A Loss of FACE: The Freedom of Access to Clinic Entrances Act post Dobbs v. Jackson Women's Health Organization

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ABSTRACT: The Freedom of Access to Clinic Entrances Act of 1994 is no longer a valid exercise of federal jurisdiction under the Fourteenth Amendment, in light of Dobbs v. Jackson Women's Health Organization, nor ever was under the Commerce Clause, properly understood, per United States v. Morrison.

Introduction

In *United States v. Morrison*, Chief Justice Rehnquist wrote for the United States Supreme Court, "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[1] Whereas the very stated purpose of The Freedom of Access

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[1] *United States v. Morrison*, 529 U.S. 598, 618 (2000).

to Clinic Entrances Act of 1994[2] is in no way concerned with actions directly affecting "instrumentalities, channels, or goods involved in interstate commerce."[3] Rather, the FACE Act presents itself as a regulation of activity that is alleged, in the aggregate, to produce an effect upon interstate commerce by a causal chain of events.

The FACE Act also sought federal jurisdiction in the enforcement clause of the Fourteenth Amendment—but that is premised on their being another pertinent clause of said amendment to enforce.[4] Yet in *Dobbs v. Jackson Women's Health Organization* the Supreme Court returned the matter of abortion "to the people and their elected representatives,"[5] overturning *Roe v. Wade* 410 U.S. 113 (1973) and *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and their claim to federal jurisdiction under Section 1 of the Fourteenth Amendment.[6] So once again the sovereign states may criminalize abortion at their discretion, as long as such laws have a rational basis.[7]

Hence The Freedom of Access to Clinic Entrances Act of 1994 is not a valid exercise of federal jurisdiction under the Fourteenth Amendment in light of *Dobbs v. Jackson Women's Health Organization*, nor under the Commerce Clause per *United States v. Morrison*.

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[2] Freedom of Access to Clinic Entrances Act of 1994, Pub. L. 103–259, § 2, May 26, 1994, 108 Stat. 694:

> Pursuant to the affirmative power of Congress to enact this legislation under section 8 of article I of the Constitution, as well as under section 5 of the fourteenth amendment to the Constitution, it is the purpose of this Act to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.

[3] U.S. Const. art. I, § 8: "The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States."

[4] U.S. Const. amend. XIV, § 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[5] "We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives." *Dobbs v. Jackson Women's Health Organization*, 597 U.S ____, ____ (2022) (Alito, J.).

[6] "We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment." *Dobbs v. Jackson Women's Health Organization*, 597 U.S ____, ____ (2022) (Alito, J.).

[7] *Dobbs v. Jackson Women's Health Organization*, 597 U.S ____, ____ (2022) (Alito, J.):

> We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.
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> Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history.

I. Congress May Not Regulate Noneconomic, Violent Intrastate Crime

It was recognized early in our history that although Congress may have general jurisdiction over federal properties and in federal territories, such as the District of Columbia, Congress has no general jurisdiction to enact criminal laws in the several states. That was made clear by Chief Justice John Marshall in the landmark case of *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).[8] Nearly two centuries later, that federalist scheme was re-affirmed by another Chief Justice, William Rehnquist, in the watershed case *United States v. Morrison*, 529 U. S. 598 (2000).

United States v. Morrison involved a civil claim for damages filed pursuant to federal statute 42 U. S. C. §13981—which was part of the Violence Against Women Act of 1994, § 40302,108 Stat. 1941-1942. As recited by the Court:

> Section 13981 was part of the Violence Against Women Act of 1994, § 40302,108 Stat. 1941-1942. It states that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U. S. C. § 13981(b). To enforce that right, subsection (c) declares:
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> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.[9]

That claim under § 13981 was dismissed by the United States District Court for the Western District of Virginia, "because it concluded that Congress lacked authority to enact the section under either the Commerce Clause or § 5 of the Fourteenth Amendment."[10] The District Court's decision was affirmed by the Court of Appeals for the Fourth Circuit, concluding "that Congress lacked constitutional authority to enact § 13981's civil remedy."[11] There being a federal statute invalidated on constitutional grounds, the United State Supreme Court granted certiorari. 527 U. S. 1068 (1999).

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[8] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821) (Marshall, C. J.): "Connected with the power to legislate within this District is a similar power in forts, arsenals, dock yards, &c. Congress has a right to punish murder in a fort or other place within its exclusive jurisdiction, but no general right to punish murder committed within any of the States." Id. at 428: "It is clear that Congress cannot punish felonies generally, and, of consequence, cannot punish misprision of felony."

[9] *United States v. Morrison*, 529 U. S. 598, 605 (2000).

[10] *Id.* at 604 (citing *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779 (WD Va. 1996)).

[11] *Id.* at 605 (citing *Brzonkala v. Virginia Polytechnic and State Univ.*, 169 F.3d 820 (CA4 1999)).

The Supreme Court began its review of constitutional concerns by citing another landmark case by Chief Justice John Marshall:

> Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176 (1803) (Marshall, C. J.).[12]

With that backdrop, Chief Justice Rehnquist then invoked the criteria enumerated in *United States v. Lopez*, 514 U. S. 549 (1995), by which the Court may "invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds"[13]—an acknowledge major change in course from *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).[14]

> As we observed in *Lopez*, modern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate under its commerce power." "First, Congress may regulate the use of the channels of interstate commerce." "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce,... i.e., those activities that substantially affect interstate commerce."[15]

II. Regulation of Activity that Substantially Affects Interstate Commerce

In both *Morrison* and *Lopez* it was not contended that either of the first two categories, pertaining directly to interstate commerce, were applicable. Statutes in both cases plainly had "nothing to do with 'commerce' or any sort of

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[12] *Id.* at 607.

[13] *Id.*

[14] *Id.* at 607-608:

> As we discussed at length in *Lopez*, our interpretation of the Commerce Clause has changed as our Nation has developed. *See* 514 U. S., at 552-557; id., at 568-574 (Kennedy, J., concurring); id., at 584, 593-599 (Thomas, J., concurring). We need not repeat that detailed review of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted. *See Lopez*, 514 U. S., at 555-556; id., at 573-574 (KENNEDY, J., concurring).

[15] *Id.* at 608-609.

economic enterprise, however broadly one might define those terms."[16] Rather, the statutes sought federal empowerment under the third category, "a regulation of activity that substantially affects interstate commerce."[17] Unfortunately the rationale supporting the claims that interstate commerce was being substantially affected was not very effective—relying on attenuated causal chains by which national productivity, and thus interstate commerce, would be negatively impacted.[18]

> We rejected these "costs of crime" and "national productivity" arguments because they would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." We noted that, under this but-for reasoning:
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> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories … , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[19]

But unlike *Lopez*, in *Morrison* Congress had sought to buttress its ability to regulate the criminal activity in question by means of congressional findings alleging a substantial effect on interstate commerce. In *Lopez*, although the Court acknowledged that Congressional findings are not constitutionally necessary,[20] it also noted that the conclusion drawn from such findings "ain't necessarily so"—as reiterated by the Court in *United States v. Morrison*:

> As we stated in *Lopez*, "'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" 514 U. S., at 557, n. 2 (quoting *Hodel*, 452 U. S., at 311 (REHNQUIST, J., concurring in judgment)). Rather, "'[w]hether particular operations affect interstate commerce sufficiently to come under the con-

[16] *United States v. Morrison*, 529 U. S. 598, 610 (2000).
[17] *Id.* at 609.
[18] *Id.* at 612.
[19] *Id.* at 612-613 (citing *United States v. Lopez*, 514 U. S. 549, 564 (1995)).
[20] *United States v. Lopez,* 514 U. S. 549, 562-563 (1995):

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

> stitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" 514 U. S., at 557, n. 2 (quoting *Heart of Atlanta Motel*, 379 U. S., at 273 (Black, J., concurring)).[21]

The Supreme Court in *Morrison* found the Congressional findings only led further down the slippery slope to a monocephalous national government, rather than adhering to the dual system of sovereignty[22] in our federal system, which for decades had not received the regard due it:

> We are not the first to recognize that the but-for causal chain must have its limits in the Commerce Clause area. In *Lopez*, 514 U. S., at 567, we quoted Justice Cardozo's concurring opinion in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935):
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> "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'" *Id.*, at 554 (quoting *United States v. A. L. A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (CA2 1935) (L. Hand, J., concurring)).[23]

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[21] *United States v. Morrison*, 529 U. S. 598, 614 (2000).

[22] *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (O'Connor, J):

> As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), "[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Over 120 years ago, the Court described the constitutional scheme of dual sovereigns:
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> "[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," . . . "[W]ithout the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725 (1869), quoting *Lane County v. Oregon*, 7 Wall. 71, 76 (1869).

[23] *United States v. Morrison*, 529 U.S. 598, 616 n.6 (2000)

III. National Versus Local Issues in Activities of Commerce

The cited concurring opinion of Judge Learned Hand is an exemplary analysis of how to discern between the national and the local issues in activities of commerce. Judge Hand begins this analysis with the premise that Congress is not supreme in all respects "and the states merely political divisions without more autonomy than it chose to accord them,"[24] leading to the practical problem permeating interstate commerce jurisprudence:

> In an industrial society bound together by means of transport and communication as rapid and certain as ours, it is idle to seek for any transaction, however apparently isolated, which may not have an effect elsewhere; such a society is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.[25]

In *United States v. ALA Schechter Poultry Corporation*, 76 F.2d 617 (2d Cir. 1935), the Second Circuit Court of Appeals found that the minimum wage and maximum-hour workweek, promulgated pursuant to the National Industrial Recovery Act (by which Congress delegated to the President the power to approve various Codes of Fair Competition), could not be sustained as a valid federal exercise of power under the Commerce Clause. As the title of the case suggests, the particular wages and hours attempted to be regulated concerned poultry slaughterhouses. And although the Second Circuit Court of Appeals found the poultry inspection provisions of the code to be valid exercises of federal power,[26] not so with the regulation of local wages and hours. To which Judge Hand concurred:

> There comes a time when imported material, like any other goods, loses its interstate character and melts into the domestic stocks of the state which are beyond the powers of Congress. So too there must come a place where the services of those who within the state work it up into a finished product are to be regarded as domestic activities. Generally the two will coalesce. Work upon material become domestic, can scarcely be other than domestic work; in this it differs from inspection and its ancillary accompaniments. For although inspection is immediately concerned with goods that have arrived, they are ordinarily still in transit; and moreover even were they

[24] *United States v. ALA Schechter Poultry Corporation*, 76 F.2d 617, 624 (2d Cir. 1935) (Hand, J., concurring).

[25] *Id.*

[26] Other provisions of the National Industrial Recovery Act, such those pertaining to the inspection fowl, were also held to be unconstitutional in two ways—because of the impermissible delegation of Congress's legislative power to the President, and Congress exceeding its power to regulate interstate commerce, which invaded powers reserved exclusively to the States. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

> not, the purpose is directly to control the importation of future goods.... But labor done to work up materials begins only after the transit is completed in law as well as in fact, and it is not directed towards the importation of future materials; it is a part of the general domestic activities of the state and is as immune as they from congressional regulation.[27]

Still, Supreme Court jurisprudence in the decades after *A. L. A. Schechter Poultry Corp. v. United States* came close to obliterating the distinction between what is national and what is local in interstate commerce law—at least until *United States v. Lopez*, 514 U. S. 549 (1995). And the pendulum of precedence had swung from Judge Learned Hand's delineation of labor applied to physical goods as local or interstate, to identifying those seemingly rare human activities which would not have a "substantial effect" on interstate commerce.[28] As Justice Thomas protested in his *Lopez* concurrence, "This test, if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life." *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring). And that was the red line the United States Supreme Court would not pass.

IV. Federal Case Law and the Jurisdictional Element

The Freedom of Access to Clinic Entrances Act of 1994 has never been upheld directly by the Supreme Court. Prior to *Dobbs v. Jackson Women's Health*, the Court chose not to review the several appellate federal cases[29] in

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[27] *United States v. ALA Schechter Poultry Corporation*, 76 F.2d 617, 625 (2d Cir. 1935) (Hand, J., concurring) (citation omitted).

[28] See *EEOC v. Wyoming*, 460 U.S. 226, 247 (1983) (Stevens, J., concurring):

> The development of judicial doctrine has accommodated the transition from a purely local, to a regional, and ultimately to a national economy.[n4]....[n4] *See*, e.g., *Wickard v. Filburn*, 317 U. S. 111, 317 U. S. 118-125 (1942) (Congress may constitutionally apply wheat marketing quota to wheat grown wholly for consumption on the farm, because of interdependence of national market).

Contra EEOC v. Wyoming, 460 U.S. 226, 265 (1983) (Powell, J., dissenting [with whom O'Connor, J., joined]) ("I join the Chief Justice's dissenting opinion, but write separately to record a personal dissent from Justice Stevens' novel view of our Nation's history.").... [n4] The authority on which Justice Stevens primarily relies is an extrajudicial lecture delivered by Justice Rutledge in 1946."). *Id.* at 275:

> Justice Stevens' concurring opinion recognizes no limitation on the ability of Congress to override state sovereignty in exercising its powers under the Commerce Clause. His opinion does not mention explicitly either federalism or state sovereignty. Instead, it declares that "[t]he only basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*." *Ante* at 460 U. S. 248 (emphasis added). Under this view, it is not easy to think of any state function -- however sovereign -- that could not be preempted.

[29] *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002), cert. denied, 537 U.S. 1172 (2003); *United States v. Gregg*, 226 F.3d 253, 267 (3d Cir.2000), cert. denied, 532 U.S. 971 (2001); *U.S. v. Hart*, 212

which FACE had been adjudged to be constitutional. This may be taken as an implicit substantive approval by the United States Supreme Court at the time. On the other hand, there was no split of opinion among federal jurisdictions to resolve,[30] nor did the lower courts invalidate a federal statute as in *Morrison*[31]—factors which tend to prompt the Supreme Court to grant certiorari. Be that as it may, we are now post *Dobbs v. Jackson Women's Health* and the rational for those federal cases which found FACE constitutional is thereby suspect.

Even prior to the *Dobbs* decision, the rational in the federal FACE cases fell short of the jurisdictional requirements in *Lopez* and *Morrison*. That is because it is admitted in these federal cases upholding FACE that it does not contain a "jurisdictional element... a provision in a federal statute that requires the government to establish specific facts justifying the exercise of federal jurisdiction in connection with any individual application of the statute." *U.S. v. Gregg*, 226 F.3d 253, 263 (3rd Cir. 2000). In this line of cases, the requirement of a jurisdictional element was dismissed for the sole reason that the statute had as its object the abortion industry; as the Third Circuit Court of Appeals postulated in *U.S. v. Gregg*, 226 F.3d 253, 263 (3rd Cir. 2000):

> Although such an element would certainly lend support to the conclusion that FACE is tied to interstate commerce, we conclude that it was not necessary for Congress explicitly to limit[32] the civil remedy provision in the case of regulating anti-abortion activity directed at reproductive health clinics that are, by definition, directly engaged in the business of providing reproductive health services. *See Bird*, 124 F.3d at 675 (reasoning that a jurisdictional element is "not always a necessary" method to ensure that Congress does not exceed its commerce power).

F.3d 1067 (8th Cir. 2000), cert. denied, 531 U.S. 1114 (2001); *United States v. Weslin*, 156 F.3d 292, 297 (2d Cir.1998), cert. denied, 525 U.S. 1071 (1999); *United States v. Bird*, 124 F.3d 667, 683-84 (5th Cir.1997), cert. denied, 523 U.S. 1006 (1998); *Hoffman v. Hunt*, 126 F.3d 575, 582-88 (4th Cir. 1997), cert. denied, 523 U.S. 1136 (1998); *Terry v. Reno*, 101 F.3d 1412, 1418-1421 (D.C.Cir.1996), cert. denied, 520 U.S. 1264 (1997); *United States v. Wilson*, 73 F.3d 675, 679-88 (7th Cir. 1995), cert. denied, 519 U.S. 806 (1996); *United States v. Soderna*, 82 F.3d 1370, 1374-77 (7th Cir.), cert. denied, 519 U.S. 1006 (1996); *United States v. Dinwiddie*, 76 F.3d 913, 921-24 (8th Cir.), cert. denied, 519 U.S. 1043 (1996); *American Life League, Inc. v. Reno*, 47 F.3d 642, 648-52 (4th Cir.1995), cert. denied, 516 U.S. 809 (1995).

[30] *See* Grant, Hendrickson, & Lynch, The Ideological Divide: Conflict and the Supreme Court's Certiorari Decision, 60 Clev. St. L. Rev. 559 (2012).

[31] "Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari. 527 U. S. 1068 (1999)." *United States v. Morrison*, 529 U.S. 598, 605 (2000).

[32] "A jurisdictional element in a statute serves to define the limits of the regulated activity. Including such a requirement assures that the legislation is directed toward a defined scope of conduct, one more apt to be within the reach of the commerce power granted to Congress." *U.S. v. Gregg*, 226 F.3d 253, 271 (3rd Cir. 2000) (Weis, J., dissenting).

In the cited case, *U.S. v. Bird*, 124 F.3d 667, 675 (5th Cir. 1997) ("*Bird I*"), the Fifth Circuit Court of Appeals in turn reasoned:

> [T]hough a jurisdictional element may help to ensure that the exercise of Congress's Commerce Clause authority extends only to those activities that substantially affect interstate commerce, it is only one method, and not always a necessary one, by which Congress may achieve that end. *See*, *e.g.*, *Terry*, 101 F.3d at 1418 ("*Lopez*'s fundamental proposition is that Congress must ensure that its Commerce Clause power to regulate noncommercial activities extends to only those activities that substantially affect interstate commerce. Congress may do so either through its own legislative findings or by including a jurisdictional element in the statute; it need not do both.")

Continuing down this daisy chain of rationales, the Fifth Circuit Court of Appeals in *Bird I* was quoting the District of Columbia Court of Appeals in *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996). The Court in *Terry v. Reno* continued its line of thought, "Where, as here, detailed congressional findings support the conclusion that the activities prohibited by the Access Act substantially affect interstate commerce, the absence of a jurisdictional element is not fatal to the statute's constitutionality." *Id.* at 1418. It is readily apparent that the pre-*Morrison* federal case of *Terry v. Reno* adopted as its critical constitutional peg congressional findings of an aggregate effect on interstate commerce.

As demonstrated, that rationale was subsequently followed in *U.S. v. Gregg*, which was argued the month before *Morrison* was handed down, and decided a few months later (*Morrison* argued January 11, 2000, decided May 15, 2000; *Gregg* argued April 25, 2000, filed September 7, 2000). The Third Circuit Court of Appeals in *U.S. v. Gregg* went through the motions of complying with the Supreme Court's *United States v. Morrison* decision, but it clung to the idea that congressional findings of a substantial aggregate effect on interstate commerce sufficed for federal jurisdiction:

> Finally, in accordance with the fourth factor of *Morrison*, the findings set forth in the House and Senate Committee Reports demonstrate that Congress had a rational basis upon which to conclude that the activities governed by FACE have a substantial effect on interstate commerce. As set out in detail below, the findings show that a national market for abortion-related services exists in this country and that reproductive health clinics are directly engaged in interstate commerce. The findings further demonstrate that a national movement engaged in the activities proscribed by FACE has decreased the availability of abortion-related services in the national market and caused women seeking services and physicians providing services to travel interstate. Accordingly, the activity proscribed by FACE has a substantial effect on the interstate commerce of reproductive health services.[33]

[33] *U.S. v. Gregg*, 226 F.3d 253, 263 (3rd Cir. 2000).

Thereby, the Third Circuit Court of Appeals reached a conclusion at odds with the holding in *United States v. Morrison*, in which the Supreme Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U. S. at 617. The local criminal activity proscribed in the FACE Act is well within the historic police power of the several states. One can wonder how Chief Justice Rehnquist could have made that more clear, "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." 529 U. S. at 618. To paraphrase Judge Hand, "There comes a time when law, like imported physical goods, loses its interstate character and melts into the domestic laws of the state which are beyond the powers of Congress."[34] *U.S. v. Gregg*, written right after the ink dried in *Morrison*, did nothing more than confirm Justice Thomas cautionary concurrence:

> The majority opinion correctly applies our decision in *United States v. Lopez*, 514 U. S. 549 (1995), and I join it in full. I write separately only to express my view that the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.[35]

Yet the FACE Act had one very important factor in its favor not found in *Lopez* or *Morrison*—the object of its enactment was an alleged federal right established by the United States Supreme Court in *Roe v. Wade*. Though there may not have been any technical *de jure* linkage between the Fourteenth Amendment right per *Roe v. Wade* and any enforcement of the FACE Act under the Commerce Clause, a *de facto* linked jurisdictional element permeates federal case law. Accordingly, the Third Circuit Court of Appeals reasoned in *U.S. v. Gregg* that the lack of a jurisdictional element in FACE was thereby excusable, "[W]e conclude that it was not necessary for Congress explicitly to limit the civil remedy provision in the case of regulating anti-abortion activity directed at reproductive health clinics that are, by definition, directly engaged

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[34] *See United States v. ALA Schechter Poultry Corporation*, 76 F.2d 617, 625 (2d Cir. 1935) (Hand, J., concurring).

[35] *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

in the business of providing reproductive health services."[36] Sixteen years later that line of reasoning was still strictly being adhered to in federal courts:

> Congress had a rational basis for concluding that a national restriction on clinic violence and obstruction was appropriate to protect the economic welfare of clinics, their employees, and their customers. *See Gregg*, 226 F.3d at 265 ("when it enacted FACE, Congress sought to regulate a truly national problem"); *Norton*, 298 F.3d at 559 ("Given the detailed congressional record, we are satisfied that Congress had a rational basis to conclude that the activities prohibited by the Act disrupted the national market for abortion-related services and decreased the availability of such services").[37]

But now, the object at the end of the thinly attenuated daisy chain of rationales is no longer protected by a hopelessly tangled web of irrational rationalizations—which was heretofore our federal abortion jurisprudence. Justice Alito cut through that Gordian Knot in *Dobbs v. Jackson Women's Health* and wrote, "Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures." *Dobbs v. Jackson Women's Health Organization*, 597 U.S ____, ____ (2022) (Alito, J.). In other words, abortion services are no more a matter of interstate commerce than any other medical procedure.

Conclusion

If a person were to walk down a city street breaking windows on various retail storefronts, which are exhibiting merchandise obtained through interstate commerce, such local criminal activity would not be the object of federal regulation by any reasonable reading of *United States v. Morrison*. Any attempt by Congress to regulate such criminal behavior would realistically be found to be lacking a jurisdictional element. Although, if that city block also contained a Post Office,[38] then the damage to said Post Office could constitute a federal offence.[39] Yet if that hypothetical Post Office was closed prior to the vandalism, and its space taken over by a private carrier of packages, such as Federal Express or UPS, then the federal jurisdictional element would have disappeared along with the Post Office.

With the demise of the *Roe v. Wade* legal regime, FACE's *de jure* Fourteenth Amendment jurisdictional element over abortion service providers has ceased to exist and, accordingly, FACE's *de facto* linked jurisdictional element under the Commerce Clause is now a non sequitur in search of a fallacious

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[36] *U.S. v. Gregg*, 226 F.3d 253, 263 (3rd Cir. 2000).

[37] United States v. Dillard, 184 F.Supp.3d 999, 1002 (D. Kan. 2016).

[38] "The Congress shall have Power... To establish Post Offices and post Roads." U.S. CONST. art. I, § 8.

[39] 18 U.S.C. § 1361; see U.S. v. LaPorta, 46 F.3d 152, 158 (2nd Cir. 1994).

premise. Consequently, to the extent someone is unlawfully prevented from any such service by a third party, then that is a matter of state law—"Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000).