1995); *infra* notes 106-16 and accompanying text (discussing the impact of *Lopez* on Commerce Clause jurisprudence).

106. 115 S. Ct. 1624 (1995).

107. Several commentators have acknowledged the significance of *Lopez*. *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995) (pronouncing *Lopez* a "revolutionary and long overdue revival" of the constitutional principle that Congress has limited enumerated power to legislate); Alan T. Dickey, Recent Development, United States v. Lopez:

account when analyzing the Commerce Clause authority of Congress.[108] In *Lopez*, the Court struck down a law banning the possession of a gun within one thousand feet of a school as unconstitutional because the law exceeded the scope of Congress's Commerce Clause power.[109] In order for the statute to withstand the Court's scrutiny, it had to be determined that Congress was properly regulating an activity under the Commerce Clause, which rested upon whether a rational basis existed for concluding that firearm possession in a school zone substantially affected interstate commerce.[110]

Neither the statute at issue in *Lopez* nor its legislative history contained legislative findings regarding the interstate commercial effects of gun possession in school zones.[111] Furthermore, the statute did not require the gun to have moved in the stream of interstate commerce.[112] Absent a congressional finding supporting a rational basis for federal reg-

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The Supreme Court Reasserts The Commerce Clause as a Limit on the Powers of Congress, 70 TUL. L. REV. 1207, 1225 (1996) (explaining that the opinion aims to rein in Congress's expansive power to regulate under the Commerce Clause); John P. Frantz, Recent Development, *The Reemergence of the Commerce Clause as a Limit on Federal Power:* United States v. Lopez, *115 S. Ct. 1624*, 19 HARV. J.L. & PUB. POL'Y 161, 161 (1995) (advocating that the Court in *Lopez* reaffirmed the Framer's intent of establishing a government of enumerated powers).

108. *Lopez*, 115 S. Ct. at 1632 (questioning Congress's findings and implicitly limiting Congress's power to legislate under the Commerce Clause). Decisions on FACE's constitutionality under the Commerce Clause that have been reached after *Lopez* have explicitly discussed the impact of *Lopez*. *See* United States v. Dinwiddie, 76 F.3d 913, 920 (8th Cir.) (finding that when Congress drafted FACE, it provided a causal link between the regulated commercial conduct and interstate commerce), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); United States v. Wilson, 73 F.3d 675, 683 (7th Cir. 1995) (recognizing that unlike the statute in *Lopez*, Congress made legitimate findings in FACE to support its authority to legislate), *cert. denied sub nom.* Skott v. United States, 65 U.S.L.W. 3242 (U.S. Oct. 7, 1996) (No. 95-1523); Cheffer v. Reno, 55 F.3d 1517, 1520-21 (11th Cir. 1995) (noting that unlike the statute in *Lopez*, FACE's enactment was supported by a rational basis); United States v. Scott, 919 F. Supp. 76, 79 (D. Conn. 1996) (rejecting the contention that *Lopez* holds that Congress may only regulate commercial activities under the Commerce Clause, and finding that unlike the statute in *Lopez*, FACE regulates a commercial activity); United States v. White, 893 F. Supp. 1423, 1433 (C.D. Cal. 1995) (stating that, unlike the statute in *Lopez*, Congress made specific findings of the many ways in which the violence and obstruction impacting clinic patients, providers, and staff affected interstate commerce).

109. *Lopez*, 115 S. Ct. at 1626 (holding that the Gun Free School Zone statute exceeded Congress's authority because it "neither regulates a commercial activity nor contains a requirement that the gun possession be connected in any way to interstate commerce").

110. *See Lopez*, 115 S. Ct. at 1629. The Court openly admitted that its precedent has been less than clear when dealing with the third category of Commerce Clause power, particularly as to the weight of the effect the regulated activity must have on interstate commerce. *See id.* at 1630.

111. *See id.* at 1631.

112. *See id.*

ulation of gun possession within one thousand feet of a school, the Court in *Lopez* looked for a logical connection to interstate commerce that was "visible to the naked eye."[113] Because no such connection was obvious, the statute failed the rational basis test.[114] This decision pointedly sends a message to Congress that the Court will no longer rubber-stamp an exercise of Commerce Clause authority to enact legislation having a questionable impact on interstate commerce, especially when Congress regulates a purely intrastate activity and fails to make findings of the activity's substantial effect on interstate commerce.[115] The Court made clear, however, that it will look favorably upon legislative findings that firmly establish that the activity Congress seeks to regulate is commercial or economic in nature.[116]

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113. *Id.* at 1632.

114. *See id.* The government argued that possession of a gun within a school zone substantially affected interstate commerce through a "costs of crime" analysis. *See id.* The argument is as follows: because the cost of crime in society is so high, insurance companies filter the costs out to the nation. *See id.* In addition, violent crime inhibits interstate travel to places with high crime rates. *See id.* Finally, the availability of guns near schools hampers the educational process because children are afraid to go to school. *See id.* If a child does manage to attend classes, the fear is not left at the schoolyard gate; instead it creeps into the classroom learning environment and, as a result, the child cannot learn to his or her fullest capacity. *See id.* This effect on children translates into low national productivity and educational levels, stifling the nation's growth. *See id.*

The Court refused to find that the "costs of crime" analysis demonstrated a substantial effect on interstate commerce, reasoning that if it found Commerce Clause authority in *Lopez*, Congress effectively would be granted the authority to regulate almost every aspect of a citizen's life that tangentially could be related to economic productivity. *See id.*

115. *See* Dickey, *supra* note 107, at 1223 (maintaining that the Court's distinction between economic activity, which easily produces a more direct effect on interstate commerce, and noneconomic activity, which has a more indirect and subtle result, can be viewed as "a new restatement" of Commerce Clause jurisprudence); Frantz, *supra* note 107, at 167-68 (declaring that the "clearest principle" gained from *Lopez* is that Congress has near plenary power to regulate commercial activities).

116. *See Lopez*, 115 S. Ct. at 1631. Congress is still not required to make legislative findings to establish its Commerce Clause authority. *See id.* ("Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."); United States v. Perez, 402 U.S. 146, 156 (1971) (stating that nothing in the decision should be taken to infer that Congress must make concrete findings when legislating under its Commerce Clause authority).

As recognized by the Supreme Court, the statute in *Lopez* did not contain any legislative findings linking the activity being regulated, possession of a gun within 1000 feet of a school zone, to having a substantial effect on interstate commerce. *Lopez*, 115 S. Ct. at 1631. The government's contention that the threat of gun possession in or near schools suppresses the learning process, leading to a less educated population that consequently cannot effectively compete in the national and international economy, is, at best, tenuous. *See id.* at 1632.

2. *A Proper Exercise of Commerce Clause Power*

Congress's purported authority to enact FACE derives from the Commerce Clause[117] and section five of the Fourteenth Amendment.[118] Congress obtained its Commerce Clause authority to enact FACE from category three, regulating an activity that substantially affects interstate commerce, by finding that the violent and obstructionist activities sur-

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

118. U.S. CONST. amend. XIV, § 5. ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). *See supra* note 49 (providing the language of the first section of the Fourteenth Amendment). Professor Laurence H. Tribe testified, "by its terms . . . the fourteenth amendment restricts only State action, not purely private conduct." *Hearing*, *supra* note 28, at 98 (statement of Professor Laurence H. Tribe). He urged, however, that Congress has authority to regulate some private conduct under the Amendment, "once Congress concludes that States and municipalities, acting alone, will be unable to provide sufficient protection against private acts that threaten the full enjoyment of Federal constitutional rights." *Id.* at 99. The court in *United States v. White*, after quoting Professor Tribe's testimony and checking the congressional findings that elucidated the inability of state and local governments to adequately respond to violence and obstructions surrounding reproductive health clinics, concluded that it appeared that Congress had additional authority to enact FACE under the Fourteenth Amendment. *See* 893 F. Supp. 1423, 1434-35 (C.D. Cal. 1995).

In reviewing the Commerce Clause issue, most courts agreed that Congress had Commerce Clause authority to enact FACE and, therefore, did not reach the issue of whether the power existed under the Fourteenth Amendment. *See* United States v. Dinwiddie, 76 F.3d 913, 921 n.4 (8th Cir.) (explaining that because it held that FACE was within Congress's Commerce Clause authority, it need not consider whether Congress also had the authority to enact FACE under section five of the Fourteenth Amendment), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); American Life League, Inc. v. Reno, 47 F.3d 642, 647 (4th Cir.) (finding proper Commerce Clause authority, and declining to address the argument that Congress lacked authority under the Fourteenth Amendment to enact FACE), *cert. denied*, 116 U.S. 55 (1995); United States v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995) (same).

But see Hoffman v. Hunt, 923 F. Supp. 791, 819-20 (W.D.N.C. 1996) (finding that Congress lacked the authority under section five of the Fourteenth Amendment and noting that the Fourteenth Amendment only applies to state action, although former justices of the Supreme Court have put forth the view that it does not); United States v. Wilson, 880 F. Supp. 621, 634-35 (E.D. Wis.) (interpreting Supreme Court precedent as strictly maintaining that the Fourteenth Amendment only applies to state conduct), *rev'd*, 73 F.3d 675 (7th Cir. 1995), *cert. denied sub nom.* Skott v. United States, 65 U.S.L.W. 3242 (U.S. Oct. 7, 1996) (No. 95-1523). The district court in *Wilson* found that because FACE regulates private conduct, "FACE is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment." *Id.* at 636; *see also* Katherine A. Hilber, Note, *Constitutional FACE-Off: Testing the Validity of the Freedom of Access to Clinic Entrances Act*, 72 U. DET. MERCY L. REV. 143, 167 (1994) (asserting that Congress's authority to enact FACE under the Fourteenth Amendment is questionable, because protected rights such as abortion and interstate travel "may not be directly violated by the actions of the protestors . . . no rights [would] exist that are protect[able] under the Fourteenth Amendment in the clinic context").

rounding reproductive health clinics substantially affected interstate commerce.[119] Through a series of legislative findings, Congress determined that many women travel to different states to obtain abortions because the clinics where they live have been subjected to clinic blockades, or few abortion providers exist due to intimidation by protestors.[120] Consequently, women often travel across state lines to obtain abortions and are then physically obstructed from entering a clinic.[121] Congress also found that the interstate commercial activities of abortion clinics were adversely affected by violent and obstructive activities.[122] Thus, Congress concluded that it had authority to enact FACE pursuant to the Commerce Clause.[123]

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119. *See* HOUSE CONFERENCE REPORT, *supra* note 2, at 724 (finding that the anti-abortion activity forced patients to travel interstate to receive unimpeded access to reproductive health services, and that the conduct also interfered with the commercial activities of clinic operators and their facilities). The government contends that it has power under both the second and third categories of authority to regulate interstate commerce. Brief for the United States as Appellee at 41-42, United States v. Hatch, *sub nom.* United States v. Soderna, 82 F.3d 1370 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141). The government has attested that FACE was properly enacted under the power to protect persons or things in interstate commerce, which is located in the second category. *See id.* Citing to congressional findings that many patients and providers engage in interstate commerce for abortion services, and that medical supplies and equipment are supplied from other states, the government advocated that these findings were sufficient to support the application of the second category. *See id.* at 42.

At least two circuit courts have left open the possibility of congressional authority under the second category of behavior: regulating the instrumentalities of commerce, or persons or things in interstate commerce. *See Dinwiddie*, 76 F.3d at 919-20; *Wilson*, 73 F.3d at 680. The Eighth Circuit in *Dinwiddie* found that FACE's protection of patients and staff, who moved "in interstate commerce" to obtain and provide abortions, was proper under Congress's authority to protect persons and things in interstate commerce, "even though the threat may come only from intrastate activities." 76 F.3d at 919-20 (quoting United States v. Lopez, 115 S. Ct. at 1629).

120. *See* SENATE REPORT, *supra* note 2, at 31; *see also Hearing*, *supra* note 28, at 97 (statement of Laurence H. Tribe) ("It is indisputable that clinics that provide abortions necessarily operate within the stream of interstate commerce and purchase goods and services that move in interstate commerce.").

121. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 275 (1993) (plurality opinion) (accepting the district court's finding that a substantial number of women travel interstate to reach abortion clinics, but finding it insufficient to support a claim under § 1985(3) for private interference with a constitutional right to interstate travel); SENATE REPORT, *supra* note 2, at 31; *Hearing*, *supra* note 28, at 16 (statement of Attorney General Janet Reno) (maintaining that "it is well-established" that many reproductive health clinics serve "significant numbers" of out-of-state patients).

122. *See* HOUSE CONFERENCE REPORT, *supra* note 2, at 724; *supra* notes 2-10 and accompanying text (detailing the effect of violence and blockades perpetrated against abortion providers and patients).

123. *See* HOUSE CONFERENCE REPORT, *supra* note 2, at 724; SENATE REPORT, *supra* note 2, at 3-17.

a. FACE Survives the Rational Basis Test

Courts have found that FACE withstands the first prong of the rational basis test,[124] even in light of *Lopez*.[125] Congress carefully examined clinic entrance blockades and the surrounding violence, and rationally determined that the problem warranted federal legislation to protect the constitutional rights of women, public health and safety, and interstate commerce.[126] In stark contrast to the statute in *Lopez*, FACE contains legislative findings of the substantial effect that violent anti-abortion activity has on interstate commerce.[127] These congressional findings pro-

124. *See Soderna*, 82 F.3d at 1379; U.S. v. Dinwiddie, 76 F.3d 913, 919-20 (8th Cir. 1996); United States v. Wilson, 73 F.3d 675, 681-83 (7th Cir. 1995); American Life League, Inc. v. Reno, 47 F.3d 642, 647 (4th Cir.) (finding that Congress "rationally concluded that the activity regulated by FACE affects interstate commerce"), *cert. denied*, 116 S. Ct. 55 (1995).

125. *See* Cheffer v. Reno, 55 F.3d 1517, 1520-21 (11th Cir. 1995) (upholding Congress's Commerce Clause power to pass FACE after examining the *Lopez* decision, and finding that FACE is constitutional because of extensive legislative findings linking the regulated violent anti-abortion activity and clinic blockades to interstate commerce); United States v. White, 893 F. Supp. 1423, 1433-34 (C.D. Cal. 1995) (finding that Congress's authority to pass FACE was untouched after *Lopez*).

But see Hoffman v. Hunt, 923 F. Supp. 791, 819 (W.D.N.C. 1996) (finding FACE unconstitutional on Commerce Clause grounds). The court found that the statutes in *Lopez* and FACE were extremely similar, in that they both attempted to regulate conduct that was neither commercial nor economic in nature. *See id.* at 818. The court reasoned that the Court in *Lopez* held that congressional authority to regulate activity that has a substantial effect on interstate commerce is limited to commercial or economic activities. *See id.* The court dismissed congressional findings that anti-abortion protests had substantially affected the reproductive health business and held that FACE was unconstitutional. *See id.* at 816, 819.

In *United States v. Wilson*, the district court employed the same reasoning. 880 F. Supp. 621, 630-33 (E.D. Wis.), *rev'd*, 73 F.3d 675 (7th Cir. 1995). In a subsequent appeal, the Seventh Circuit reversed the district court's decision because the district court failed to address whether the regulated activities substantially affected interstate commerce. *Wilson*, 73 F.3d at 681. By failing to do so, and by refusing to defer to Congress's finding under the rational basis test to Congress's findings, the district court created "a less deferential standard." *Id.* The Court of Appeals determined that this standard contradicted Supreme Court precedent. *See id.*

126. *See* SENATE REPORT, *supra* note 2, at 11-21; *see also American Life League*, 47 F.3d at 647. A district court in California tactfully highlighted a major defect of the *Wilson* district court decision, which held that Congress had exceeded Commerce Clause authority, by stating: "with all due respect, it does appear that the [*Wilson*] court substituted its own findings for those of Congress." United States v. White, 893 F. Supp. 1423, 1434 (C.D. Cal. 1995). It is not appropriate, the court explained, to ignore Congress's "institutional competence" in locating and addressing problems that it has decided are nationwide in scope and consequently are in need of federal attention. *Id.*

127. *See* HOUSE CONFERENCE REPORT, *supra* note 2, at 724 (finding that violent, threatening, and destructive conduct engaged in by anti-abortion activists interferes with interstate commercial activities of abortion clinic providers); *Hearing*, *supra* note 28, at 16-17 (statement of Attorney General Janet Reno) (emphasizing that providing abortion services is commerce and the activities engaged in by anti-abortion groups have directly af-

vide a rational basis for the conclusion that the activity FACE regulates, the physical safety of those involved in providing and receiving reproductive health services, is commercial and interstate in nature.[128] Moreover, the legislative record compiled by Congress supports its summary that "violence, threats of force, and physical obstructions aimed at persons seeking or providing reproductive health services" substantially affect interstate commerce.[129]

FACE also satisfies the second component of the rational basis test by implementing a reasonable response to the problem by regulating, through a motive requirement, only the types of violent and obstructive conduct that Congress found affected interstate commerce, while still al-

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fected these services); *supra* notes 2-11, 68 and accompanying text (describing the outbreak of violence directed at clinics and their staff and providing illustrations of Congress's findings that the types of anti-abortion activity surrounding reproductive health clinics impact clinic business and commercial operations).

128. *See Wilson*, 73 F.3d at 684 (supporting the proposition that FACE is distinguishable because Congress made specific findings connecting the regulated activity to interstate commerce); *Cheffer*, 55 F.3d at 1520 (accepting Congress's findings that FACE regulates activity that "substantially affects" interstate commerce); *see also supra* note 68 and accompanying text (providing Congress's findings that illustrate the types of activity surrounding reproductive health clinics which substantially affect interstate commerce).

Furthermore, Congress found that women engage in interstate travel to receive reproductive health services. *See* HOUSE REPORT, *supra* note 4, at 703; SENATE REPORT, *supra* note 2, at 31; *Hearing*, *supra* note 28, at 16 (statement of Attorney General Janet Reno) (noting that a federal district court in Kansas found that about forty-four percent of patients at a clinic were non-residents, and that a federal district court in Virginia found that a substantial number of patients had crossed state lines to obtain abortion services).

But see Hilber, *supra* note 118, at 164-65 (stating that the activity that FACE proscribes is almost entirely intrastate in nature, and is already regulated by the states as either criminal or tortious conduct); *cf.* Frantz, *supra* note 107, at 164 (stating that the statute in *Lopez* futilely attempted to regulate actions that are "purely criminal in nature and not tied to commerce or economic enterprise of any sort").

129. *See* HOUSE REPORT, *supra* note 4, at 703-07; SENATE REPORT, *supra* note 2, at 3-17, 31-32; *supra* notes 2-11, 68, and accompanying text (discussing legislative findings connecting the types of conduct engaged in by anti-abortion activists to a detrimental economic effect experienced by clinics, thereby substantially affecting interstate commerce); *see also American Life League*, 47 F.3d at 647. The Fourth Circuit supported its finding of Congress's rational basis by noting that Dr. Gunn, who was murdered by an anti-abortion activist in 1993, provided abortion services in several states, that medical supplies often move in interstate commerce, and that clinics often are shut down due to blockades and destruction of property. *See id.*

The intimidation and violence has taken a noticeable toll on the number of doctors and clinics willing to perform abortions. *See* HOUSE REPORT, *supra* note 4, at 705. The House found that "[t]he facts are that only 17 percent of U.S. counties have an abortion provider and that clinic owners face a shortage of doctors willing to perform abortions." *Id.* Indeed, as a direct result of anti-abortion tactics such as blockades, invasions, and sabotage, clinics are forced to curtail or completely cease providing abortion services. *See* SENATE REPORT, *supra* note 2, at 31.

lowing ample avenues for peaceful demonstrations.[130] Courts have concluded that the regulatory means that Congress chose were well-suited to accomplish the permissible ends of FACE:[131] (1) protecting the flow of commerce; (2) protecting patient access to reproductive health services; (3) protecting women's constitutional right to obtain an abortion; (4) protecting clinic employees' safety; and (5) protecting clinics from damage and sabotage.[132] Thus, FACE's specific congressional findings linking the prohibited conduct's effect on interstate commerce enabled the statute to survive rational basis review.[133] In sum, the judicial consensus is that FACE's criminal and civil penalties are reasonably adapted to meet the goal of preventing violent behavior aimed at abortion providers and the obstructive tactics that block access to clinic entrances.[134]

B. FACE is Neither an Overbroad Nor Vague Statute

FACE is further challenged as both overbroad and vague, and therefore unconstitutional because of its "chilling effect" on free speech.[135] A

130. *See* American Life League, Inc. v. Reno, 47 F.3d 642, 647 (4th Cir.) (finding Congress chose regulatory means which were reasonably adapted to deter violent and obstructive activities aimed at abortion clinics, providers, and patients), *cert. denied.*, 116 S. Ct. 55 (1995). See generally *supra* notes 125-29, and *infra* notes 131-34 (providing cases that find Congress has proper Commerce Clause authority to enact FACE).

131. *See American Life League*, 47 F.3d at 647 (recognizing that the civil remedies and criminal penalties are specifically intended and tailored to prevent the violent, obstructive, and destructive conduct that prompted Congress to enact FACE).

132. *See id.* (finding that Congress's legitimate interests in passing FACE and the means by which it crafted the legislation provide a rational basis for Congress's Commerce Clause authority).

133. *See id.* The district court in *United States v. Hill*, 893 F. Supp. 1034 (N.D. Fla. 1994), also found persuasive Congress's conclusion that uniform legislation was needed because "'a patchwork of State and local laws is inherently inadequate to address what is a nationwide, interstate phenomenon.'" *Id.* at 1037 (quoting SENATE REPORT, *supra* note 2, at 19).

134. As stated by Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit, "[T]his is a statute that really does seek to remove a significant obstruction, in rather a literal sense, to the free movement of persons and goods across state lines." United States v. Soderna, 82 F.3d 1370, 1373 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141).

135. The overbreadth and vagueness arguments asserted by opponents of FACE are that "'[t]housands of persons who daily engage in peaceful activities around abortion clinics now risk arrest'" because: (1) FACE proscribes too much protected speech; and (2) the conduct prohibited by FACE is not clear to the average person and therefore will lead to confusion about what is protected. *American Life League*, 47 F.3d at 652-53 (quoting Brief for Appellants at 29). Courts faced with these constitutional challenges do not agree. *See Soderna*, 82 F.3d at 1377 (finding that FACE is not void for vagueness); United States v. Dinwiddie, 76 F.3d 913, 924 (8th Cir.) (holding that FACE is neither overbroad in its application nor are its terms vague), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); *American Life League*, 47 F.3d at 653 (holding that FACE is constitutional because it "speaks in clear common words" and provides definitions for important terms); Council

chilling effect may occur when people are intimidated by a statute because they may not understand what is and is not prohibited, and consequently forego exercising protected speech and expressive conduct.[136] Because the interests in prohibiting a chilling effect on free speech are much the same in overbroad statutes as in vague statutes, courts tend to analyze the doctrines together.[137] The Supreme Court has stated that when examining both challenges, however, courts should consider the overbreadth argument first, and then inquire whether the statute is unconstitutionally vague.[138]

1. No Real and Substantial Overbreadth

A statute will be held void on its face for overbreadth if it "does not aim specifically at evils within the allowable area of State control but .... sweeps within its ambit other activities" that are protected by the First Amendment guarantees of free speech or freedom of association.[139] When expressive conduct and not just pure speech is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[140] The Supreme Court has noted that the rationale behind the dual requirements of "real"

for Life Coalition v. Reno, 856 F. Supp. 1422, 1429 (S.D. Cal. 1994) (holding that FACE is not unconstitutionally vague because key terms are defined with specificity).

136. *See* Arnett v. Kennedy, 416 U.S. 134, 229 (1974) (Marshall, J., dissenting) (explaining that a chilling effect prevents people from either speaking or acting because of fear of violating the regulation). Justice Marshall's dissent in *Arnett* propounded upon the evils of an unconstitutionally overbroad or vague statute. *See id.* at 227-31. He described such a statute as a Sword of Damocles, the value of which "is that it hangs—not that it drops." *Id.* at 231. He further recognized that the unusual standing application in such a case "is not on the individual actor before the court but on others who may forego protected activity rather than run afoul of the statute's proscriptions." *Id.* at 229; *see also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852-58 (1970) (examining the chilling effect rationale behind overbreadth and vagueness jurisprudence) [hereinafter *Overbreadth Doctrine*].

137. *See* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (reviewing a statute that regulated expression and observing that when vagueness and overbreadth are combined, "the hazard of loss or substantial impairment of those precious [First Amendment] rights may be critical").

138. *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982). The Court announced that when dealing with both facial challenges to a statute, determining whether a statute is substantially overbroad is the first step. *See id.* at 494. If the statute is not overbroad, then the examination should continue as to whether the statute is impermissibly vague. *See id.* at 494-95.

139. Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

140. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); *see* Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987) (finding that a statute regulating disruptive expressive conduct in the Los Angeles airport terminal was overbroad because it prohibited *all* free speech activity in the terminal including talking, reading, and wearing slogans on buttons—whether or not it was disruptive).

and "substantial" overbreadth is that because the doctrine itself is such "strong medicine" it should not be used lightly to invalidate a statute.[141]

FACE's regulation of expressive conduct cannot be construed as real and substantially overbroad because the statute's proscription is narrowly limited, by only prohibiting physical obstruction with the intent to injure, intimidate, or interfere with a person who is either providing or obtaining reproductive health services.[142] Some courts simply find that because FACE is directed at both unprotected conduct and speech, such as physical obstruction or threats, the First Amendment interests in curbing overbreadth are not even implicated.[143] Just because the statute withstands

141. *Broadrick*, 413 U.S. at 613. The Court recognized that the overbreadth doctrine should be used as a last resort and will not be employed "when a limiting construction has been or could be placed on the challenged statute." *Id.*; *see also Overbreadth Doctrine*, *supra* note 136, at 918. The author asserts that the application of substantial overbreadth depends on the type of statute at issue, and discerns three types of overbroad statutes that have First Amendment considerations. *See id.* The first category contains "censorial" statutes that limit certain viewpoints on matters of public debate; the second group encompasses "inhibitory" statutes, "which impinge on expressive and associational conduct but whose impact tends to be neutral as to viewpoints sought to be advocated;" and finally, "remedial" statutes that restrict certain free speech within the concerns of the First Amendment. *Id.* The author concludes that the Court is less tolerant of censorial laws, for instance, criminal syndicalism laws, and therefore such a regulation does not need to be as real and substantially overbroad as an inhibitory law, for example, libel, to be struck down. *See id.* A remedial statute is often given the most deference; examples are lobbying and campaign contribution limitations. *See* NOWAK & ROTUNDA, *supra* note 83, § 16.8, at 946 (explaining that the regulation in *Broadrick*, which withstood an overbreadth challenge was a remedial law, in that it regulated the political activities of state employees).

142. 18 U.S.C. § 248(a)(1) (1994); *see* American Life League, Inc. v. Reno, 47 F.3d 642, 653 (4th Cir.) (observing that FACE was not substantially overbroad "in relation to its legitimate scope of outlawing violence and barriers to access"), *cert. denied*, 116 S. Ct. 55 (1995); United States v. White, 893 F. Supp. 1423, 1437 (C.D. Cal. 1995) (recognizing that FACE's regulation of physical obstruction is narrowly tailored).

143. *See* Riely v. Reno, 860 F. Supp. 693, 704 (D. Ariz. 1994) (maintaining that neither physical obstruction of access to a building, nor threats of bodily harm are protected speech and therefore that FACE is not unconstitutionally overbroad); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1429 (S.D. Cal. 1994) (finding that plaintiffs did not establish that FACE reached a "substantial amount of protected conduct"); *see also infra* notes 208-10 (threats), 267-68 (physical obstruction) and accompanying text (discussing Court precedent that illustrates that threats of force and physical obstruction are not protected conduct or speech under the First Amendment). *But see* Hoffman v. Hunt, 923 F. Supp. 791, 802-03 (W.D.N.C. 1996) (pronouncing FACE overbroad). In *Hoffman*, the court found that FACE violated the First Amendment because it "prohibits speech that is 'intimidating' to someone because it creates a 'reasonable apprehension of bodily harm to him-or herself or another,' such that the application of the statute hinges on the subjective reaction that speech elicits from its listener and is therefore unconstitutional." *Id.* The district court further asserted that FACE's prohibition against threats that create a reasonable apprehension of bodily harm in an individual impermissibly prohibited speech outside the category of "fighting words." *Id.* Because FACE restricts some protected free speech, it is therefore unconstitutionally overbroad. *See id.*; *see also* Michael Stokes Paulsen & Michael W. McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 VA. J.

an overbreadth challenge, however, does not ensure it is not void for vagueness.

2. *Providing Clear Definitional Standards of Prohibited Conduct*

A statute is void for vagueness from a due process perspective if a person of common intelligence must guess as to its meaning.[144] From a First Amendment vantage, the void for vagueness doctrine implicates not only the due process concepts of fair notice and warning, but also clear guidelines to ensure non-discriminatory enforcement.[145] In short, the void for vagueness doctrine protects both due process and free speech rights.[146]

SOC. POL'Y & L. 261, 276 (1994) (stating that FACE's language substantially limits protected speech and expressive conduct, such as face-to-face persuasion and peaceful picketing, which thereby severely chills free speech and is, consequently, overbroad). The court in *Riely* addressed the line of argument advanced by Paulsen & McConnell, and insisted that no provision of FACE "could possibly be construed to prohibit mere 'sidewalk counseling'" and that furthermore, the only type of persuasion prohibited by FACE is threat of bodily harm. 860 F. Supp. at 704. In short, FACE presents no "real" risk of substantial overbreadth. *Id.*

One court has also posited that even if FACE reaches expressive activity, it is an allowable regulation of the time, place, and manner of specific conduct. *See* United States v. Brock, 863 F. Supp. 851, 865-66 (E.D. Wis. 1994), *aff'd sub nom.* United States v. Soderna, 82 F.3d 1370 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141). Supreme Court precedent allows for reasonable time, place, and manner restrictions of protected speech and expressive conduct as long as the restrictions are "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); *see supra* note 83 (providing a cursory time, place, and manner discussion). Because the court found that FACE's regulation of expressive conduct was a permissible time, place, and manner restriction, the court explained that "FACE is not only not 'substantially' overbroad, it is not overbroad at all." *Brock*, 863 F. Supp. at 866.

144. *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (holding that criminal statutes must be clear enough to inform the public of the exact types of conduct which are prohibited).

145. *See* Smith v. Goguen, 415 U.S. 566, 572-73 (1974) (holding that a flag-misuse statute is void for vagueness because the phrase "treats contemptuously" does not create an ascertainable standard of conduct either for the citizen who must comply or the public official who must enforce); NOWAK & ROTUNDA, *supra* note 83, § 16.9, at 950 (explaining that when there are no clear standards of enforcement, there is a danger of discriminatory and selective enforcement, which is especially dangerous when a fundamental right is involved); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 76-77 (1960) (observing that a substantial problem, in addition to fair notice and warning, and chilling free speech, may occur with a vague statute, such that language may empower "an administrative or executive authority to fix, by unmistakably specific action" whether particular conduct as defined is unlawful) [hereinafter *Vagueness Doctrine*].

146. *See Goguen*, 415 U.S. at 573 (recognizing that when the First Amendment is at issue, the void for vagueness doctrine "demands a greater degree of specificity"); *Connally*, 269 U.S. at 391 (maintaining that when a criminal statute's terms are too vague, the due process requirement of fair notice is violated); *Vagueness Doctrine*, *supra* note 145, at 75-78 (recognizing that protecting First Amendment and other Bill of Rights freedoms are im-

Congress specifically defined FACE's key terms, including "interfere with," "intimidate," and "physical obstruction."[147] These terms are prevalent in the United States Code and are ones that the Supreme Court has not held unconstitutionally vague[148] or overbroad.[149] Because of the careful drafting and definitions provided in the statute, a person of ordinary intelligence could read FACE and understand its meaning and application.[150] There is no "chilling" of free speech when ordinary people of average intelligence can understand the meaning of FACE's operative words, which have been defined and repeatedly used in state and federal statutes that have been upheld as constitutional, and thus can compre-

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plicit in, but not limited to, the void-for-vagueness doctrine; noting that two different types of void-for-vagueness decisions exist: (1) lack of fair warning or notice of prohibited conduct; and (2) the threat that the vagueness of the statute may suppress free speech).

147. 18 U.S.C. § 248(e)(2),(3),(4); *see supra* note 73 (providing FACE's definition of important terms).

148. The statute at issue in *Cameron v. Johnson* prohibited picketing that obstructed or unreasonably interfered with ingress or egress to any county courthouse. 390 U.S. 611, 616 (1968). The Court observed that the word "unreasonably" "is a widely used and well understood word, and clearly so when juxtaposed with 'obstruct' and 'interfere.'" *Id.* In concert with the Court's finding in *Cameron*, Congress defined physical obstruction under FACE as "rendering impassable ingress or egress from a facility . . . or rendering passage to or from such a facility . . . unreasonably difficult or hazardous." 18 U.S.C. § 248(e)(4). The Seventh Circuit found that the "unreasonably difficult" language of FACE was similar enough to "unreasonably interfere" in *Cameron* to uphold FACE as not void for vagueness. *Soderna*, 82 F.3d at 1376.

149. *See Cameron*, 390 U.S. at 616 (finding that the words "obstruct," "interfere," and "unreasonably" are words that can be commonly understood and therefore are not overbroad or vague); United States v. Gilbert, 813 F.2d 1523, 1530 (9th Cir. 1987) (examining the Fair Housing Act's terminology of "force" and "threat of force" and concluding that these words are not vague or overbroad); *see also* United States v. Brock, 863 F. Supp. 851, 866 (E.D. Wis. 1994) (noting that most of FACE's proscribed conduct terminology has already been challenged and upheld in other statutes), *aff'd sub nom.* United States v. Soderna, 82 F.3d 1370 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1429 (S.D. Cal. 1994) (finding that the Supreme Court has previously examined many important terms that are used in FACE, such as "intimidate," "interfere," and "physical obstruction," and did not find them unconstitutionally vague); American Life League, Inc. v. Reno, 855 F. Supp. 137, 142 (E.D. Va. 1994) (remarking that most of FACE's operative words come from statutes which have been upheld by the Supreme Court as constitutional), *aff'd*, 47 F.3d 642, 648-51 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995).

150. *See Brock*, 863 F. Supp. at 866 (asserting that FACE gives fair notice and warning to the public as to what conduct is prohibited).

hend the type of conduct prohibited.[151] Therefore, courts find that FACE is neither unconstitutionally vague[152] nor overbroad.[153]

IV. "CONGRESS SHALL MAKE NO LAW . . . ABRIDGING THE FREEDOM OF SPEECH . . . ."

Beginning with its journey through Congress, the most contentious constitutional issue surrounding FACE is that it violates the First Amendment.[154] Since FACE became law, courts have grappled with whether FACE is facially unconstitutional because it regulates free speech based on a desire to quell the pro-life message.[155] Another concern addressed

151. *American Life League*, 47 F.3d at 653 (stating that Congress defined the meanings of prohibited conduct so that the public should understand what activities are unlawful). The district court in *American Life League* pointed out that FACE proscribes conduct that is already prohibited by state and local laws, such as trespass and assault. *See* 855 F. Supp. 137, 143 (E.D. Va. 1994), *aff'd*, 47 F.3d 642, 652-3 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995). The court bluntly stated: "Without ambiguity there is no chill. Protestors who are not chilled by the existing laws against trespass and assault could not reasonably be chilled by this Act." *Id.*; *see supra* notes 148-49 (illustrating statutory language that survived overbreadth and void for vagueness challenges). *But see* Paulsen & McConnell, *supra* note 143, at 278 (explaining that reliance on other statutes may be misplaced and misguided, because FACE "embraces a substantial amount of constitutionally protected conduct with relation to its sweep in a way that these other statutes may well not").

152. *See generally supra* note 147-51 (illustrating cases where FACE's language and terminology has been held by courts to be not unconstitutionally vague).

153. *See generally supra* note 142-43 (providing cases where FACE was upheld as not unconstitutionally overbroad with the exception of one district court case).

154. *See Hearing*, *supra* note 28, at 117-21 (statement of Carol Crossed, American Family Association) (expressing the opinion that FACE discriminatorily targets pro-life protestors' viewpoint and prohibits civil disobedience); 140 CONG. REC. S5599 (daily ed. May 12, 1994) (statement of Sen. Hatch) (insisting that FACE "clearly masks a hostility to the pro-life viewpoint," which is essentially discrimination that is inconsistent with the First Amendment guarantees of free speech). *But see* SENATE REPORT, *supra* note 2, at 28-30 (defending FACE as a statute fully consistent with First Amendment principles and Supreme Court precedent).

155. *See* United States v. Soderna, 82 F.3d 1370, 1374-76 (7th Cir.) (finding that FACE is not a viewpoint-based regulation), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); United States v. Dinwiddie, 76 F.3d 913, 921-23 (8th Cir.) (holding that FACE is not a viewpoint-based regulation of speech), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); Cheffer v. Reno, 55 F.3d 1517, 1521 (11th Cir. 1995) (upholding FACE under the First Amendment according to the rationale of the Fourth Circuit in *American Life League*); American Life League, Inc. v. Reno, 47 F.3d 642, 648-51 (4th Cir.) (maintaining that FACE is viewpoint-neutral), *cert. denied*, 116 S. Ct. 55 (1995); United States v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995) (same); United States v. White, 893 F. Supp. 1423, 1435-36 (C.D. Cal. 1995) (same); Riely v. Reno, 860 F. Supp. 693, 701-03 (D. Ariz. 1994) (finding that FACE regulates unprotected speech and is not a viewpoint-based regulation); Cook v. Reno, 859 F. Supp. 1008, 1010 (W.D. La. 1994) (holding that FACE regulates unprotected conduct, and is not a viewpoint restriction); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1427-28 (S.D. Cal. 1994) (same). *But see* Hoffman v. Hunt, 923 F. Supp. 791, 822 (W.D.N.C. 1996) (finding FACE's prohibition of threats of

by courts is that FACE violates the First Amendment because it may incidentally affect peaceful, yet physically obstructive, conduct.[156] When faced with such First Amendment challenges, however, courts sometimes stumble through the appropriate steps, jumble what should be separate analytic points, and imprecisely apply terminology.[157] To determine how courts should properly address all arguments that FACE violates the guarantees of the First Amendment, a proper foundation of Supreme Court First Amendment precedent must first be laid. Because FACE primarily regulates conduct, that will be the appropriate starting point of discussion.

A. The Appropriate First Amendment Analysis When Examining a Regulation of Conduct

The First Amendment broadly establishes the right of all citizens to engage in free speech without governmental interference.[158] First Amendment protection is not limited to the spoken or written word, however.[159] It may extend to certain types of conduct depending on the

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force unconstitutional because the application of the statute "hinges on the subjective reaction that speech elicits from its listener").

156. *See Soderna*, 82 F.3d at 1374-75 (finding that FACE does not infringe upon conduct protected by the First Amendment); *Dinwiddie*, 76 F.3d at 921 (maintaining that FACE "easily satisfies" the *O'Brien* expressive conduct test); *Cheffer*, 55 F.3d at 1521 (upholding FACE under the First Amendment according to the rationale of the Fourth Circuit in *American Life League*); *American Life League*, 47 F.3d at 651-52 (stating that FACE survives the *O'Brien* examination of expressive conduct); *Lucero*, 895 F. Supp. at 1424 (same); *White*, 893 F. Supp. at 1436-37 (finding that FACE passes the *O'Brien* examination for expressive conduct); *Riely*, 860 F. Supp. at 700 (same); *Cook*, 859 F. Supp. at 1010 (stating that FACE regulates unprotected violent conduct); *Council for Life Coalition*, 856 F. Supp. at 1226-27 (same).

157. *See infra* notes 237-59 and accompanying text (describing how some courts confuse First Amendment methodology and terminology when examining FACE).

158. U.S. CONST. amend. I. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The ideal behind the First Amendment is one of spirited public debate. *See* New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (advocating that discussion of issues important to the public should be "uninhibited, robust, and wide open"); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (expounding that there must be freedom to express one's views so that a competition of ideas results, and consequently, only the best ideas will survive).

159. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) (observing that although the text of the First Amendment "literally forbids the abridgement of only 'speech,'" Supreme Court precedent has extended the protection to certain expressive conduct); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7, at 826 (2d ed. 1988) (locating the origin of treating some conduct as speech in the 1940's labor picketing cases).

intent of the actor and the circumstances surrounding the actor's conduct.[160]

1. *The* Spence *Test: Determining Whether Conduct is Expressive*

In *Spence v. Washington*,[161] the Supreme Court developed a two-part test to determine when conduct possesses enough communicative elements to elevate it to the level of expressive or speech-related conduct, and thus implicate the First Amendment.[162] The first question is whether there is "an intent to convey a particularized message" and second, whether there is a great likelihood under the surrounding circumstances "that the message would be understood by those who view[ ] it."[163] If conduct fails this test, it is not speech-related, and there simply is no First Amendment issue.[164] Certain conduct, such as violent acts or physical obstruction, falls under the category of unprotected conduct no matter what type of communicative expression motivates the action, and may be regulated as outside the scope and purpose of the First Amendment.[165]

160. *See Johnson*, 491 U.S. at 404 (accepting that particular conduct may be "'sufficiently imbued with elements of communication'" so that it falls under the protection of the First Amendment) (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)); *Spence*, 418 U.S. at 410-11 (acknowledging that when certain conduct has a significant amount of communication motivating the act, the First Amendment is implicated).

161. 418 U.S. 405 (1974).

162. *See id.* at 410-11.

163. *Id.* In *Spence*, the placement of a peace sign on an American flag hung upside down was found to be speech-related conduct, in part because it was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent state tragedy." *Id.* at 410. The wearing of black armbands in school during the Vietnam war is another example of conduct held to possess sufficient communicative elements; because it conveyed the wearer's dissatisfaction with the government's Vietnam policy, it was found to be expressive conduct protected by the First Amendment. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505 (1969).

164. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (rejecting the premise that all conduct that is used to express an idea or message will be found to be expressive and thereby protected under the First Amendment).

165. *See* Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (stressing that violence is not protected under the guise of free speech); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence .... The use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'") (quoting Samuels v. Mackell, 401 U.S. 66, 75 (1971) (Douglas, J., concurring)); Cameron v. Johnson, 390 U.S. 611, 617 (1968) (upholding a statute that prohibited picketing that physically obstructed the entrances of courthouses, because this "'activity bears no relationship to the freedom to . . . distribute information or opinion'") (quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939)).

2. *Evaluating Expressive Conduct Under* United States v. O'Brien

When a statute regulates conduct that meets the two-part *Spence* test, and therefore is expressive conduct, courts engage in the analysis developed in *United States v. O'Brien*[166] to evaluate whether the regulation unconstitutionally infringes upon the First Amendment.[167] Under the four-pronged *O'Brien* test, a court must determine if the statute: (1) was enacted pursuant to valid congressional power; (2) furthers a substantial governmental interest; (3) is unrelated to the suppression of free speech; and, (4) affects the incidental restrictions on First Amendment freedoms no more than necessary.[168]

As a threshold matter, the implied and unstated launching point for courts in an *O'Brien* type analysis is step three: whether government's regulation is unrelated to the suppression of free speech.[169] The importance of this level of analysis is illustrated by the underlying principle of First Amendment jurisprudence that the government is greatly restricted in regulating conduct either because of the content of its expressive elements[170] or because of the communicative impact the speech-related conduct may have on the public.[171]

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166. 391 U.S. 367 (1968).

167. *See id.* at 376. O'Brien was a Vietnam protestor who violated a federal statute that prohibited the burning of one's draft card, an act which O'Brien maintained was "symbolic speech." *Id.* The Court did not accept the precept that all conduct engaged in to convey a message is permissible under the First Amendment. *See id.* Instead, the Court recognized that Congress often has substantial governmental interests in regulating conduct that has an expressive element. *See id.*

168. *See id.* at 377.

169. *See* Texas v. Johnson, 491 U.S. 397, 407 (1989) (stating that the Court primarily focuses on the component of the *O'Brien* test that addresses whether the governmental interest is unrelated to the suppression of free speech); Cohen v. California, 403 U.S. 15, 18 (1971) (insisting that the regulation at issue "rests upon the asserted offensiveness of the words Cohen used to convey his message to the public" and therefore, finding that the regulation was not unrelated to free speech); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969) (finding that the school's regulation was aimed at punishing opinion, and not at containing disruptive action, and thereby tacitly discounted the rest of the *O'Brien* test as not applicable).

170. *See Johnson*, 491 U.S. at 406.

171. *See Tinker*, 393 U.S. at 508; *see also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 229 (1983). Professor Stone distinguishes between government's disagreement with a particular viewpoint, which the author categorizes as improper motivation, and government's concern over the impact of the speech, which the author translates as "paternalistic justification": a concern that others will accept and adhere to the speaker's viewpoint. *Id.* "Paternalistic justification" can be rebutted by a showing that the regulation falls under a category of unprotected speech, or if the government can show it has compelling reasons unrelated to paternalism behind the statute. *Id.* Improper motive, on the other hand, is "by definition per se illegitimate." *Id.*

Congressional purpose is crucial in determining whether government's interest in adopting a restriction on conduct was "unrelated to the suppression of free speech."[172] Consequently, courts examine whether the regulation furthers legitimate goals unrelated to the subject matter, speaker, or viewpoint of the speech that underlies the conduct.[173] If the court determines that the government has regulated conduct for reasons unrelated to speech, the statute will pass the third component of *O'Brien* and the inquiry then focuses on the other three elements, which are more easily satisfied.[174] Where all four elements are met, a statute will be upheld as a constitutional content-neutral regulation regardless of the incidental restrictions on speech-related conduct.[175] If the government cannot bear its burden of showing that the regulation is unrelated to the message behind the affected conduct, there is no need for further inquiry under *O'Brien*; the statute will be treated and examined as if it regulates "pure speech."[176]

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172. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (recognizing that in determining content neutrality, government's purpose is paramount); *O'Brien*, 391 U.S. at 383 (explaining that an inquiry into congressional purpose is necessary when there is an allegation of illicit congressional motive).

173. *See Ward*, 491 U.S. at 791; *see also* TRIBE, *supra* note 159, § 12-6, at 821-22 (finding that often the Court will uphold the constitutionality of a statute "only after finding that the legislature has properly weighed its costs and benefits: where an illicit reason has played a substantial role in the legislature's deliberations, it may be reasonably said that the decisional calculus has been impermissibly skewed").

174. *See Johnson*, 491 U.S. at 407 (pronouncing the leniency of the *O'Brien* test, and that consequently, the Court limits the applicability of the test to cases where "'the governmental interest is unrelated to the suppression of free expression'") (quoting *O'Brien*, 391 U.S. at 377).

175. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984); *O'Brien*, 391 U.S. at 377. The Court in *Clark* found that a government regulation prohibiting camping and overnight sleeping in some federal parks withstood the *O'Brien* analysis, and was therefore valid, even though the statute incidentally affected those who wished to engage in the prohibited conduct to effectuate political protest of the plight of the homeless. *See Clark*, at 298-99.

176. Spence v. Washington, 418 U.S. 405, 414 n.8 (1974) (explaining that because government could not advance a valid interest unrelated to expression in defense of a flag desecration regulation, the *O'Brien* test was inapplicable because one of the four necessary steps had failed); Cohen v. California, 403 U.S. 15, 18 (1971). After the Court in *Cohen* quickly decided that the regulation targeted the message and not Cohen's conduct, the Court advanced to a pure speech analysis. *See id.* at 19; *accord* Texas v. Johnson, 491 U.S. 397, 406-07 (1989); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969).

For purposes of this Comment, "pure speech" connotes verbal expression, which is to be distinguished from conduct with communicative elements, what this Comment refers to as "speech-related conduct" or "expressive conduct."

B. Presumptively Invalid: Content-Based Regulations of Pure Speech

There are two different avenues to reach a First Amendment pure speech analysis. First, as discussed immediately above, a statute may regulate expressive, non-verbal conduct for reasons related to the subject matter, speaker, or viewpoint of the speech sought to be communicated by the conduct.[177] The other avenue is that the behavior regulated is itself verbal speech, such as threats of force.[178] In either situation, the regulation is prohibiting or restricting a person's speech or expressive conduct because of disapproval of the consequential communicative impact of the words on the listener.[179]

Content-based regulations are presumptively invalid[180] as violating a fundamental underlying principle of the First Amendment that government should not limit debate on matters of public interest or promote its own viewpoint through content regulation.[181] Not surprisingly, the free-

177. *See Tinker*, 393 U.S. at 505-06 (stating that a regulation prohibiting the wearing of black armbands in a public school was actually regulating the speech behind the conduct, namely the protestation of the Vietnam War); *see also supra* notes 169-74 and accompanying text (discussing *O'Brien*'s third prong, which inquires whether government's motivation in regulating conduct is unrelated to the speech that motivates the behavior).

178. *See* Watts v. United States, 394 U.S. 705, 705-06 (1969) (involving a federal statute prohibiting any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States" (quoting 18 U.S.C. § 871(a)) (alterations in original); Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942) (examining a regulation, inter alia, that prohibited any person from addressing another with offensive, derisive, or annoying words).

179. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (explaining that content-based regulations are presumptively invalid). Content-based regulations will be examined under what has been dubbed by Professor Laurence Tribe a "track one" analysis. TRIBE, *supra* note 159, § 12-2, at 791. As explained by Professor Tribe, if a regulation falls under track one, the government must be able to show either that the regulation fits into an unprotected category of speech, or that the regulation is necessary to meet a compelling state interest. *See id.* at 833. Track one is to be distinguished from "track two" situations that occur when government regulations are not based on the communicative impact or content of the speech, but instead on the noncommunicative impact of the action. *See id.* at 792. Track two cases are beyond the scope of this Comment and are not addressed except briefly in note 83, addressing injunctive relief and the appropriate standard of analysis imposed on an injunction issued pursuant to FACE.

180. *See R.A.V.*, 505 U.S. at 382.

181. *See Cohen*, 403 U.S. at 24-25. The *Cohen* Court in dicta reaffirms the idea that First Amendment freedoms should not be tampered with lightly. *See id.* The Court eloquently combines the vision of a free market place of ideas and the political system of democracy that this country was founded upon:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours . . . designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect

dom of expression has never been found to be absolute.[182] Consequently, some content-based regulations are permissible under the First Amendment: either if the regulation falls within narrowly defined classes of speech traditionally found outside the protection of the First Amendment,[183] or, in the case of a regulation that discriminates against a particular subject matter, speaker, or viewpoint, if the government can prove that the regulation is necessary to serve a compelling interest and is narrowly drawn to achieve that end.[184]

1. Categories of Unprotected Speech

There are a few limited categories of pure speech that have been excluded from the First Amendment prohibition on content-based regulations.[185] Some categories of unprotected speech, such as defamation[186]

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polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id.

182. *See R.A.V.*, 505 U.S. at 387 (recognizing that even the prohibition against content discrimination has exceptions); Miller v. California, 413 U.S. 15, 23 (1973) (stating that the First Amendment has never been viewed as an absolute guarantee that all speech is protected); *Chaplinsky*, 315 U.S. at 571 (restating that the right of free speech "is not absolute at all times and under all circumstances").

183. *See Chaplinsky*, 315 U.S. at 572 (providing examples of classes or forms of speech that may be prevented consistently with the First Amendment); *see also infra* notes 185-205 and accompanying text (providing a full discussion of the categories of speech that may be regulated or prohibited as outside the protection of the First Amendment).

184. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 94-95 (1972) (explaining that because a city ordinance treated one subject of picketing differently than others, the First Amendment claim became "closely intertwined" with the Equal Protection Clause claim). Professor Tribe maintains that the crux of the compelling interest test is that "[w]henever the harm feared could be averted by a further exchange of ideas, governmental suppression is conclusively deemed unnecessary." TRIBE, *supra* note 159, § 12-8, at 833-34 (emphasis omitted); *see infra* notes 212-36 and accompanying text (discussing the types of content discrimination that are not permissible unless government can meet the compelling interest test).

185. *See Chaplinsky*, 315 U.S. at 571-72 (listing various classes of speech, such as obscenity, libel, and fighting words, that hold no constitutional protection, "and the punishment of which have never been thought to raise any Constitutional problem").

186. *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (prohibiting a public official from "recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (finding that public publisher or broadcaster who defames a private individual in the context of a public controversy may not claim a First Amendment privilege against liability, and holding that states may define for themselves the standard of liability to protect private individuals, as long they do not impose strict liability); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (plurality opinion) (stating that a private figure who sues over defamation concerning purely private concerns may be awarded compensatory and punitive damages without a showing of "actual malice").

and obscenity,[187] will not be discussed because of their obvious inapplicability to the FACE statute. The exceptions of "fighting words"[188] and inciting unlawful conduct[189] are germane, however, because of FACE's prohibition of threats of force.

a. "Fighting Words": Chaplinsky v. New Hampshire

In *Chaplinsky v. New Hampshire*,[190] the Court characterized "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[191] In reaching the conclusion that fighting words are unprotected by the First Amendment, the Court reasoned that such speech has no essential role in the free marketplace of ideas, and provides such minimal social value to society's search for truth and information that any benefit gained from using or hearing them "is clearly outweighed by the social interest in order and morality."[192]

187. *See Miller*, 413 U.S. at 23-24 (1973) (recounting that obscene material is unprotected by the First Amendment, and setting forth more explanatory guidelines of what may be considered obscene). The Court embellished the earlier definition as introduced in *Roth v. United States*, 354 U.S. 476 (1957), which was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. The new standard announced in *Miller*, expanding *Roth*, requires a court also to determine "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law" and "whether the work, taken as whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24.

188. *Chaplinsky*, 315 U.S. at 572 (memorializing the "fighting words" exception to First Amendment protection); *see infra* notes 190-98 and accompanying text (setting forth the fighting words doctrine).

189. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (announcing the test to determine when speech advocates the use of force or unlawful conduct and is therefore outside the scope of First Amendment protection); *see also infra* notes 199-207 and accompanying text (discussing the evolution of the inciting unlawful conduct doctrine).

190. 315 U.S. 568, 572 (1942). Chaplinsky was a Jehovah's Witness who, while distributing literature on public streets, condemned all religion as "a racket." *Id.* at 569-70. His utterances apparently were upsetting a crowd that had gathered. *See id.* at 569. As a result, he was approached by a police officer and asked to stop, at which point he allegedly said "'You are a God damned racketeer'" and "'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.'" *Id.* He was charged under a New Hampshire law that prohibited, inter alia, any person from addressing another person with offensive, derisive, or annoying words. *See id.* The New Hampshire Supreme Court narrowed the statute's construction by providing that "[t]he word 'offensive' is not to be defined in terms of what a particular addressee thinks . . . the test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." *Id.* at 573. The Supreme Court upheld the conviction based on the fact that the statements made by Chaplinsky were fighting words as construed by the definition provided for by New Hampshire's highest court. *See id.* at 572.

191. *Id.* at 571-72.

192. *Id.*; *see* Stone, *supra* note 171, at 194. The author categorizes this statement as the emergence of "low" First Amendment value theory, meaning that the speech deserves limited constitutional protection because of its slight value to society. *Id.* Although the fac-

The phrase "inflict injury" used in *Chaplinsky* could have been used by government as an invitation to prohibit offensive and profane language; however, the Court in *Cohen v. California*[193] declined to embark on such a slippery slope.[194] The Court updated the fighting words doctrine slightly, omitting the subjective injury requirement and replacing it with "those personally abusive epithets, which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[195] The fighting words doctrine has two current forms: on an individual level, it necessarily implies a face-to-face confrontation that would provoke the listener to act out violently, not just trigger an angry response;[196] the other level is directed at a group, otherwise known as a hostile group reaction, where the government tries to silence the speaker before the audience becomes outraged and uncontrollable.[197] The Supreme Court has narrowly construed the fighting words doctrine throughout the years.[198]

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tors considered by the Court in deciding whether a certain category will receive unprotected status under the First Amendment is not clearly articulated, Professor Stone advances that the Court focuses on "the extent to which the speech furthers the historical, political, and philosophical purposes that underlie the first amendment." *Id.*

193. 403 U.S. 15 (1971). Cohen was convicted of violating a statute that prohibited willful or malicious breach of the peace by offensive conduct, by wearing a jacket inscribed with the words "Fuck the Draft" in a court corridor filled with people. *Id.* at 16. The Court declined to find the language obscene, and discounted the government's argument that the state could in this instance prohibit offensive messages being "thrust upon unwilling or unsuspecting viewers." *Id.* at 21. Finally, the Court found no recognized governmental role as keeper of public morality to ban "one particular scurrilous epithet from the public discourse." *Id.* at 22-23. Only certain narrow categories of speech may be prohibited by government on the basis of their content, and the statute in *Cohen* did not fall under any of them. *See id.* at 24.

194. *See id.* at 25. Justice Harlan artfully captured the problem of permitting governmental regulation of profane or obscene language when he professed, "[o]ne man's vulgarity is another man's lyric." *Id.*

195. *Id.* at 20.

196. *See Cohen*, 403 U.S. at 20; *Chaplinsky*, 315 U.S. at 571-72; Terminiello v. Chicago, 337 U.S. 1, 4, 6 (1949) (pronouncing that fighting words must rise "far above public inconvenience, annoyance, or unrest," and invalidating a conviction under an overbroad regulation prohibiting speech that stirred people to anger, or encouraged unrest and dispute).

197. *See* Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam). The Court overturned a conviction of disorderly conduct during an anti-war demonstration because the speech was not directed at any person or group, and furthermore, the speech could be taken for "counsel for present moderation; at worst, it amounted to nothing more than the advocacy of illegal action at some further time." *Id.*; *cf.* Feiner v. New York, 340 U.S. 315, 316-18 (1951) (upholding conviction of a speaker who, while addressing a racially mixed crowd, encouraged African Americans to rise up against white people).

198. *See* TRIBE, *supra* note 159, § 12-10, at 850-51 (suggesting that the original fighting words doctrine is being replaced with a doctrine that takes the context of the speech into consideration, and not just the content); Aviva O. Wertheimer, Note, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding*

b. The "Inciting Unlawful Conduct" Doctrine

The basic principles behind the inciting unlawful conduct exception to First Amendment protection can be traced to the "clear and present danger" doctrine introduced by Justice Holmes earlier this century.[199] Under this test, a factual question must be answered as to "whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."[200] The clear and present danger test was criticized as focusing only on the circumstances surrounding the speech, and not on whether the actual content of the speech was inciting unlawful conduct or violence.[201] The argument was that permissible advocacy of a cause or idea should not be regulated unless it "counsel[s] or advise[s] others to violate the law as it stands."[202]

The clear and present danger test was never fully embraced because of the restrictive impact it had upon free speech,[203] until *Brandenburg v.*

Fighting Words Jurisprudence, 63 FORDHAM L. REV. 793, 816-19 (1994) (arguing that the Court's application of the fighting words doctrine has left a trail of "arbitrary and unprincipled" case law).

199. Schenck v. United States, 249 U.S. 47 (1919). The statute at issue was the Espionage Act of 1917, which prohibited obstructing the draft process, and causing or attempting to cause insubordination in any of the branches of the armed forces. *See id.* at 49. Schenck and others were convicted of conspiring to violate the Act by mailing draftees literature urging them to "assert their rights" and "not submit to intimidation." *Id.* at 51. The document did not expressly advocate that the draftees engage in unlawful means to resist the draft, however. *See id.* A unanimous Court upheld the conviction based upon the newly articulated clear and present danger test, explaining that it was one of proximity and degree. *See id.* at 52.

200. *Id.* Justice Holmes exemplified a situation where a clear and present danger would be present by proffering the famous hypothetical of falsely yelling "fire!" in a crowded theater. *Id.*

201. *See* Masses Publ'g Co. v. Pattern, 224 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917). In a pre-*Schenck* decision, Judge Learned Hand presided over a case involving anti-war cartoons with captions and text that were critical of World War I and the draft, and expressed sympathy for draft resisters. *See id.* at 536. The speech was not found to advise unlawful conduct. *See id.* at 540-41. Concluding that the speech was abstract advocacy, he stated: "[T]o assimilate [political] agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government." *Id.* at 540. Because the speech was not a direct incitement to violate the law, he refused to allow the government to regulate it. *See id.* at 542. Hand's test was not accepted by the Court until *Brandenburg* incorporated both it and the clear and present danger test into a more speech protective standard. *See* TRIBE, *supra* note 159, § 12-9, at 848 (stating that the current statement of the law regarding fighting words is *Brandenburg*, which incorporated Hand's view of protecting mere advocacy).

202. *Masses Publ'g*, 224 F. at 540.

203. *See* Brandenburg v. Ohio, 395 U.S. 444, 450-54 (1969) (per curiam). Justice Douglas in concurrence engaged in a historical, and not very approving, overview of the clear and present danger doctrine. *See id.* at 450-54 (Douglas, J., concurring) He concluded by

Ohio.[204] In *Brandenburg*, the Court refined the test into a more speech-protective doctrine referred to as "incitement of unlawful conduct."[205] Under this doctrine, speech may be constitutionally prohibited if the regulation proscribes speech that is intended to "incit[e] or produc[e] imminent lawless action and is likely to incite or produce such action."[206] Consequently, a statute that punishes speech because of its advocacy of ideas, without the requirements of imminency or probability of unlawful action, will be struck down as a violation of the First Amendment.[207]

c. "True Threats"

Although not specifically referred to as a categorical exception to the First Amendment's protection of speech, threats of force are not considered protected speech by the Supreme Court.[208] The reasons given by the Supreme Court are that government has an important interest in protecting citizens from the fear of violence, the disruption that such fear causes, and the possibility that the speaker will actually commit the threatened violence.[209] The Supreme Court has never defined what constitutes a threat other than it must be a "true threat," and not political hyperbole;[210] thus, this question still remains open.

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clearly relating that "I see no place in the regime of the First Amendment for any 'clear and present danger' test." *Id.* at 454.

204. 395 U.S. 444 (1969) (per curiam).

205. The facts of Brandenburg involved a Ku Klux Klan leader who was convicted under a state criminal syndicalism statute, which prohibited the advocacy of crime or violence as a method of achieving industrial or political reform. *See id.* at 445. During a television filming of a KKK meeting, the leader made several statements, including one statement directing that "revengeance" be taken if the government continued to suppress the white race. *Id.* at 446. The Court, against the backdrop of the newly articulated incitement of unlawful conduct standard, examined the state statute and found that it was not drafted in a manner consistent with the First Amendment. *See id.* at 448. The Court therefore did not reach the issue of whether the speaker's expression could be prohibited as inciting unlawful conduct. *See id.* at 448-49.

206. *Id.* at 447.

207. *See id.* at 449.

208. *See* Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2529 (1994) (finding that threats made to patients and their family members, "however communicated, are proscribable under the First Amendment); R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (concluding that threats of violence are not protected by the First Amendment); Watts v. United States, 394 U.S. 705, 707-08 (1969) (upholding statute that prohibited threats against the President because regulation distinguished "a threat . . . from what is constitutionally protected speech").

209. *See R.A.V.*, 505 U.S. at 388.

210. *Watts*, 394 U.S. at 708.

2. The Compelling Governmental Interest Exception

The First Amendment protects "speech," but it is essentially political speech that is at the heart of the Amendment.[211] Public debate in a public forum is what the Constitution promises; the logical corollary to this precept is that government should not discriminate in favor of "a single class of speakers, a single viewpoint, or a single subject."[212] There is an "equality of status in the field of ideas" and government should permit all topics, points of view, and messengers an opportunity to be heard.[213]

a. Discriminating Against Speech Through Regulation of Subject Matter, Speaker, or Viewpoint

This ideal of free speech correspondingly translates into the principle that regulations of speech should be content-neutral, with the exception of the narrowly defined categories of unprotected speech previously discussed.[214] Subject matter discrimination is present where a regulation describes permissible speech in terms of a broad topic, for instance, permitting peaceful labor picketing, but excluding all other picketing.[215] The second category of content discrimination is directed at the speaker, and can be found where a regulation allows certain groups or individuals access to a forum to express their viewpoint, but restricts or prohibits others from the same avenue of communication.[216] It can be concep-

211. *See* Boos v. Barry, 485 U.S. 312, 318 (1988) (recognizing that the First Amendment "reflects a 'profound national commitment'" to an open and public exchange on issues of public concern); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (noting that any restriction based on the content of speech cuts across the national commitment to a robust public discussion on issues of public concern); Cohen v. California, 403 U.S. 15, 25 (1971) (advocating that the fact that the "air may at times seem filled with verbal cacophony" is a sign of society's strength, not weakness).

212. Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 55 (1983).

213. *Mosley*, 408 U.S. at 96 (1972) (citing A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)); *see* Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 208-10 (1982) (discussing the high regard for political speech in Supreme Court jurisprudence and various commentators' theories on the reasons for the Court's respect in this area).

214. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (stating that content-based restrictions are presumptively invalid, with the exception of traditional limitations of speech in areas such as obscenity, fighting words, and defamation); *see also supra* notes 185-210 and accompanying text (reviewing certain unprotected categories of speech that may be regulated based on content).

215. *See Mosley*, 408 U.S. at 95. Content discrimination based on the subject matter of speech is "impermissible because the First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic." *Boos*, 485 U.S. at 319 (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980)).

216. *See Perry Educ. Assn.*, 460 U.S. at 54 (scrutinizing collective bargaining agreement between school district and teachers' exclusive bargaining representative that only permitted use of interschool mail system to incumbent union and not to rival). The Court upheld

tually difficult to ascertain the distinction between speaker discrimination and viewpoint discrimination, because in reality, each speaker has a particular view on any subject that he or she would want to convey if given the opportunity.[217]

Nevertheless, viewpoint discrimination is a separate category of content discrimination, propounded as "censorship in the purest form . . . threaten[ing] the continued vitality of 'free speech.'"[218] Viewpoint discrimination occurs where government permits discussion regarding a subject matter, yet prohibits the expression of certain points of view pertaining to that subject matter.[219] This may well be the most insidious of all content-based regulations, not only because it disadvantages those whose viewpoint is stifled, but those receiving alternative viewpoints may never realize that there is a competing point of view in society.[220]

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the restriction on the use of the mail system in *Perry Education Association* based on the fact that the school's mail system was not a public forum, or even a limited one, and because of this fact "not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used." *Id.* at 55. The difference in status between an exclusive bargaining representative and a rival union is a distinction which may be permissibly drawn when regulating the use of the school's mail system. *See id.* The Court appears to uphold many speaker-based restrictions in labor relations situations. *See* TRIBE, *supra* note 159, § 12-3, at 796 n.14 (providing examples of the Supreme Court upholding speaker distinctions in labor regulation cases).

217. *See Perry Educ. Assn.*, 460 U.S. at 65 (Brennan, J., dissenting) (citing with approval the court of appeals' finding that the school district, through the regulation of exclusive access to the mailboxes, formed "a speaker restriction, favor[ing] a particular viewpoint on labor relations"); Stone, *supra* note 171, at 249 (noting that there is often a close connection between speaker and viewpoint discrimination regulations).

218. Perry Educ. Assn. v. Perry Local Educators Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

219. *See* Texas v. Johnson, 491 U.S. 397, 416 (1989) (finding that a "bedrock principle" of the Constitution is that "government may not prohibit expression simply because it disagrees with its message"); Carey v. Brown, 447 U.S. 455, 461 (1980) (striking down ordinance because it accorded preferential treatment to one viewpoint, and restricted all others); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (pronouncing that under both the First Amendment and the Equal Protection Clause, government may not selectively prohibit certain viewpoints from public debate, yet allow others to be heard).

220. *See* Stone, *supra* note 171, at 198 (explaining that viewpoint discrimination "mutilates 'the thinking process of the community' and is thus incompatible with the central precepts of the first amendment"). Professor Stone stresses that because of this serious inconsistency with the First Amendment's ideals, only the most compelling interests advanced by government will permit a court to uphold a viewpoint-based statute. *See id. But see* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 130-31 (1981) (disagreeing with the premise that content-based restrictions "leave the public with a more incomplete and inaccurate perception of social reality" as neither intuitive nor supportable).

b. Regulation That Is Discriminatory Against Speech May Still Survive if Compelling Interest Test Met

In determining whether a regulation is content-neutral, the government's purpose is the controlling factor.[221] If the government regulates expressive conduct without reference to the content of the speech that motivates the conduct, and the regulation is facially neutral, then the government has regulated in a content-neutral manner.[222] Correspondingly, the listener's reaction to speech usually is not a primary factor in finding a statute content-neutral.[223] When a statute is found to be content-based by regulating beyond the unprotected categories of speech and discriminating based on subject matter, speaker, or viewpoint, it will be subjected to an Equal Protection Clause analysis.[224]

All three content discrimination categories—subject matter, speaker, and viewpoint—are presumptively invalid unless the regulation withstands an Equal Protection examination.[225] The government must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[226] If government sustains this stringent burden, the regulation will be upheld even though it is content-based; if government cannot, the regulation will be held unconstitutional.[227]

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221. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (stating that a regulation that is unrelated to the content of speech will be found to be neutral, "even if it has an incidental effect on some speakers or messages but not others"). Of course, irrespective of governmental purpose, a statute may be found to be facially discriminatory against certain subjects, speakers, or viewpoints. *See Mosley*, 408 U.S. at 95 (finding that ordinance described permissible picketing in terms of subject matter); *see also supra* notes 212-20 and accompanying text (discussing subject matter, speaker and viewpoint discrimination).

222. *See Ward*, 491 U.S. at 791.

223. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992); *Johnson*, 491 U.S. at 408 (declining to find that listener's offense or hostile reaction to speech is a basis for content regulation).

224. *See* Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 54 (1983) (stating that content discrimination based upon the provider of information, although in the First Amendment arena, will be examined under the Equal Protection Clause); *Carey*, 447 U.S. at 461-62 (subjecting viewpoint discrimination regulation to an Equal Protection Clause analysis); *Mosley*, 408 U.S. at 101 (finding that a content-based regulation pertaining to subject matter must be analyzed according to the Equal Protection Clause).

225. *See supra* note 224 (providing a case that illustrates the precept that a content-based regulation that is discriminatory will be exposed to an equal protection examination). The Supreme Court acknowledges that it has "occasionally fused the First Amendment into the Equal Protection Clause" but that no question exists that the First Amendment issue is present and that it initiated the equal protection inquiry. R.A.V. v. City of St. Paul, 505 U.S. 377, 385 n.4 (1992).

226. *Perry Educ. Assn.*, 460 U.S. at 45.

227. *See id.*; *see also* TRIBE, *supra* note 159, § 12-3, at 798 (recognizing that the Supreme Court applies the "most exacting scrutiny" to regulations that discriminate based

c. R.A.V. v. City of St. Paul: *A Lesson in Viewpoint Regulation*

An important caveat to content-based regulation jurisprudence, particularly viewpoint discrimination, was added by the Court in *R.A.V. v. City of St. Paul*.[228] At issue was an ordinance that prohibited the placement of a symbol, object, or graffiti that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender;" the highest state court found the ordinance to be a regulation of fighting words.[229] The Supreme Court found the regulation unconstitutional, holding that viewpoint discrimination within a category of unprotected speech is not permissible unless government can meet the compelling governmental interest test, which the Court implied to mean that no content-neutral alternative exists.[230] *R.A.V.* stands for the proposition that although the government may identify limited categories of speech as unprotected, it generally may not selectively regulate subsets of these categories due to a hostility toward the viewpoint contained.[231] This is an important principle, for prior to *R.A.V.* it was assumed that an area of speech within one of the unprotected categories of First Amendment section was completely devoid of First Amendment concerns.[232]

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on speech content (quoting Widmar v. Vincent, 454 U.S. 263, 276 (1981)); *cf.* Police Dept. of Chicago v. Mosley, 408 U.S. 92, 101-02 (1972) (insisting that a regulation based on the subject matter of speech must be narrowly tailored to a *substantial* governmental interest).

228. 505 U.S. 377 (1992).

229. *Id.* at 380.

230. *See id.* at 395-96. The ordinance in *R.A.V.* prohibited specific categories of fighting words or "hate speech" that communicated messages of racial, gender, or religious intolerance, creating a presumption that the city was attempting to limit particular viewpoints. *See id.* at 394. The Court, upon identifying content discrimination through viewpoint regulation, analyzed the regulation under the Equal Protection Clause, stating that the "dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not." *Id.* at 395-96.

The Court found that the state's interest in protecting members of society that historically have been subjected to discrimination was compelling, and that the ordinance promoted this interest; however, the Court found that it was not narrowly tailored because a content-neutral regulation against fighting words would better further the interest in a nondiscriminatory way. *See id.* at 395; *cf.* Wertheimer, *supra* note 198, at 824 (maintaining that the Court did not apply the compelling interest test, instead looking only to a content-neutral alternative).

231. *See R.A.V.*, 505 U.S. at 393-94. The Court firmly dispelled the idea that First Amendment establishes the tenet that the government may freely regulate categories of proscribable speech. *See id.* at 384. Justice Scalia, writing for the Court, maintained a slight distinction, perhaps never before stated, that the Court has never contended that unprotected categories have "'*no* part of the expression of ideas,' but only that they constitute 'no *essential* part of any exposition of ideas.'" *Id.* at 385 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

232. *See id.* at 384.

Qualifying this sweeping holding, however, the Court stated that subject matter discrimination within an unprotected category may be lawful provided that the restriction is not even arguably "conditioned upon the sovereign's agreement with what a speaker may intend to say."[233] Thus, *R.A.V.* provides that when the purpose for the subject matter discrimination is based on the reason the entire category of speech is unprotected,[234] or when a regulation directed at conduct contains subject matter discrimination associated with the "secondary effects" of the speech, the regulation may stand.[235] Despite these qualifications, the *R.A.V.* Court clearly pronounced that unprotected categories of speech are not "entirely invisible to the Constitution, so that they may be made the vehicles for [viewpoint] discrimination unrelated to their distinctively proscribable content."[236]

C. Confusion in the Courts

FACE regulates three types of activity: verbal speech, such as threats of force; non-violent conduct, such as physical obstruction; and violent conduct, such as the use of force.[237] When courts are confronted with a First Amendment challenge to FACE, the initial step should be to differentiate among verbal speech, non-verbal expressive conduct, and non-verbal,

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233. *Id.* at 390 (quoting Metromedia, Inc. v. San Diego, 453 U.S. 490, 555 (1981)). *R. A. V.* addressed regulation of a category of unprotected speech that was also discriminatory against viewpoint. *See id.* at 392-93; *cf.* Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1145-46 (1994) (advancing the theory that the Court "reconceptualized" the compelling interest test when examining *all* viewpoint discrimination regulations).

234. *See R.A.V.*, 505 U.S. at 388. The Court qualified the holding by permitting content discrimination in an unprotected category where the "basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable" because then the dangers of suppression of political speech and ideas do not exist. *Id.* An example given which illustrated this point was that government could ban only the most extreme forms of obscenity, but it could not only prohibit obscenity with offensive political messages. *See id.*

235. *Id.* at 389. The Court expressed this concept in a hypothetical statute that permitted all obscene live performances, except those involving minors. *See id.* Furthermore, words can sometimes violate laws "directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets"). *Id.* Thus, certain categories of unprotected speech can be incidentally affected by a statute that is directed at conduct. *See id.* The Court placed Title VII within this exception, maintaining that when a regulation does not target conduct because of its expressive content, "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 390-91.

236. *Id.* at 384.

237. 18 U.S.C. § 248(a) (1994); *see supra* notes 2, 71, 73, and accompanying text (providing the types of activities that FACE regulates).

non-expressive conduct.[238] For example: if the facts of a case involve only non-verbal conduct, then the threshold inquiry should be to determine if it is expressive or non-expressive using the *Spence* test.[239] If found to be expressive conduct, the statute should be evaluated using the four steps provided for in *O'Brien* to ascertain whether the incidental restrictions on the speech-related conduct is permissible under the First Amendment.[240] If the conduct does not pass the *Spence* test, and therefore is not expressive conduct, it simply is not protected by the First Amendment.[241]

1. Blurring the Distinction Between Conduct and Speech Analysis

The main structural problem with the manner in which FACE often is examined under the First Amendment is that some courts do not distinguish among the distinct activities regulated by FACE.[242] Consequently, and most importantly, the different attributes and method of examination that corresponds to each are jumbled.[243] For instance, a court may have a physical obstruction violation pending, which may be non-expressive, unprotected conduct, or may be expressive conduct depending on the sur-

238. *See* Cohen v. California, 403 U.S. 15, 18 (1971) (examining a conviction for breach of the peace for wearing a jacket with profanity on it, the Court found that what was being punished was not the conduct, but the communicative element behind the conduct).

239. Spence v. Washington, 418 U.S. 405, 409-10 (1974) (exploring whether "an intent to convey a particularized message was present," and whether under all the surrounding circumstances the message would be understood by those who viewed it).

240. United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

241. *See Spence*, 418 U.S. at 409-10.

242. *See* United States v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995). Without any introduction as to what type of activity the court was examining under the First Amendment, the district court begins its analysis with whether FACE is a viewpoint-based regulation. *See id.* Upon inspection of the facts of the case, the charge against the defendants was physical obstruction of a clinic by welding themselves into vehicles. *See id.* at 1422. In a similar misapplication, the *Cook* court found that plaintiffs engaged in peaceful activity, such as sidewalk counseling and distributing literature, but that they also were charged with physical obstruction under FACE. *See* Cook v. Reno, 859 F. Supp. 1008, 1010 (W.D. La. 1994). Immediately after these observations, however, the court began the First Amendment examination with a viewpoint discrimination analysis, instead of the proper starting point for conduct regulations, which is *Spence* and *O'Brien*. *See id.*

243. *See* American Life League, Inc. v. Reno, 47 F.3d 642, 648-51 (4th Cir.) (finding initially that FACE incidentally regulates expressive conduct, the court delved into a discussion of viewpoint discrimination and concluded with *O'Brien*), *cert. denied*, 116 S. Ct. 55 (1995); *Lucero*, 895 F. Supp. at 1424 (examining a physical obstruction violation, the court commenced with viewpoint discrimination analysis and ended with the *O'Brien* test); *Cook*, 859 F. Supp. at 1010 (intimating that peaceful conduct may be implicated by FACE, the court started with the claim that FACE is viewpoint-based and closed with an *O'Brien* examination).

rounding circumstances.[244] Thus, the court should begin with the two-part *Spence* test to determine if the activity is expressive or non-expressive conduct, and if it is expressive, advance to an *O'Brien* inquiry.[245]

Instead, some courts, having determined that the conduct regulated by FACE may be expressive, move immediately to a First Amendment analysis entailing a viewpoint discrimination examination,[246] which is a form of content-based regulation of pure speech.[247] Another related problem is when a court engages in a viewpoint discrimination evaluation, but only has before it a physical obstruction violation with no logical link to expressive conduct.[248] Physical obstruction is itself unprotected conduct.[249] Unless the court makes the connection that some expressive conduct, such as peaceful picketing, may be encompassed by the physical obstruction component of FACE, or is presented with evidence that Congress was motivated by an animus against pro-life speech, there is no First Amendment issue. In either situation, the starting point for First Amendment analysis is inexact.[250]

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244. *See Lucero*, 895 F. Supp. at 1424 (examining statute under a physical obstruction violation); *Cook*, 859 F. Supp. at 1010 (same). Physical obstruction of the ingress or egress of a building is conduct unprotected by the First Amendment. *See* Cameron v. Johnson, 390 U.S. 611, 617 (1968) (finding a statute constitutional that only prohibited picketing that physically obstructed entrances and exits from courthouse buildings); Cox v. Louisiana, 379 U.S. 536, 555 (1965) (stating that physical obstruction is unprotected conduct regardless of the intent of expression which motivates it).

245. *See O'Brien*, 391 U.S. at 377 (determining whether burning a draft card was expressive conduct, and after finding that it was, engaging in four-part test designed to examine whether the incidental restrictions on conduct could be constitutionally justified); *see also supra* notes 156-75 and accompanying text (explaining sequence of First Amendment analysis when confronted with potentially expressive conduct).

246. *See supra* note 243 (illustrating two cases that have engaged in this practice).

247. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (explaining that even though the challenged ordinance was a permissible content-based regulation of fighting words—an unprotected category of speech—it also was an impermissible content-based regulation of viewpoint); *see also supra* notes 218-20 and accompanying text (describing the characteristics of viewpoint discrimination).

248. *See* United States v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995). The case before the court was a physical obstruction violation, but making no mention of the charge or types of conduct that FACE may regulate, the court commenced First Amendment analysis with an inquiry into viewpoint discrimination.

249. *See Cameron*, 390 U.S. at 617 (explaining that physical obstruction does not implicate the First Amendment because the activity bears no "necessary relationship" to the dissemination of ideas or information).

250. *See supra* note 242-43 (describing cases that improperly mix and borrow between distinctly different analyses of expressive conduct and pure speech); *cf.* United States v. Dinwiddie, 76 F.3d 913, 922-23 (8th Cir.), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615). The Eighth Circuit in *Dinwiddie* began its First Amendment examination by focusing on the defendant's contention that FACE's threats of force provision was a content-based restriction. *See id.* at 922. The court appropriately entered into a pure speech analysis of content-based regulations, and after finding that FACE regulated an unpro-

Admittedly, courts that find the conduct expressive could be commencing their analysis with the third step of *O'Brien*: whether government's purpose in regulating conduct is unrelated to the suppression of speech.[251] This element of *O'Brien* asks whether the government's interest in the regulation is unrelated to the communicative impact of the nonverbal expressive conduct on the viewer, which often is essentially the same analysis as a verbal speech analysis,[252] of which viewpoint discrimination is a subcategory.[253] The emergence of a full *O'Brien* analysis in court opinions only after the viewpoint examination has concluded, however, dispels this theory, and thereby displays a haphazard approach to First Amendment methodology.[254]

2. *Misapplying First Amendment Terminology*

Another potential area of improvement is court usage of accurate and appropriate First Amendment terminology. In the area of content-based distinctions, in particular subject matter and viewpoint discrimination, it is understandably difficult because the Supreme Court itself has not been clear and consistent.[255]

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tected category of speech, and that the motive requirement did not render the statute a viewpoint discrimination regulation, concluded that FACE was content-neutral. *See id.* at 922-23. The court recognized, however, that some of FACE's prohibited conduct may incidentally affect protected conduct, such as peaceful picketing that could physically obstruct one's entrance into a clinic, and therefore engaged in an *O'Brien* analysis. *See id.* at 923-24. The court concluded that FACE passed all four steps and was therefore constitutional, even though it may incidentally affect some protected expressive conduct. *See id.*; *see also* Riely v. Reno, 860 F. Supp. 693, 700-01 (D. Ariz. 1994) (beginning with expressive conduct and an *O'Brien* analysis, then proceeding to a pure speech examination).

251. *See O'Brien*, 391 U.S. at 377; *see also supra* notes 169-74 and accompanying text (discussing the third step of *O'Brien*).

252. *Compare supra* notes 169-74 and accompanying text (exploring the inquiry behind *O'Brien*'s step three, which requires courts to determine whether the government's purpose behind the regulation of conduct is related to the suppression of speech), *with supra* notes 211-36 and accompanying text (discussing content-based regulation).

253. *See supra* notes 211-36 and accompanying text (examining content-based regulations that are discriminatory in purpose).

254. Considering a fact-based scenario that involves physical obstruction, some courts begin with a discussion about whether the statute is content-based, specifically viewpoint, and then conclude with the *O'Brien* test. *See* American Life League, Inc. v. Reno, 47 F.3d 642, 651-52 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995); United States v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995); Cook v. Reno, 859 F. Supp. 1008, 1010 (W.D. La. 1994).

255. *See* TRIBE, *supra* note 159, § 12-3, at 800 n.23 (finding that the Court's treatment of subject matter discrimination within the rubric of content-based regulation has not been consistent). Professor Tribe finds that the Court's treatment of the content discrimination categories "arbitrary and easily manipulable." *Id.* at 803; *see* Redish, *supra* note 220, at 117-18 (finding that the Court's application of subject matter discrimination is ambiguous, and that the Court tends to reserve its strictest scrutiny for viewpoint discrimination);

It is confusing as to what a court actually analyzes when it examines whether FACE is content-based. First, courts recurringly phrase the First Amendment issue as whether FACE is either content *or* viewpoint-based, as if there were separate inquiries, but then only seem to discuss whether FACE is viewpoint-based.[256] Second, it is difficult to determine what a court is examining when it explores both whether FACE is a content-based or a viewpoint-based statute, for viewpoint discrimination is a type of content-based regulation, and not independent from it.[257] It is possible that courts either are engaging solely in a viewpoint discrimination examination, or are confusing content-based with subject matter discrimination.[258]

The question of whether FACE discriminates against the pro-life message should thus begin with the possible types of content discrimination that have been identified by the Court: subject matter, speaker, and viewpoint.[259] With a statute as important as FACE to the public debate of abortion, it should be a paramount responsibility to engage in thorough, precise, and clear analyses so that pro-life citizens have an opportunity for their claims to be fairly heard. While no court has ever fully examined all three types of activity that FACE regulates under the First Amendment, this Comment concludes with such an analysis.

Stone, *supra* note 171, at 239-42 (discussing the problematic subject matter discrimination and its questionable fit into the content-based regulation regime).

256. *See Cook*, 859 F. Supp. at 1010 (engaging in inquiry as to whether FACE is viewpoint neutral, and upon summation that it is, examining whether FACE is a discriminatory content-based restriction).

257. *See supra* notes 212-20 and accompanying text (explaining that the main category is content-based discrimination, and that viewpoint is one of three identifiable subsets).

258. *See* TRIBE, *supra* at 159, § 12-3, at 803. Conceding the difficulty in distinguishing between the types of speech restrictions, Professor Tribe argues that content-based restrictions on speech "may regulate speech on the basis of its general subject matter ('no discussion of the upcoming election') or on the basis of its particular viewpoint ('no criticism of the Democratic candidate')." *Id.* He also mentions the category of speaker-based restrictions, but notes that it is difficult to separate this category from that of viewpoint. *See id.*

259. *See* Boos v. Barry, 485 U.S. 312, 318-19 (1988) (examining an ordinance that prohibited certain speech surrounding foreign embassies, the court first inquired as to whether the content-based regulation was discriminatorily based on viewpoint; deciding that it was not, the Court advanced to whether it was based on subject matter, which was answered in the affirmative); *see also supra* notes 212-20 and accompanying text (describing the three types of content-based regulations that discriminate on the basis of speech).

V. A Complete First Amendment Examination of Each Category of Activity Regulated by FACE: Non-Expressive and Expressive Conduct, and Verbal Speech

A. FACE Regulates Non-Verbal Conduct by Proscribing Acts of Force and Physical Obstruction

As a threshold matter, it is necessary to determine whether First Amendment analysis is necessary for FACE's regulation of non-verbal conduct. FACE prohibits violent conduct, such as acts of force.[260] It also proscribes physical obstruction with the intent to injure, intimidate, or interfere with another person because that person is obtaining or providing reproductive health services.[261] The first inquiry is to ascertain whether such conduct is expressive conduct falling within the scope of First Amendment methodology.[262] The *Spence* two-part analysis is the proper analytical vehicle for this determination: whether there is an intent to convey a particular message and whether under the surrounding circumstances the message would be understood by the viewer.[263] If the conduct fails the *Spence* test, it is non-expressive conduct outside the purview of the First Amendment.[264]

The use of force has never been found by the Supreme Court to meet the *Spence* test of expressive conduct.[265] For instance, if someone shot and killed another person over a political disagreement, there arguably may be an intent by the shooter to convey a message, but seldom would anyone witnessing the shooting understand that a particularized message was being conveyed by the act. Accordingly, the violent conduct proscribed by FACE is not expressive, and is plainly beyond the First Amendment's breadth of coverage.[266]

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260. 18 U.S.C. § 248(a)(1) & (3) (1994) (prohibiting force with intent to injure, intimidate, or interfere with a person because that person is either obtaining or providing reproductive health services, and further proscribing intentional damage or destruction of property that provides reproductive health services).

261. *Id.* § 248(a)(1) (encompassing *attempts* to injure, intimidate, or interfere with another person as well).

262. *See supra* notes 160-76 and accompanying text (providing proper First Amendment inquiry when reviewing statute that regulates conduct).

263. Spence v. Washington, 418 U.S. 405, 409-10 (1974).

264. *See supra* notes 161-65 and accompanying text (illustrating the use and purpose of the *Spence* test).

265. *See* Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (stating that "a physical assault is not by any stretch of the imagination" expressive conduct that receives First Amendment protection).

266. *See* United States v. Dinwiddie, 76 F.3d 913, 922 (8th Cir.) (recognizing that the use of force does not enjoy First Amendment protection), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); American Life League, Inc. v. Reno, 47 F.3d 642, 648 (4th Cir.)

The Court has also found that physical obstruction does not receive First Amendment protection,[267] stating that "[a] group of demonstrators [can] not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who [does] not agree to listen to their extortions."[268] FACE prohibits physical obstruction with the intent to injure, intimidate, or interfere with another person because that person is either obtaining or providing reproductive health services.[269] Furthermore, physical obstruction is defined by FACE as rendering passage to or from a facility "unreasonably difficult or hazardous."[270] To violate FACE's regulation of physical obstruction, the actor must have the intent to injure, intimidate, or interfere with another person;[271] this requirement prohibits an inadvertent violation of the statute. If there is no such intent, there is no FACE violation.

If physical obstruction is present with the intent to injure, interfere with another person's movement, or intimidate, defined by FACE as placing another person in reasonable apprehension of personal bodily harm or harm to another, because another is either obtaining or providing reproductive health services, a violation of FACE has occurred.[272] Even though physical obstruction is generally unprotected by the First Amendment, in FACE's context a *Spence* inquiry is appropriate to address claims that FACE incidentally regulates some peaceful conduct. It could well be the case that sometimes physical obstruction with the required intent may be inextricably combined with peaceful conduct and expression, such as picketing with placards bearing messages, handing out leaflets, and verbal speech.[273] This type of physical obstruction violation

(finding that the use of force or violence is not protected by the First Amendment), *cert. denied*, 116 S. Ct. 55 (1995); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1426 (S.D. Cal. 1994) (rejecting that the violent conduct regulated by FACE receives any First Amendment scrutiny).

267. *See* Cameron v. Johnson, 390 U.S. 611, 617 (1968) (finding that physical obstruction has no necessary link to the freedom to disseminate information or express an opinion); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965) (maintaining that blocking access to public streets, or public or private entrances, is not a form of speech protected by the First Amendment).

268. *Cox*, 379 U.S. at 555.

269. 18 U.S.C. § 248(a)(1) (1994).

270. *Id.* § 248(e)(4).

271. *See id.* § 248(a)(1).

272. *See id.* § 248(a)(1).

273. This type of conduct long has been recognized by the Court as expressive. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972) (citing an exhaustive compilation of cases for the proposition that peaceful picketing involves expressive conduct); TRIBE, *supra* note 159, § 12-7, at 829. Professor Tribe provides a comprehensive list of activities that have historically been recognized as speech-related conduct, for example: "outdoor distribution of leaflets or pamphlets; door-to-door political canvassing; solicitation of con-

would most likely meet a *Spence* test: it is probable that such activity in the close vicinity of a clinic would convey an intent by the protestors to express the message that abortion is wrong, and that those who view such a demonstration would understand that message.[274] Therefore, because in certain factual situations the non-verbal act of physical obstruction with the requisite intent may be expressive, FACE's regulation of such conduct should be evaluated under the four-part *O'Brien* test.[275]

1. *Finding the Non-Verbal Act of Physical Obstruction to be Expressive Conduct: A Requisite* O'Brien *Examination*

In situations where non-verbal conduct has been found to be expressive, an *O'Brien* analysis is appropriate.[276] *O'Brien* requires that the regulation be enacted pursuant to valid congressional power, that it further a substantial governmental interest, that the government's purpose be unrelated to the suppression of free speech, and that the incidental restrictions on free speech be no more burdensome than necessary.[277]

The most efficacious starting point in an *O'Brien* analysis is step three: whether the government's purpose in promulgating a regulation is unrelated to the suppression of free speech.[278] When addressing this issue, an

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tributions . . . ; mailbox stuffing; picketing; civil rights demonstrations and boycotts; communicating with government; [and] putting up outdoor posters or signs." *Id.* at 829-30 (citations omitted).

274. *See* United States v. Soderna, 82 F.3d 1370, 1375 (7th Cir.) (explaining that although physical obstruction has expressive elements, the First Amendment does not extend its protection to "coercive or obstructionist conduct solely because it serves some passionate ideology or interest" (quoting Pro-Choice Network v. Schenck, 67 F.3d 377, 395 (2d Cir. 1995)), *cert. granted*, 116 S. Ct. 1260 (1996)), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); American Life League, Inc. v. Reno, 47 F.3d 642, 648 (4th Cir.) (finding that FACE "might incidentally affect some conduct with protected expressive elements, such as peaceful but obstructive picketing"), *cert. denied*, 116 S. Ct. 55 (1995); Jill W. Rose & Chris Osborn, Note, *FACE-ial Neutrality: A Free Speech Challenge to the Freedom of Access to Clinic Entrances Act*, 81 VA. L. REV. 1505, 1523 (1995) (finding that FACE regulates conduct that is inextricably related to expression).

275. *See supra* notes 166-76 and accompanying text (discussing the *O'Brien* test and its application).

276. *See* United States v. Dinwiddie, 76 F.3d 913, 923-24 (8th Cir.) (engaging in *O'Brien* examination), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); *American Life League*, 47 F.3d at 651-52 (same); United States v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995) (same); United States v. White, 893 F. Supp. 1423, 1436-37 (C.D. Cal. 1995) (same); Riely v. Reno, 860 F. Supp. 693, 700 (D. Ariz. 1994) (same). *But see* Cook v. Reno, 859 F. Supp. 1008, 1010-11 (W.D. La. 1994) (finding that FACE may affect expressive conduct, but not engaging in *O'Brien* analysis because once a statute regulates unprotected conduct, "it in no way implicates the right of speech and assembly").

277. *O'Brien*, 391 U.S. at 377.

278. *See* Texas v. Johnson, 491 U.S. 397, 407 (1989) (conceding that the Court has limited the applicability of *O'Brien*'s "relatively lenient standard to those cases in which 'the governmental interest is unrelated to the suppression of free expression'" (quoting

examination of the congressional purpose behind the enactment of FACE is important.[279] This entails a close examination of the language and legislative history of the statute.[280] The Court has viewed potential content discrimination by the government as an indication that it may be acting out of malice toward a particular group, and consequently scrutinizes the regulation closely.[281] Every reason for the regulation that is given by the government in support of the regulation will be carefully inspected to determine if it is legitimate, or is a cleverly veiled attempt to disguise discrimination based on speech content.[282]

The Court has respected government's discretion in regulating to protect public policy within the boundaries of the First Amendment.[283] The statute's stated purpose and rules of construction indicate that Congress enacted FACE to protect interstate commerce and the public's health and safety.[284] The legislative history also is replete with the theme that FACE

O'Brien, 391 U.S. at 377); *see also supra* note 174 (citing Supreme Court precedent that indicates that the third prong of *O'Brien* is the appropriate point to begin analysis of a regulation that affects expressive conduct).

279. *See supra* notes 171-76 and accompanying text (illustrating the importance of inspecting congressional purpose).

280. *See* American Life League, Inc. v. Reno, 47 F.3d 642, 649 (4th Cir.) *cert. denied*, 116 S. Ct. 55 (1995).

281. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-40 (1985). The zoning ordinance in *Cleburne* was underinclusive and suggested discrimination against the mentally challenged. *See id.* Only facilities for the mentally challenged were required to obtain a special permit for group house zoning, but not other multiple-dwelling facilities, such as nursing homes, or sanitariums. *See id.* at 447-48; Stone, *supra* note 171, at 206 (noting that although the Court has relied heavily on the Equal Protection Clause when reviewing allegations of discrimination against speech, it is still important to remember that the First Amendment is what is at issue); *see also supra* notes 219, 224-25 and accompanying text (illustrating that the Court uses the Equal Protection Clause analysis during an examination of whether a statute is an impermissible regulation based on content discrimination).

282. *See Cleburne*, 473 U.S. at 448-50. Each proffer by the government for the restriction on group homes for the mentally challenged was rejected as not legitimate and thereby impermissibly underinclusive. *See id.* For example, the city was concerned with the "negative attitudes" of surrounding property owners. *See id.* at 448. The Court dismissed this interest because society's fear or misguidance about the mentally challenged is not a legitimate basis for treating a group home for the mentally challenged differently than other group homes. *See id.* Next, the city was fearful of the reaction from the junior high school students across the street; again, validating this interest would be sanctioning discrimination. *See id.* at 449. Arguments were offered expressing concern that the proposed home's location was on a "five hundred year flood plain," but the Court noted this concern should be present for any group home that wanted that location. *Id.* The arguments were all struck down as masking discrimination against the mentally challenged, and the ordinance was invalidated. *See id.* at 450.

283. *See* International Bhd. of Teamsters, Local 695 v. Vogt, 354 U.S. 284, 294 (1957) (upholding restriction prohibiting picketing meant to coerce employer to pressure employees to join union because the activity was in direct contradiction with state labor law).

284. *See supra* note 68 (providing stated congressional purposes of FACE).

does not prohibit conduct because of its message, but because of its deleterious effects.[285] Moreover, the motive requirement narrows FACE's scope by limiting its reach to the type of conduct that Congress has determined affects public health and safety, women's access to reproductive health services, and interstate commerce.[286] The reasons given by Congress for enacting FACE and imposing a motive requirement withstand more than a cursory, deferential examination, and therefore are legitimate: protecting a segment of the public from a national pattern of specifically directed violence and obstructive conduct motivated by the protest of the legality of a constitutional right, and the resulting impact this conduct has on public health and safety, and interstate commerce.[287]

Furthermore, FACE enjoyed bi-partisan support during its journey through Congress;[288] even avid opponents of abortion spoke on behalf of the bill.[289] The endorsement of FACE by some pro-life Members demonstrates that it is very possible for someone to oppose abortion, yet abhor the violent and obstructive tactics used by some in protesting it, by advocating a legislative response to stop the violence and blockades surround-

285. *See* United States v. Brock, 863 F. Supp. 851, 860-61 (E.D. Wis. 1994) (finding that the legislative history documents the harmful effects of clinic blockades and harassment and the inadequacy of the states' efforts to address these effects), *aff'd sub nom.* United States v. Soderna, 82 F.3d 1370 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); *see also supra* notes 2-11 (providing examples of violent and obstructive conduct that prompted Congress to enact FACE; *supra* note 68 and accompanying text (describing congressional purposes for enacting FACE).

286. *See* Wisconsin v. Mitchell, 508 U.S. 476, 487-88 (1993) (finding a Wisconsin penalty-enhancement statute constitutional that prohibited discriminatory motives for acting because this type of conduct was thought "to inflict greater individual and social harm"); American Life League, Inc. v. Reno, 47 F.3d at 642, 650 (4th Cir.) (explaining that Congress has discretion to "single out" certain conduct it finds harmful to individuals and society by narrowing the scope of the statute with a motive requirement), *cert. denied*, 116 S. Ct. 55 (1995); *Hearing*, *supra* note 28, at 91 (testimony of Laurence H. Tribe) ("It is widely regarded as a mark of our civilization that we make the intention of the actor relevant to the question of whether the person is deemed a wrongdoer.").

287. *See supra* notes 2-11, 25-66 and accompanying text (identifying the various reasons for enacting FACE).

288. In the "Additional Views" section of the Senate Report on FACE, former Senator Durenberger, while personally expressing his belief that abortion is wrong, nonetheless voiced his support for the bill. *See* SENATE REPORT, *supra* note 2, at 39. Succinctly put, the Senator stated, "[I]t is incumbent upon those of us who oppose the taking of innocent human [life] also to oppose and deplore actions which harm others." *Id.*

289. *See* 139 CONG. REC. H10,081 (daily ed. Nov. 18, 1993) (statement of Rep. Sangmeister). Supporting FACE as it moved through House debate, Rep. Sangmeister affirmed that although he is "pro-life both personally and politically," he urged his colleagues to vote for FACE because violence, harassment, and vandalism should not be tolerated. *Id.* Former Senator Danforth was a recognized defender of the pro-life movement in Congress, but, nevertheless, supported the enactment of FACE and spoke on the bill's behalf. 139 CONG. REC. S15,680 (daily ed. Nov. 16, 1993) (statement of Sen. Danforth).

ing the provision of reproductive health services.[290] In fact, due to the comments and concerns of the pro-life movement, Congress amended the original bill.[291] The original version addressed only violence and obstructive conduct aimed at abortion clinics and services;[292] the final version extends protection to "services relating to pregnancy or the termination of a pregnancy."[293]

It goes without saying, however, that one will rarely find a "smoking gun" in the legislative purpose or history of the statute that points to government's unsavory motivation in enacting a regulation.[294] An examination of the statute's content-neutrality will greatly assist in determining whether government has regulated conduct because of a hostility toward the content of speech that inspires the conduct.[295] Consequently, analysis

290. *See Soderna*, 82 F.3d at 1374; *see also supra notes* 2, 25 (recognizing that many participants in the pro-life movement condone violence as a way of protesting the continued legality of abortion).

291. *See* S. 636, 103d Cong. (1993). For instance, the only terms defined in the original bill were "abortion services," "Attorney General," "medical facility," and "state." *See id.* Moreover, the penalties were much stiffer, in that there was no leniency for offenders of physical obstruction violations. *Id.* at §3(b). A first time offender could receive fines, up to a year in prison, or both; a repeat offender would be subject to fines, up to three years in prison, or both. *See id.*; *cf. supra* notes 77-78 and accompanying text (providing FACE's criminal penalties for physical obstruction which are less than those the original bill granted).

292. *See* S. 636, 103d Cong. (1993). The original bill only covered abortion services, which was defined as including "medical, surgical, counselling or referral services relating to the termination of a pregnancy." *Id.* The phrase "medical facilities" was to include facilities that provided health, surgical services, counseling or referrals related to such services. *See id.*; *see also* SENATE REPORT, *supra* note 2, at 24-25 (advocating that the term "medical facilities" could cover facilities that did not offer abortions, although the act specifically only discussed and defined "abortion services").

293. 18 U.S.C. § 248(e)(5) (1994) (providing that "reproductive health services" encompasses those "services relating to the human reproductive system, including services related to pregnancy or the termination of a pregnancy"); *see* United States v. Soderna, 82 F.3d 1370, 1376 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141). The Seventh Circuit found that by broadening the scope of FACE out of caution, Congress "finessed" the assertion that the statute is content-based. *See id.* Although those being prosecuted under the statute are primarily pro-life, they are violating the provision of interfering with pregnancy *or* abortion related services. *See id.*

294. *See* TRIBE, *supra* note 159, § 12-6, at 823 (admitting the difficulty in "ferreting out the real purpose of a collective lawmaking body"); Stone, *supra* note 171, at 230-31 (recognizing the difficulty in discovering the true motivation behind a regulation that affects speech); *cf.* United States v. O'Brien, 391 U.S. 367, 383 (1968). The *O'Brien* Court explained that inquiries into alleged illicit government motivation are generally a "hazardous matter." *Id.* But when an otherwise constitutional law is alleged to have been enacted due to improper purpose based on statements made by a few lawmakers, the Court will decline to strike it down because "the stakes are sufficiently high for us to eschew guesswork." *Id.* at 384.

295. *See* Stone, *supra* note 171, at 230-31 (discussing the use of the "content-based/content-neutral distinction" to extricate the real motivation of government in enacting a

under the third step of *O'Brien* proceeds to whether Congress's legitimate stated purposes behind FACE are merely a pretext: an attempt to hide government's hostility toward the entire subject of the abortion debate, or the pro-life viewpoint.[296]

2. *FACE's Prohibition of Force and Physical Obstruction Does Not Discriminate Against the Subject Matter of Abortion Speech*

Congress drafted FACE to ensure that it would not infringe upon such constitutionally protected activities as speech-making, distributing leaflets, carrying picket signs, and praying in front of clinics.[297] What FACE does regulate through its prohibition of force and physical obstruction is the violent conduct and barricading tactics that occur because a person is either obtaining or providing reproductive health services.[298] The mere fact that FACE only regulates conduct occurring at reproductive health facilities, however, does not make it a subject matter discrimination regulation.[299] It is a fundamental principle of government that Congress may address one problem at a time, otherwise "[i]t would be a prescription for constitutional deadlock if Congress, every time it addressed a given prob-

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regulation). Professor Stone also notes that government will more likely pass a content-based regulation because of disagreement with the content, rather than approval. *See id.*

296. *See* United States v. Dinwiddie, 76 F.3d 913, 922-23 (8th Cir.) (analyzing whether FACE is a content-based regulation), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); American Life League, Inc. v. Reno, 47 F.3d 642, 652 (4th Cir.) (same), *cert. denied*, 116 S. Ct. 55 (1995); United States v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995) (recognizing that its discussion of whether FACE is content-based was the same as *O'Brien*'s requirement that the statute not be related to the suppression of expression); United States v. White, 893 F. Supp. 1423, 1435-36 (C.D. Cal. 1995) (stating that the *O'Brien* factor of not regulating to suppress certain ideas "tracked the content- and viewpoint-neutrality test discussed" previously).

297. *See* 18 U.S.C. § 248(d)(2) (expressly pronouncing that nothing in FACE shall be interpreted to proscribe protected First Amendment activity); *see also* HOUSE REPORT, *supra* note 4, at 708-09 (providing types of prohibited activities covered by FACE). Many pro-life members of Congress voted for FACE because it restricts violent conduct, not protected speech. *See* 140 CONG. REC. H3134-35 (daily ed. May 5, 1994) (vote tally on S. 636); 140 CONG. REC. S5628 (daily ed. May 12, 1994) (vote tally on S. 636); *see also supra* notes 288-89 (providing examples of self-avowed pro-life members that supported FACE's passage).

298. *See* 18 U.S.C. § 248(a)(1).

299. *American Life League*, 47 F.3d at 651 (stating that just because "one ideologically defined group is more likely to engage in the proscribed conduct" it does not immediately follow that the statute is content-based). *But cf.* Paulsen & McConnell, *supra* note 143, at 263 (advocating that FACE "imposes severe sanctions on a demonstrator at an abortion clinic without imposing any sanction on an otherwise identical demonstrator at a nuclear power plant or at a research hospital engaged in animal experimentation").

lem, had to scan the ideological horizon and address every other problem that is like it or that is its mirror image."[300]

Congress had a proper purpose, established by valid congressional findings, in protecting the health and safety of clinic employees and patients through a proscription on violent, destructive, and obstructive conduct.[301] Only the nationwide anti-abortion activity surrounding reproductive health services was found by Congress to be serious enough to affect interstate commerce and warrant a federal response.[302] Furthermore, Congress found that the national campaign waged on abortion clinics undermined the constitutional right to an abortion, and placed the public health and safety in jeopardy.[303] Congress legislated to prevent the unlawful conduct's adverse effects on interstate commerce, prohibit interference with a constitutional right, and prohibit the violent and disruptive actions it found harmful enough to warrant federal attention.[304]

300. *Hearing*, *supra* note 28, at 92 (testimony of Laurence H. Tribe); *see* Wisconsin v. Mitchell, 508 U.S. 476, 487-88 (1993) (stating that government may choose to legislate against specific conduct that produces harm to individuals and society); *American Life League*, 47 F.3d at 651 (pronouncing that Congress may decide to legislate only those actions it considers to be of prime importance).

301. *See Dinwiddie*, 76 F.3d at 923 (citing to congressional reports on FACE, the court concluded that Congress enacted FACE to prohibit conduct that interferes with the ability of women to gain to access reproductive health services, which includes abortion); Riely v. Reno, 860 F. Supp. 693, 700 (D. Ariz. 1994) (finding that Congress's purpose was to protect medical facilities and staff from violence and other forceful and threatening tactics); *see also* HOUSE REPORT, *supra* note 4, at 699 (furnishing the purpose of FACE as deterring "the growing violence accompanying the debate over the continued legality and availability of abortion and other reproductive health services"); SENATE REPORT, *supra* note 2, at 2 (providing that congressional purpose for enacting FACE was premised on preventing the use of violence, physical obstruction, and other types of destructive activity against those who provide abortion-related services).

302. *See* American Life League, Inc. v. Reno, 47 F.3d 642, 651 (4th Cir.) (asserting that "Congress may choose to legislate only against actions it considers to be more serious" and that the conduct surrounding the provision of abortion services was more serious than conduct that affected such services incidentally, such as labor protesting), *cert. denied*, 116 S. Ct. 55 (1995); *see also supra* note 68 and accompanying text (describing congressional findings regarding the impact of abortion violence, obstruction, and threatening conduct on interstate commerce). *But see* Paulsen & McConnell, *supra* note 143, at 282. The authors find FACE to be a content-based statute, explaining, "Abortion protestors are not the only political protestors to obstruct others in an attempt to intimidate or prevent them from exercising their legal rights, but they would be the only ones singled out for special punishment as a matter of federal law." *Id.* They assert that FACE punishes civil disobedience based on a disagreement with the pro-life viewpoint. *See id.*

303. *See* HOUSE REPORT, *supra* note 4, at 704-07; *see also supra* notes 25-37 and accompanying text (elucidating the nationwide scope and effect of anti-abortion conduct prior to the enactment of FACE).

304. *See American Life League*, 47 F.3d at 648 (finding that FACE prohibits the unprotected violent and obstructive conduct that was adversely affecting the provision of abortion services, and consequently, the disruption of interstate commerce); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1426 (S.D. Cal. 1994) (rejecting that FACE regulates

Therefore, FACE does not discriminate based on the subject matter of abortion speech. Rather, Congress legislated to prevent violent, obstructive, and destructive conduct, which happens to surround the abortion debate, and the conduct's injurious effects.[305]

3. *FACE Does Not Regulate Conduct to Silence the Pro-Life Point of View*

FACE's applicability depends in part on the actor's motive.[306] To violate the statute, one must engage in the proscribed activity with the intent to injure, intimidate or interfere with another person because that person is seeking either to provide or obtain reproductive health services.[307]

The mere presence of a motive requirement in a regulation, however, does not automatically render a statute viewpoint-based.[308] The issue is whether Congress was attempting to disadvantage the pro-life viewpoint through FACE's regulation of conduct, and especially by means of the motive requirement.

The fact that one group is more likely to engage in the activity prohibited by Congress does not render the restriction one based on discrimination toward a particular viewpoint.[309] Even though pro-life activity may

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any conduct protected by the First Amendment in its response to anti-abortion violence); *see also Hearing*, *supra* note 28, at 94 (statement of Laurence H. Tribe). Professor Tribe stressed, "One of the most common recurring phrases in U.S. Supreme Court opinions . . . is that the Constitution permits legislative bodies to move one step at a time." *Id.*

305. *See supra* notes 221-27 and accompanying text (explaining the application of the Equal Protection Clause's compelling governmental interest test to discriminatory regulations of the content of speech).

306. *See* 18 U.S.C. § 248(a)(1) (prohibiting activity if it is motivated by another person either obtaining or providing reproductive health services).

307. *See id.* § 248(a)(1). The Fourth Circuit asserts that the motive requirement is the crux of the viewpoint discrimination argument. *See American Life League*, 47 F.3d at 649.

308. The Supreme Court made this point abundantly clear in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). In *Mitchell*, the statute increased the punishment of unprotected conduct, such as aggravated battery, when the act was motivated by discrimination based on another's race, religion, color, disability, sexual orientation, or national origin. *See id.* at 480. The Court clearly distinguished the holding in *R.A.V. v. City of St. Paul* because the city ordinance in *R.A.V.* was plainly tailored to discriminate against a category of unprotected *expression*, whereas the statute in *Mitchell* was aimed at unprotected *conduct*. *See id.* at 487.

309. *See* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2524 (1994) (holding that an injunction against anti-abortion protestors does not render it content-based although it affects people with a particular viewpoint); United States v. O'Brien, 391 U.S. 367, 385-86 (1968) (upholding a statute prohibiting draft card burning although the most likely offenders would be opposed to the Vietnam War); United States v. Dinwiddie, 76 F.3d 913, 923 (8th Cir.) (insisting that there is no "disparate impact theory in First Amendment law"), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); American Life League, Inc. v. Reno, 47 F.3d 642, 651 (4th Cir.) (stating that a statute does not cease to be neutral just because one side in a debate is more likely to engage in the prohibited con-

be most affected by FACE,[310] the term "reproductive health services" is broad enough to cover health services other than abortions.[311] Therefore, if a pro-choice protestor interferes with a woman trying to gain access to a reproductive health clinic for routine pregnancy services, the protestor may be charged under FACE if the interference is motivated by the fact that the woman is obtaining reproductive health services.[312] In fact, charges brought against an abortion rights supporter for threatening to kill workers at a pregnancy counseling center demonstrate that FACE is both neutral on its face and in application.[313]

Nor does *R.A.V. v. City of St. Paul*[314] require a contrary result.[315] The ordinance struck down by the Court in *R.A.V.* was a regulation directed at speech: it prohibited certain categories of "fighting words," characterized as "hate speech," based on viewpoint.[316] The Court found that government's purpose in the viewpoint regulation of a subset of an

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duct), cert. denied, 116 S. Ct. 55 (1995); *see also Hearing*, *supra* note 28, at 100 (statement of Laurence H. Tribe). Addressing this point, Professor Tribe emphasized, "It is crucial to recognize that nothing in the first amendment remotely shields objectively defined, non-speech conduct from regulation simply because many or even most of those who engage in that conduct are likely to share a certain philosophy or viewpoint." *Id.*

310. *See Hearing*, *supra* note 28, at 100 (statement of Laurence H. Tribe) (conceding that physical obstruction of a clinic by a protestor motivated by something other than a pro-life viewpoint would be rare).

311. *See* Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1427 (S.D. Cal. 1994) (recognizing that the broad statutory definition does not restrict the meaning to clinics that provide abortion services).

The Seventh Circuit noted that FACE is a facially neutral statute, and does not distinguish between pro-life and pro-choice conduct. *See* United States v. Soderna, 82 F.3d 1370, 1376 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141). The court hypothesized that if FACE provided for stiffer criminal penalties for pro-life defendants who violated FACE, then the distinction would most likely be unlawful. *See id.*

312. *See American Life League*, 47 F.3d at 649 (asserting that anyone who engages in the prohibited conduct with the required intent violates FACE, regardless of the viewpoint of the actor); Riely v. Reno, 860 F. Supp. 693, 702 (D. Ariz. 1994) (finding that FACE applies to both pro-life and pro-choice activity).

313. *See* United States v. Mathison, Crim No. 95-085-FVS (E.D. Wa. 1995); Brief for the United States as Appellee at 19, United States v. Hatch, *sub nom.* United States v. Soderna, 82 F.3d 1370 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141).

314. 505 U.S. 337 (1992).

315. *See* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (illustrating that *R.A.V.* was inapplicable because it regulated speech, where the statute at issue in *Mitchell* was aimed at unprotected conduct); *Soderna*, 82 F.3d at 1376 (finding that FACE is analogous to the regulation in *Mitchell*, directed at unprotected conduct, and not the ordinance in *R.A.V.*, which regulated speech through its proscription of "fighting words"). *But see* Rose & Osborn, *supra* note 274, at 1527-31 (contending that the holding in *R.A.V.*, and not *Mitchell*, applies to FACE). Rose and Osborn find that FACE regulates unprotected expressive conduct, and that the ordinance in *R.A.V.* also regulated unprotected expressive conduct through its prohibition on hate speech. *See id.* at 1531-32.

316. *R.A.V.*, 505 U.S. at 391.

unprotected category of speech was based on a discriminatory animus toward "hate speech," and that the government did not meet the compelling governmental interest test necessary to withstand the viewpoint discrimination challenge.[317]

Conversely, FACE does not regulate based on any viewpoint: it regulates the conduct of force and physical obstruction.[318] FACE is analogous to the regulation before the Court in *Wisconsin v. Mitchell*,[319] which involved an increased penalty statute that required, for its applicability, an intent on the part of the defendant to select a victim based on a discriminatory motive.[320] The Court found the regulation to be constitutional because the statute regulated the underlying non-expressive conduct, distinguishing the *Mitchell* holding from that of *R.A.V.* by explaining that the ordinance in *R.A.V.* regulated expression.[321]

In short, Congress's legislative purpose in enacting the force and physical obstruction proscriptions in FACE is unrelated to the suppression of speech, and not in any way motivated by an animus directed at the sub-

317. *See id.* at 395-96.

318. *See* 18 U.S.C. § 248(a)(1) (1994) (prohibiting use of force and physical obstruction that "intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been . . . obtaining or providing reproductive health services"); United States v. Soderna, 82 F.3d 1370, 1376 (7th Cir.) (stressing that FACE is about conduct that has "physical consequences that are independent of symbolic significance"), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141).

319. 508 U.S. 476 (1993).

320. *See id.* at 487-88. The defendant in *Mitchell* was convicted of aggravated battery, and received an increased penalty for severely beating a white boy, whom he apparently selected as a victim solely because the boy was Caucasian. *See id.* The Court rejected the argument that the motive requirement was discriminatory, explaining that the underlying conduct was unprotected by the First Amendment. *See id.* at 487.

The Seventh Circuit stated that the distinguishing factor quoted by the *Mitchell* Court, which was "the ordinance struck down in *R.A.V.* was explicitly directed at expression [namely hate speech] . . . [whereas] the statute in this case is aimed at conduct unprotected by the First Amendment," could be used to combat the constitutional charge against FACE. *Soderna*, 82 F.3d at 1376 (quoting *Mitchell*, 508 U.S. at 487-89) (alterations in original); *see also* Riely v. Reno, 860 F. Supp. 693, 703 (D. Ariz. 1994) (maintaining that FACE is unlike the ordinance in *R.A.V.* because FACE regulates unprotected conduct).

321. *See Mitchell*, 508 U.S. at 487. Furthermore, the Supreme Court has held that the motive requirement in Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin" is compatible with the First Amendment. 42 U.S.C. § 2000e-2(a)(1) (1994); *see Mitchell*, 508 U.S. at 487; *R.A.V.*, 505 U.S. at 389; *see also* American Life League, Inc. v. Reno, 47 F.3d 642, 650 (4th Cir.) (discussing the motive requirement of FACE, the court pointed out that Title VII includes a motive requirement and has been upheld by the Supreme Court as not violative of the First Amendment), *cert. denied*, 116 S. Ct. 55 (1995).

ject matter of abortion, or the pro-life viewpoint.[322] Therefore, FACE is a content-neutral regulation of conduct and meets the third step of *O'Brien*.[323]

4. FACE Meets the Remaining Components of the O'Brien *Test*

Because it has been established that Congress enacted FACE for reasons unrelated to the suppression of speech, the analysis then continues with the remaining components of the *O'Brien* test.[324] The considerations are whether FACE was enacted pursuant to valid congressional power, whether it furthers a substantial governmental interest, and finally whether the incidental restrictions on First Amendment guarantees are no greater than necessary.[325]

Applying the first step of *O'Brien* to FACE, Congress has the authority to enact FACE pursuant to its Commerce Clause power.[326] Second, the statute furthers substantial governmental interests.[327] Specifically, FACE

322. *See supra* notes 276-321 and accompanying text (illustrating that the congressional purpose behind enacting FACE is legitimate, and that no discriminatory motive based on the subject matter of abortion or the pro-life viewpoint exists).

323. *See Soderna*, 82 F.3d at 1374 (finding that FACE does not discriminate against the pro-life viewpoint, but that it targets unprotected conduct); United States v. Dinwiddie, 76 F.3d 913, 923 (8th Cir.) (stating that FACE's motive requirement accomplishes the "perfectly constitutional task of filtering out conduct that Congress believes need not be covered by a federal statute"), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615); *American Life League*, 47 F.3d at 652 (pronouncing that FACE was not enacted to suppress the pro-life message, but instead to prohibit unlawful conduct); United States v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995) (deciding that the motive requirement permissibly narrowed the prohibited behavior that Congress found substantially affected interstate commerce); United States v. White, 893 F. Supp. 1423, 1435 (C.D. Cal. 1995) (recognizing that "Congress was extremely cautious in balancing defendants' First Amendment rights"); Riely v. Reno, 860 F. Supp. 693, 702 (D. Ariz. 1994) (stating that FACE's language would "apply to an individual who spray paints the words 'KEEP ABORTION LEGAL' on a facility providing counseling regarding abortion alternatives as well as the individual who spray paints 'DEATH CAMP' on a facility providing abortion services"); Cook v. Reno, 859 F. Supp. 1008, 1010 (W.D. La. 1994) ("Violence is the target of . . . [FACE], not speech, and as such is a constitutionally permitted intrusion."); Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1427 (S.D. Cal. 1994) (noting that the governmental purpose behind enacting FACE was the permissible goal of halting the violence occurring at reproductive health clinics, as opposed to "a desire to curb any anti-abortion message some people wish to convey").

324. *See supra* notes 166-76 and accompanying text (illustrating the four steps of an *O'Brien* examination); *supra* notes 283-323 (finding that FACE meets the third prong of *O'Brien*).

325. *See Dinwiddie*, 76 F.3d at 923; *American Life League*, 47 F.3d at 651-52; *Lucero*, 895 F. Supp. at 1424; *White*, 893 F. Supp. at 1436-37; *Riely*, 860 F. Supp. at 700.

326. *See American Life League* 47 F.3d at 647; *see also supra* notes 117-34 and accompanying text (providing Congress's Commerce Clause authority to enact FACE).

327. *See* American Life League, Inc. v. Reno, 47 F.3d 642, 651 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995). The Fourth Circuit found two distinct interests. *See id.* One related

promotes public health and safety by providing safe access to medical clinics, protects the exercise of a constitutional right, and remedies the detrimental effects of clinic blockades on interstate commerce.[328] As previously discussed, *O'Brien*'s third step is satisfied because the force and obstruction provisions of FACE regulate conduct without regard to the suppression of speech.[329]

Finally, the conduct prohibited by the statute does not unduly burden more speech than necessary to achieve the government's interest.[330] FACE allows for peaceful protesting, speeches, sidewalk counseling, and distribution of literature, as long as these activities are not performed in a manner that physically obstructs with the intent to injure, intimidate or interfere with another's entrance or exit from a clinic.[331] Therefore, FACE withstands the *O'Brien* test, even assuming arguendo that it incidentally affects some expressive conduct that is inextricably entwined with proscribed activity.[332]

B. *Threats of Force: FACE's Constitutional Regulation of Pure Speech*

Courts must recognize that in one of its provisions, FACE regulates purely verbal behavior through its proscription of threats of force that intentionally injure, intimidate or interfere with another person because

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to protecting public health and safety, and interstate commerce, and the other interest sought to "protect[ ] women and men from violence and threats in the exercise of their rights." *Id.* Expounding upon this, the court recognized that the Supreme Court has identified government's strong interest in "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." *Id.* (quoting Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2526 (1994). The court concluded that this freedom encompasses the right to obtain an abortion, recently reaffirmed by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *See id.*; *see also Riely*, 860 F. Supp. at 700 (pronouncing that Congress identified suitably important interests to regulate the conduct in FACE); *see also supra* notes 2-11, 68, and accompanying text (discussing the substantial governmental interests that Congress sought to further with FACE).

328. *See American Life League*, 47 F.3d at 651.

329. *See supra* notes 297-323 and accompanying text (concluding that FACE is not a content-based regulation based on either the subject matter or viewpoint of speech).

330. *See American Life League*, 47 F.3d at 652 (noting that most of the conduct proscribed by FACE lacks protected expressive speech components); United States v. Lucero, 895 F. Supp. 1421, 1424 (D. Kan. 1995) (finding that although FACE may affect some peaceful protest where physical obstruction is involved, the "prohibition is no more restrictive than necessary").

331. *See American Life League*, 47 F.3d at 652.

332. *See supra* note 323 and accompanying text (citing cases that stand for the proposition that FACE withstands *O'Brien* scrutiny). *But see* Rose & Osborn, *supra* note 274, at 1534-35 (finding that FACE is content-based because the "limited applicability of FACE gives rise to the inference that Congress targeted abortion protests out of a hostility to the message conveyed and, in particular, a desire to suppress the activities of the pro-life movement").

that person is either obtaining or providing reproductive health services.[333] This prohibition is not properly evaluated under *O'Brien*, a test limited to expressive non-verbal conduct.[334] Though threats are pure speech, they are not protected by the First Amendment.[335]

FACE is neither the first nor the only federal statute to prohibit threats of force. For example, it is unlawful to intimidate, threaten or coerce a foreign official in the course of her duties;[336] to threaten, intimidate or interfere with any person from exercising certain designated rights;[337] and, to knowingly and willfully threaten the President or Vice President of the United States.[338] Although all these statutes prohibit speech, they are permissible content-discrimination regulations because "the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable."[339] Threats are unprotected speech because the government has a compelling interest in protecting its citizens from fear of violence, and especially from the possibility that what today is a threat may tomorrow come true.[340] It is permissible to "regulate speech to the extent that the communicative impact of the words on the listener is that of fear of bodily harm."[341]

Moreover, FACE's proscription of threats of force is not based on an animus toward the pro-life viewpoint for the same reasons argued in the previous section: the purpose is unrelated to the suppression of speech.[342] Congress found that all the activity prohibited by FACE, including threats of force, interfered with public health and safety, a women's right to reproductive health services, and substantially affected interstate com-

333. 18 U.S.C. § 248(a)(1) (1994).

334. *See supra* notes 166-76 and accompanying text (illustrating that an *O'Brien* examination only is utilized when scrutinizing expressive conduct).

335. *See supra* notes 208-10 and accompanying text (explaining that the Supreme Court does not consider threats of force to be protected under the First Amendment).

336. *See* 18 U.S.C. § 112(b).

337. *See* 18 U.S.C. § 245(b).

338. *See* 18 U.S.C. § 871(a). This statute was examined and held to be constitutional. *See* Watts v. United States, 394 U.S. 705 (1969); *see also infra* notes 346-47 (providing background on *Watts*).

339. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

340. *See id.* The Supreme Court concluded that the reason threats are outside the First Amendment is to protect "individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *Id.*

341. Riely v. Reno, 860 F. Supp. 693, 701 (D. Ariz. 1994). The court cites to *Madsen v. Women's Health Center*, in which the Supreme Court stated "clearly, threats to patients or their families, however communicated, are proscribable under the First Amendment." 114 S. Ct. 2516, 2529 (1994); *see also* United States v. Gilbert, 813 F.2d 1523, 1531 (9th Cir. 1987) (finding no doubt that threats of force may be permissibly prohibited).

342. *See supra* notes 278-323 and accompanying text (examining the stated congressional purposes for enacting FACE and also delving into whether the purposes were a pretext for either subject matter or viewpoint discrimination).

merce.[343] Furthermore, FACE's motive requirement does not evince discriminatory intent on behalf of Congress to silence the pro-life viewpoint.[344] Therefore FACE does not present an *R.A.V.* situation, again, because threats of force are not prohibited by FACE based on viewpoint.[345]

1. What Constitutes a Threat of Force Under FACE?

While the Supreme Court has found that threats of force are not protected speech under the First Amendment, it has never provided a definition of what constitutes a threat, other than to state that it must be a true threat.[346] It is clear that when proscribing pure speech conduct, First Amendment rights must be kept in mind.[347] In search of a First Amendment formula to apply to FACE's proscription of threats, the fighting words doctrine is proffered, yet promptly rejected.

Use of the fighting words doctrine in defining threats of force is inappropriate, for the doctrine requires the likelihood of a violent response by the listener toward the speaker, not vice versa.[348] A *Brandenburg* analysis seems slightly better suited to an examination of whether words spoken are threats of force under FACE, but it ultimately fails to provide an applicable standard of analysis.[349]

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343. *See supra* notes 278-323 and accompanying text (illustrating Congress's legislative purposes for FACE's regulation of conduct); *see also* note 10 (describing the types of threats of force experienced by abortion providers).

344. *See supra* notes 306-23 and accompanying text (discussing the constitutionality of FACE's motive requirement).

345. *See supra* notes 228-36 and 314-21 and accompanying text (discussing the issue and holding in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

346. *See* Watts v. United States, 394 U.S. 705, 708 (1969). At a political rally on the Washington Monument grounds, an eighteen year old remarked about the draft, "If they ever make me carry a rifle the first man I want to get in my sights is L. B. J. [President Lyndon Baines Johnson]" *Id.* at 706. He was convicted under 18 U.S.C. § 871(a), which prohibits a knowing and willful threat to take the life of the President. *See id.* The Court reversed the conviction, finding the statement to be "political hyperbole" and not a "true threat" as required by the statute. *Id.* at 708. Furthermore, Watt's statement was conditioned upon being drafted, and when he made the allegedly threatening comment, people laughed. *Id.* at 707-08.

347. *See Watts*, 394 U.S. at 707 (noting that while the language of political debate is often "vituperative, abusive and inexact," the First Amendment does not prohibit such language); United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir.) (finding that the First Amendment does not permit government to punish aggressive or forceful speech), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-5615).

348. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942) (describing the fighting words doctrine as words that are likely to make the addressee commit an act of violence, probably against the speaker); *see also supra* notes 190-98 and accompanying text (outlining the fighting words doctrine and its evolution).

349. *See Dinwiddie*, 76 F.3d at 922 n.5. The Eighth Circuit found the *Brandenburg* test inapplicable to FACE, because it only applies to regulations that prohibit speech that in-

Brandenburg requires that a statute prohibiting speech that advocates the use of force must be limited to proscribing advocacy that is "directed to inciting or producing imminent lawless action" and that the advocacy is likely to produce such a response.[350] The Court's formulation of the inciting unlawful conduct exception to First Amendment protection has been limited to public speech directed to encourage others to engage in violent or unlawful activity.[351] FACE involves privately communicated threats directed to one individual[352] and does not encompass a violent reaction by the listener toward a third party.[353]

FACE's legislative history provides an illustration of the types of speech Congress intended to prohibit through the statute's threats of force provision.[354] According to Congress, threats of force are present where "it is reasonably foreseeable that the threat would be interpreted as a serious expression of an intention to inflict bodily harm."[355] Also related to a threat definition is the term "intimidate," which is defined as placing a person in reasonable apprehension of bodily harm.[356]

The few courts reviewing an alleged FACE violation based on the threats of force provision consequently have designed a set of factors from which to determine whether a "threat of force" has been committed.[357] The Eighth Circuit provided a number of considerations when attempting to define whether speech constituted a threat:

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cites the listener to use violence against a third party. *See id.* FACE prohibits the speaker from "directly threatening another person." *Id.* A district court in Arizona also declined to find *Brandenburg* useful in examining FACE's proscription against threats. *See* Riely v. Reno, 860 F. Supp. 693, 702 (D. Ariz. 1994).

350. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); *see supra* notes 199-207 (discussing *Brandenburg* and its application).

351. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) (examining public speeches made by civil rights leader); Hess v. Indiana, 414 U.S. 105, 107 (1973) (inspecting demonstration speech made in public streets); *Brandenburg*, 395 U.S. at 447 (scrutinizing speech made by a KKK leader taped for television).

352. *See Riely*, 860 F. Supp. at 702.

353. *See Dinwiddie*, 76 F.3d at 922 n.5.

354. *See* SENATE REPORT, *supra* note 2, at 23.

355. *Id.* at 23.

356. *See* 18 U.S.C. § 248(a)(1) & (e)(4) (1994). The court in *Hoffman v. Hunt* found this provision and the definition of intimidate to be unconstitutional because the statute's operation depends on the subjective reaction of the listener to the speech. 923 F. Supp. 791, 822 (W.D.N.C. 1996). Moreover, the court maintained that this provision extended beyond both the fighting words and inciting unlawful conduct doctrines, further rendering the statute unconstitutionally overbroad. *See id.*

357. *See* United States v. Dinwiddie, 76 F.3d 913, 925-26 (8th Cir.) (outlining a number of factors when assessing whether speech constituted a threat), *petition for cert. filed*, (U.S. Aug. 6, 1996) (No. 96-141); Lucero v. Trosch, 928 F. Supp. 1124, 1129-30 (S.D. Ala. 1996) (adhering to the factors set out by the Eighth Circuit in *Dinwiddie*). The Eighth Circuit

> [T]he reaction of the recipient of the threat and of other listeners; whether the threat was conditional; whether the threat was communicated directly to its victim; whether the maker of the threat had made similar statements to the victim in the past; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. This list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive.[358]

Courts take into account the circumstances of the threatening speech, and apply these factors to the situation.[359] Upon application of the above guidelines, FACE's proscription against threats was found not to be violated by a Catholic priest who appeared on a nationally televised talk show with an abortion provider.[360] Although the priest's remarks were highly inflammatory and involved affirmative statements that the doctor was a mass murderer and should be dead,[361] the court ruled that under all the circumstances, it could not find a genuine threat of force under FACE.[362]

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borrowed extensively from its decisions addressing other threat statutes to create a list of considerations for a definition of threat under FACE. *See Dinwiddie*, 76 F.3d at 925.

358. *Dinwiddie*, 76 F.3d at 925 (citations omitted).

359. *See id.* at 925-26. The facts of the threat situation in *Dinwiddie* permitted the court to hold that Ms. Dinwiddie's statements were threats of force within the meaning of FACE. *See id.* at 925. The Court found that between mid-1994 and early 1995, Ms. Dinwiddie used a bullhorn to warn an abortion provider approximately 50 times to "'remember Dr. Gunn . . . . This could happen to you. . . . He is not in the world anymore. . . . Whoever sheds man's blood, by man his blood shall be shed." *Id.* The doctor was aware that Ms. Dinwiddie had attacked a maintenance supervisor at Planned Parenthood, physically obstructed the entranceway, and told the executive director of the facility, "'[Y]ou have not seen violence yet until you see what we do to you." *Id.* The doctor began wearing a bullet proof vest in response. *See id.* at 926. The manner in which the statements were made, the surrounding circumstances, and the fact that they placed the doctor in "reasonable apprehension of bodily harm" supported the court's conclusion that they were threats of force under FACE. *Id.* at 925.

360. *See Trosch*, 928 F. Supp. at 1124. Father Trosch is an avid supporter of the "justifiable homicide" doctrine, which is described by him as "'anyone participating in the direct act of murdering innocent human beings, can have [his or her] life forfeited in the defense of innocent human life.'" *Id.* at 1125 (alterations in original) (quoting Father Trosch). He was suspended by the Catholic Church after an attempt to place newspaper advertisements that espoused the view of justifiable homicide. *See* Smothers, *supra* note 2, at 26.

Appearing on the *Geraldo Show* with Dr. Lucero, who was himself not a stranger to this type of public forum for discussing the abortion debate, Father Trosch made several inflammatory and "emotionally charged" remarks aimed at Dr. Lucero concerning killing abortion doctors and Dr. Lucero in particular. *Trosch*, 928 F. Supp. at 1127.

361. When asked by Geraldo Rivera, the show's host, whether the priest would murder an abortion doctor if he had a gun in his possession, the priest replied, "'No, I would not murder him, but I would kill him. There's a difference.'" *Trosch*, 928 F. Supp. at 1127.

362. *See Trosch*, 928 F. Supp. at 1228-30. The court examined the statements in the context in which they were made. *See id.* at 1230. The court pointed out that the state-

VI. CONCLUSION

While it has been alleged that FACE violates basic Constitutional provisions, such as the First Amendment and the Commerce Clause, FACE simply safeguards every citizen's opportunity to exercise his or her rights under the Constitution. Congress properly enacted FACE by laying the groundwork for its Commerce Clause authority to enact FACE through abundant congressional findings. These findings demonstrated that the conduct regulated by the statute substantially affects the economic and commercial nature of interstate commerce.

Furthermore, Congress enacted a statute that is consistent with First Amendment guarantees. FACE neither discriminates against the pro-life viewpoint nor the subject matter of abortion speech. FACE is not about regulating expressive conduct or protected speech, but about prohibiting violent, physically obstructive, and threatening acts that are outside the realm of the First Amendment protection, regardless of the message that may motivate them. The motive requirement merely limits FACE's applicability by narrowly tailoring the statute to prevent the type of violent and unlawful behavior surrounding reproductive health services that Congress found serious enough to garner federal attention.

Finally, FACE is not constitutionally overbroad or void for vagueness. There is no chilling effect on free speech because FACE's language is clearly defined and carefully modeled after other federal statutes so that an average person can understand what is prohibited, and its scope is limited to unprotected conduct and speech. Therefore, pro-life supporters may protest the legality of abortion outside clinics by making speeches, handing out literature, sidewalk counseling, picketing, and praying, as long as these activities are done peacefully, and without physically obstructing access to a facility with the intent to injure, intimidate or interfere with a person who is either obtaining or providing reproductive health services.

Most importantly, FACE has accomplished what it was designed to do. A recent survey demonstrates that violent, disruptive, and obstructive activity at reproductive health service facilities has dramatically decreased

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ments were made on a nationally televised show to Dr. Lucero, who was well aware of Father Trosch's viewpoint previous to appearing on the show. *See id.* Furthermore, although the court termed the statements "extreme," it could not ignore the several qualifications and verbal tempering made by Father Trosch during the show. *See id.* For example, when asked if he had the courage to say that he would kill the doctor, Father Trosch replied "[h]e deserves to be dead, absolutely." *Id.* at 1127. The court concluded after reviewing all of the circumstances as a whole, it could not find by even a preponderance of the evidence that the statements made by Father Trosch to Dr. Lucero constituted threats of force under FACE. *See id.* at 1130.

since FACE became law in May of 1994.[363] Consequently, not only is FACE's constitutionality assured, but so is its deterrent effect on violent and unlawful acts. The statute can continue providing protection for women, reproductive health providers, and clinics from the violent and obstructionist "in your face" tactics of some groups protesting the legality of abortion. Those desiring to protest peacefully have nothing to fear from FACE.

Kristine L. Sendek

363. *See* Robert Pear, *Protests at Abortion Clinics Have Fallen, and New Law is Credited*, N.Y. TIMES, Sept. 24, 1996, at A18 (using statistics from a National Abortion Federation issued news release, containing data compiled from 1977 to present). The survey illustrates that acts of violence, disruption, and blockades have diminished from 1,987 in 1994 to fewer than 400 in 1996. *See id.*