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THE DEATH AND RESURRECTION OF RFRA: INTEGRATING LOPEZ AND BOERNE

John M.A. DiPippa*

I. REQUIEM AETERNAM:¹ THE DEATH OF EXPANSIVE CONGRESSIONAL POWER

Strictly speaking, a requiem is a funeral mass. The word has come to signify grief and mourning on a grand scale as exemplified by the musical compositions bearing the name. It is a clever word to use in connection with a symposium on the Religious Freedom Restoration Act.² Funerals are cultic rituals meant to symbolically embody the community's deepest beliefs. Funerals signify the community's respect for the dead, its care for the living, and its beliefs about the future. They reenact the deceased's movement from life to death by remembering the deceased's life, noting her death, and acknowledging the deceased's and the survivors' uncertain futures. These rituals help organize the survivors' lives afterwards; that is, they remind the survivors of their own mortality, their fundamental beliefs, and of the way they should lead their lives from that day forward.

*City of Boerne v. Flores*³ is a requiem for expansive congressional power to define and expand human rights. The opinion remembers the life of this broad congressional power and marks the death of extreme judicial deference to congressional authority. It reminds us of some fundamental constitutional ideas: congressional power is limited and the Supreme Court defines these limits. The decision orients Congress to these fundamental realities in the (now uncertain) future by suggesting that Congress establish the factual basis for its actions more completely and coherently.

The *Boerne* case puts to rest any congressional claim to a substantive Section Five⁴ power.⁵ More important, *Boerne* modifies the traditional rational basis standard the court purportedly uses in this area.⁶ This result is in line with

* Professor of Law, University of Arkansas at Little Rock School of Law. I would like to thank UALR School of Law Dean Rodney Smith for organizing this symposium and for encouraging me to participate. I would also like to thank my research assistant, Robin Baldwin, for her excellent help in preparing this article.

1. Rest Eternal: First words of the Introit in the Latin mass for the Dead, "Requiem aeternam dona eis, Domine." [Give to them eternal rest, O God.] XIII Oxford English Dictionary 681 (2nd ed. 1989).

2. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000 (1994) [hereinafter RFRA].

3. 117 S. Ct. 2157 (1997).

4. U.S. CONST. amend. XIV, § 5.

5. See *Boerne*, 117 S. Ct. at 2164-67.

6. See *id.* at 2169-71.

the Court's recent decision in *United States v. Lopez*,⁷ which seemed to modify the rational basis standard in Commerce Clause cases similarly.⁸ These two cases suggest that the Court will more closely review future congressional legislation. Both cases call for a more searching review of the congressional record. Stricter review may spell trouble for some recent and popular congressional legislation like the Freedom of Access to Clinic Entrances Act.⁹ Nevertheless, even under this tighter standard Congress could enact narrowly focused variations of RFRA under its Commerce Power.

II. DIES IRAE:¹⁰ THE LIFE AND DEATH OF *KATZENBACH V. MORGAN*

In *Katzenbach v. Morgan*,¹¹ the United States Supreme Court upheld Congress' use of its Section Five power under the Fourteenth Amendment to invalidate some English literacy requirements although the court itself had previously held such requirements constitutional.¹² The Court said that "[I]t was for Congress . . . to assess and weigh the various conflicting considerations It is enough that we be able to perceive a basis upon which Congress might resolve the conflict as it did."¹³

Archibald Cox participated in *Morgan* as Solicitor General. He wrote that *Morgan* "call[ed] attention to a vast untapped reservoir of federal legislative power to define and promote the constitutional rights of individuals in relation to state government."¹⁴ Cox believed that *Morgan* and *South Carolina v. Katzenbach*¹⁵ established that Congress had the power to "regulate activities which do not themselves violate the prohibitions of [the 14th] Amendment, where the regulation is a rational means of effectuating one of its prohibitions."¹⁶ Cox correctly noted that judicial deference was the key to the

7. 514 U.S. 549 (1995).

8. See *Lopez*, 514 U.S. at 551-64.

9. Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248 (1994).

10. Day of Wrath: first words, and so the name, of a Latin hymn on the Last Judgment. IV OXFORD ENGLISH DICTIONARY 634 (2d ed. 1989).

11. 384 U.S. 641 (1966).

12. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (upholding the use of literacy tests in the face of a Fourteenth Amendment challenge). The section of the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973-1973bb-1 (1994), at issue in *Morgan*, section 4(e), prohibited states from using English language literacy to deny the right to vote to people who had been educated in Puerto Rican schools. See 384 U.S. at 643 n.1.

13. 384 U.S. at 653.

14. Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 99 (1966). For a further elaboration of Cox' views see Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971).

15. 383 U.S. 301 (1966) (upholding congressional power to enact various provisions of Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 including the suspension of literacy tests).

16. Cox, *supra* note 14, at 102.

development of this principle: "The scope of this principle will naturally depend upon the extent to which the judicial branch reviews legislative judgments concerning the relation between the statutory measure and the constitutional objective."¹⁷

Cox analogized *Morgan* to the post New Deal Commerce Clause cases. In those cases, the court rejected its prior strict review of congressional commerce legislation and gave congressional judgment great deference.¹⁸ As one commentator noted thirty years later, *Morgan* could have been the New Deal of civil rights jurisprudence: the beginning of an era of judicial deference to congressional use of its Civil War Amendments' power.¹⁹

Justice Brennan's opinion²⁰ contained two justifications for upholding Congressional power. The "remedial" justification argued that outlawing literacy tests was a way to remedy constitutional violations in the provision of government services. Ensuring voting power for minorities disenfranchised by the literacy requirement helped remedy and prevent future constitutional violations.²¹ This justification was relatively non-controversial. After all, its pedigree extends all the way to *McCulloch v. Maryland*.²² Its success depended on the existence of one or more real or potential constitutional violations that the legislation aimed to remedy or prevent.²³ The other justification was more controversial. Justice Brennan suggested that Congress could prohibit conduct that it concluded was unconstitutional although the Supreme Court had ruled otherwise.²⁴ This "Substantive" power did not depend on the existence of

17. Cox, *supra* note 14, at 103.

18. See Cox, *supra* note 14, at 105, 107.

19. See Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 718 (1996).

20. See *Morgan*, 384 U.S. 641.

21. See *id.* at 652-53.

22. 17 U.S. (4 Wheat.) 316, 420-21 (1819). *Morgan* expressly relied on *McCulloch's* famous statement: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional . . ." *Katzenbach v. Morgan*, 384 U.S. at 650. Cox noted that the use of this standard had "far-reaching consequences" because judicial restrictions on congressional actions might be non-existent. See Cox, *supra* note 14, at 174. For an argument that the Section Five power is the equivalent of the Necessary and Proper "power," see G. Sidney Buchanan, *Katzenbach V. Morgan and Congressional Enforcement Power Under the Fourteenth Amendment: a Study in Conceptual Confusion*, 17 HOUS. L. REV. 69, 116-117 (1979); see also Donald Francis Donovan, Note, *Toward Limits on Congressional Enforcement Power Under the Civil War Amendments*, 34 STAN. L. REV. 453 (1982). Stephen Carter takes the position that 1) the *McCulloch* language is not a "test," and 2) the framers of the 14th Amendment rejected the necessary and proper language. See Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 827-828 (1986).

23. See *Morgan*, 384 U.S. at 652.

24. See *id.* at 654-55.

constitutional violations that the court recognized. It gave Congress a sweeping power to act in spite of the court's contrary holdings.²⁵ It was this substantive interpretation that earned most of Cox' praise.²⁶

Morgan's promise (or threat depending on your point of view) never materialized.²⁷ Subsequent Supreme Court cases involving the Civil Rights Amendments' enforcement clauses seemed to limit, if not reject, the substantive theory.²⁸ At the same time, Commerce Clause developments reduced the necessity for a broad Section Five power. The Court greatly expanded the scope of the Commerce Clause while at the same time giving more deference

25. Justice Brennan tried to limit this power to legislation that increased the protection of civil rights. See 384 U.S. at 651 n.10. This is the so-called ratchet theory. See Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995). That is, this substantive power only works when Congress expands rights. It cannot be used to dilute rights. See *id.* See also Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982) (Substantive power limited to classifications that the Court will strictly review). But see Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 462 (1994) (Congress empowered to extend and supplement the work of the Court but not to command Court's acquiescence to congressional interpretation of Constitution).

Morgan's ratchet theory may have contained the seeds of its own destruction. See Richard Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 117-118 (The Court will decide whether or not Congress expands or contracts rights. Thus, "*Morgan* . . . appears to confer independent power on Congress with one hand and then not even bother to switch hands to retake that power [T]he Court will set the basic terms. Congress can only fill in the blanks.").

26. "[T]here seems to be no persuasive reason why the question whether certain action violates the Fourteenth Amendment should be regarded as necessarily 'judicial' in nature. Indeed, the judgment of a representative legislature might be thought especially significant in interpreting fundamental political rights." Cox, *supra* note 14, at 172.

27. See Irving A. Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW .U. L. REV. 656, 657-58 (1977) (*Morgan's* development seriously arrested by Court's rejection of its substantive rationale).

28. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), a divided court greatly undermined the substantive theory. The Court upheld Amendments to the Voting Rights Act that prohibited literacy tests nationwide using a remedial theory. See *id.* at 144-47. A different majority struck down an Amendment that would have set 18 as the voting age for all state elections. See *id.* at 118, 124-31. This majority rejected a justification for this provision based on the substantive theory. Justice Black argued that a broad reading of *Morgan* would threaten the independent existence of the states. See *id.* at 128-29. Chief Justice Burger, joining Justice Stewart's opinion, looked only to the remedial theory as authority for the 18-year-old vote provision. The Amendment was not constitutional in the absence of any prior or potential constitutional violations. See *id.* at 296. See also *EEOC v. Wyoming*, 460 U.S. 226, 260 (1983) (Burger, C.J., dissenting) ("Congress may act only where a violation lurks."). But see William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 620 (1975) (Theories of Section 5 that depend on the difference between substantive interpretation and remedial enforcement are not viable. The only judicially enforceable limitations are contained in the Bill of Rights, excluding the Tenth Amendment.).

to Congress' judgments in commerce cases.²⁹ Ironically, Congress could accomplish many of its Section Five goals by using the commerce power.³⁰

Two recent Supreme Court decisions undermine this state of affairs. In *City of Boerne v. Flores*, the Supreme Court held that Congress exceeded its Section Five power under the 14th Amendment when it enacted RFRA.³¹ The Court declared that the legislative record could not support a remedy so broad as RFRA. In *United States v. Lopez*, the Supreme Court held that the Commerce Clause did not allow Congress to prohibit the possession of a firearm within 1000 feet of a school.³² Congress made no findings of interstate effect and the opinion rejected the government's *post hoc* attempts to show such effect.³³

Boerne and *Lopez* may be part of a renewed effort by the Supreme Court to engage in meaningful review of congressional action. Under this form of review, the Court takes a close look at the actual legislative record to see if it supports the claimed purpose and the chosen means. The lower courts have not uniformly followed the Supreme Court's lead, however. Some lower courts still use a pre-*Lopez* style of review, deferring to thin and artificial arguments about the connections to interstate commerce. *Boerne* sends another message that the days of absolute judicial deference are over. When combined with *Lopez*, a good deal of contemporary legislation may be in jeopardy.

29. See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 18-19 (1990) (stating that National Trails System Act Amendments of 1983, 16 U.S.C. §§ 1241-1251 (1994), converting unused rail rights-of-way to recreational trails valid exercise of Commerce Power because Congress could encourage the development of additional recreational trails. Court was not at liberty to invalidate act because other methods might serve the Congressional purposes more directly.) See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) (Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1994), did not violate the Commerce Clause when there is "any rational basis" for congressional finding that activity affects interstate commerce). *Perez v. United States*, 402 U.S. 146 (1971) (arguing that impact of individual case on commerce not important when rational basis exists for conclusion that general category affects commerce).

30. For example, Fourteenth Amendment precedent precluded the use of the Section Five power to prohibit private racial discriminations in places of public accommodation. See *The Civil Rights Cases*, 109 U.S. 3 (1875) (explaining that public accommodations provisions of Civil Rights Act of 1875 exceed Congress' Section Five power). Nevertheless, the court upheld Congress' use of the Commerce Clause to outlaw private racial discrimination in public accommodations. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (Private discrimination in public accommodations has harmful effect on interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (Congress had a rational basis to conclude that private racial discrimination in restaurants adversely affected interstate commerce); *EEOC v. Wyoming*, 460 U.S. 226 (1983) (upholding application of Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, to state employees).

31. See *City of Boerne*, 117 S. Ct. 2157.

32. See *Lopez*, 514 U.S. at 549.

33. See *id.* at 563.

III. OFFERTORIUM: CITY OF BOERNE AND THE DEATH OF A SUBSTANTIVE SECTION FIVE POWER

In *City of Boerne v. Flores*, the United States Supreme Court held that Congress exceeded its authority under Section Five of the 14th Amendment when it enacted the Religious Freedom Restoration Act (RFRA).³⁴ The Court noted that the Section Five power only extended to "enforcing" the provisions of the Fourteenth Amendment. Therefore, "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing" the Fourteenth Amendment.³⁵

The court must be ready to declare Congressional action unconstitutional when it strays from remedy to substance:

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and a proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.³⁶

The court concluded that both the history of the 14th Amendment and its prior cases limited Congress to enforcing but not defining the 14th Amendment.³⁷ The court could find no principled limitation on Congressional power if Congress could define the scope of its Section Five power by defining or redefining the substantive scope of the 14th Amendment.³⁸ The court rejected the suggestion that *Morgan* supported a substantive Section Five power. Instead, the court limited *Morgan* to situations where the chosen remedy is a reasonable means to prevent clearly unconstitutional governmental action.³⁹

Compare how the court considered the legislative record in both *Morgan* and *Boerne*. In *Morgan*, the court deferred to the Congressional judgment on remedial matters. The court simply required "some basis" for Congressional

34. See *City of Boerne*, 117 S. Ct. at 2157. City authorities in Boerne, Texas, acting under a local historic preservation ordinance denied a building permit to enlarge a church. Archbishop P. F. Flores challenged the denial by claiming that it violated RFRA. The district court declared RFRA unconstitutional but the Fifth Circuit Court of Appeals reversed. See 73 F.3d 1352 (5th Cir. 1996). For additional academic commentary on RFRA, see *The James R. Browning Symposium for 1994: The Religious Freedom Restoration Act*, 56 MONT. L. REV. 5 (1995).

35. *Boerne*, 117 S. Ct. at 2164.

36. *Id.*

37. See *id.* at 2164-68.

38. See *id.* at 2168.

39. See *id.*

action, even speculating about the underlying basis when the Congressional record did not express it.⁴⁰ The court relied on evidence of the motives of the framers of the New York literacy requirement that, at the time of *Morgan*, was more than forty years old.⁴¹ Moreover, the court clearly speculated on the possible Congressional motives for the particular provision at issue.⁴² The court was exceptionally generous in reading the remarks in the Congressional record to support the constitutionality of the act.⁴³

Archibald Cox noted this deference in his commentary on *Morgan*. He argued that the “dominant theme” of *Morgan* was drawn from the court’s modern Commerce Clause cases:

The Court should defer to the Congressional judgment . . . in reviewing legislation enacted under Section Five [and] will eschew reviewing legislative judgments upon the relation of means to ends and like questions of proportion and degree.⁴⁴

Cox noted that phrases like “reasonable relation” and “rational” were absent from the *Morgan* opinion.⁴⁵ *Morgan* held that the Court would uphold the law if it “may be viewed” as a measure to enforce the 14th Amendment and if the court could “perceive a basis” upon which Congress could base this judgement.⁴⁶ To Cox, this language was not accidental. It represented the

40. See *Morgan*, 384 U.S. at 654-56. The court concluded that the English language requirement may have been motivated by racial or ethnic prejudice. See *id.* at 654. It referred to the following statement at the state constitutional convention that considered adopting the English literacy requirement: “[T]he mental qualities of our race . . . are exposed to a single danger, and that is that by constantly changing our voting citizenship through the wholesale but valuable and necessary infusion of Southern and Eastern European races The danger has begun We should check it.” *Id.* at 654 n.14 (citing III New York State Constitutional Convention 3012 (Rev. Record 1916)). The Court simply concluded that Congress was “aware of that evidence.” See *id.*

41. See *id.*

42. The Court said that “Congress might have” believed that banning literacy requirements would advance important goals. See *id.* at 654. It is not clear that Congress ever actually believed such things. The act was part of broad based attack on “tests and devices” and the provision at issue in *Morgan* was only a small part of it. In fact, the measure was introduced from the floor by members of the New York Congressional delegation. Consequently, there were no committee hearings or findings in regard to this section. See *Morgan*, 384 U.S. at 669 n.9 (Harlan, J. dissenting). Its passage may simply have been a favor to members of a state delegation who stood to gain the votes of the newly enfranchised voters. See also Burt, *supra* note 25, at 108-09 (stating that senators were more interested in total number of registered voters if large number of newly registered voters are likely to vote for that Senator).

43. The Court even supplements this record with its own research, and statements from the lower court. See *Morgan*, 384 U.S. at 652 n.11, 15, & 16.

44. Cox, *supra* note 14, at 104.

45. See Cox, *supra* note 14, at 104.

46. See Cox, *supra* note 14, at 104.

court's determination to uphold Section Five legislation "without judging the substantiality of its relation to a permissible federal objective."⁴⁷

Cox concluded that "[i]mplicit in this reasoning is the proposition that the basis for the congressional determination need not appear in the legislative record."⁴⁸ He accepted Justice Harlan's statement in dissent that there was "simply no legislative record supporting" Justice Brennan's hypothesized discrimination.⁴⁹ Cox argued that Justice Harlan was wrong, however, when he claimed that some legislative record supporting the extension of the Section Five power was necessary. Instead, the Court had never required a record. This reflected "the fact that the fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives only a small part, or even none, of which may come from the hearings and reports of committees or debates on the floor."⁵⁰ The Court should assume the existence of facts supporting the Congressional judgment unless "rationally impossible" even if that judgment is at odds with the Court's own determination of constitutionality.⁵¹

In *Boerne*, the Court reviewed the legislation with a more careful eye. Bishop Flores argued that RFRA, like the literacy test upheld in *Morgan*, was a measure designed to prevent and remedy constitutional violations. RFRA represented Congress' judgment that it would be too difficult for plaintiffs to prove intentional discrimination in many cases. Reviving the *Sherbert/Yoder* test⁵² was a reasonable means to enforce the guarantees of the 14th Amendment.⁵³ The success of this claim, as Cox pointed out in his commentary on *Morgan*, depends on the extent to which the Court will defer to Congressional judgment.⁵⁴ In *Boerne*, the court gives Congress little deference.⁵⁵ First, the

47. Cox, *supra* note 14, at 104.

48. Cox, *supra* note 14, at 104.

49. See Cox, *supra* note 14, at 104-05 (quoting *Morgan*, 384 U.S. at 669 (Harlan, J., dissenting)). See also Carter, *supra* note 22, at 841 (stating that *Morgan* was not based on congressional facts because "[t]here weren't any!").

50. Cox, *supra* note 14, at 105.

51. See Cox, *supra* note 14, at 106-07.

52. Balancing test discussed in *Boerne*, whose abandonment by the Court prompted the passage of RFRA. See *Boerne*, 117 S. Ct. at 2160-62.

53. See *id.* at 2162-63. See also Laycock, *supra* note 25, at 166; Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 245-52 (1993); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 62-68 (1994).

54. See Cox, *supra* note 14, at 104-05. See also *Vance v. Bradley*, 440 U.S. 93, 97 (1979). ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.")

55. The Court noted that "[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body

Court assessed the congruence between the “means used and the ends to be achieved.”⁵⁶ The court discounted the legislative record because it lacked “examples of modern instances of generally applicable laws passed because of religious bigotry.”⁵⁷ The evidence of religious persecution produced at the hearings was at least forty years old.⁵⁸ More recent evidence consisted of “anecdotal evidence” of laws of general applicability that burdened religious practices.⁵⁹ These were not examples of laws “enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country.”⁶⁰ Congress’ concern was not with intentional discrimination but, rather, with laws that incidentally burdened religion. RFRA’s revival of the compelling interest remedy was not congruent with the purported goals of the legislation.

Second, the court concluded that RFRA was out of proportion to any supposed constitutional violations. Courts could not confine RFRA to cases where the laws in question would be unconstitutional. The scanty legislative record was not “RFRA’s most serious shortcoming,” however.⁶¹

Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.⁶²

RFRA applied to all levels of state and federal government though the Congressional record contained little evidence that governments were pervasively discriminating against religion. In all of the Voting Rights Act

constitutionally appointed to decide As a general matter, it is for Congress to determine the method by which it will reach a decision.” See *Boerne*, 117 S. Ct. at 2170. This statement came between the sections of the opinion where the Court declared that the legislative record failed to support RFRA because there was no evidence of contemporary discrimination and that Congress was more concerned with remedying burdens on religion by otherwise constitutional state laws. It is hard to credit this claim of deference when the court critiques both the quality of the record and the motivations of Congress. See *id.* at 2169-70.

56. *Boerne*, 117 S. Ct. at 2169. The Court noted that the “appropriateness of remedial measures must be considered in light of the evil presented. . . . Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” See *id.*

57. *Id.*

58. See *id.*

59. See *id.*

60. *Id.*

61. See *Boerne*, 117 S. Ct. at 2169.

62. *Id.* at 2170.

cases,⁶³ Congress acted upon a legislative record which established the existence of widespread or pervasive intentional discrimination.⁶⁴

This broad scope of RFRA further distinguished it from the Voting Rights Act. The Voting Rights Act affected a particular class of laws and only applied to areas of the country where intentional racial discrimination had been most virulent.⁶⁵ In cases like *Morgan*, Congress aimed the law's remedies at a particular device historically used to deny voting rights.⁶⁶ Finally, the voting rights provisions had a time limit. Although not all Section Five legislation requires "termination dates, geographic restrictions or egregious predicates . . ." these things help ". . . ensure Congress' means are proportionate to ends legitimate under Section Five."⁶⁷ RFRA had none of these limitations.

The Court's conclusions as to congruence and proportionality stem from its rejection of the congressional record. Unlike *Morgan*, the Court did not presume the existence of facts to support congressional enactment of RFRA. Instead, it carefully scrutinized the actual record to conclude that the evidence of constitutional violations either was too old or too scanty. Unlike *Morgan*, the *Boerne* court did not allow any speculation about what Congress "might have" believed nor did it use conventional rational basis analysis.⁶⁸ For example, Congress heard testimony concerning the burdens placed on religion by generally applicable laws.⁶⁹ If the court were deferring to the congressional

63. In these cases the Court upheld various sections of the Voting Rights Act when there was evidence that state and local governments were acting in violation of the Fifteenth Amendment. See *South Carolina v. Katzenbach*, 383 U. S. 301 (1966). Several of the sections contradicted Supreme Court decisions. For example, in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Supreme Court held that the Fifteenth Amendment requires proof of intentional discrimination. Nevertheless, the court upheld a provision of the Voting Rights Act that required preclearance of practices that had a disparate impact on racial minorities in *City of Rome v. United States*, 446 U.S. 156 (1980). In that case the Court concluded that Congress had a rational basis to believe jurisdictions with histories of intentional racial discrimination continued to pose a "risk of purposeful discrimination." *Id.* at 177. Therefore, Congress could require these jurisdictions to preclear all changes that had any disparate racial impact. See *id.*

64. See, e.g., *City of Rome*, 446 U.S. at 180-81 (relying on the significant disparity between the number of African-American citizens and the number of registered African-American voters and elected African-American officials); *Katzenbach*, 383 U.S. at 309 (relying on the "voluminous legislative history" documenting the "unremitting and ingenious defiance of the Constitution" by the covered states).

65. See *Boerne*, 117 S. Ct. at 2170.

66. See *id.*

67. *Id.*

68. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U. S. 307, 313 (1993). ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.")

69. See *Boerne*, 117 S. Ct. at 2169. *Boerne* cites seven statements in House and Senate Records on autopsies and eight statements in House and Senate Records on zoning regulations.

judgment, it could easily have concluded that these examples showed how easy it might be to hide an unconstitutionally discriminatory motive. Therefore, a rational legislator could have believed RFRA to be a necessary remedial measure.⁷⁰

More remarkable, however, was the way the Court used the legislative record against Congress.⁷¹ The actual congressional record doomed RFRA because it showed that Congress was not interested in remedying or preventing constitutional violations. The Court concluded that the actual record showed that Congress was more interested in undoing the *Smith*⁷² test.⁷³ While *Morgan* had always been a controversial decision, subsequent cases did not suggest that the court would use the congressional record against Congress to strike down a law.⁷⁴

Boerne may be an anomaly. The Court may confine its more searching congruence and proportionality review to the unique circumstances of RFRA. On the other hand, if the Court does not confine the test to these circumstances, then it may be about to embark on an era of much more active and significant review of congressional legislation. This review calls into question Cox' conclusion that the court is "committed to the presumption that facts exist

70. See *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (rational-basis review does not require "that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification").

71. Compare *Boerne* with *FCC v. Beach Communications, Inc.*, 508 U.S. at 315, where the Court noted that

because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . Thus, the absence of 'legislative facts' . . . has no significance in rational-basis analysis. . . . In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.

Id.

72. This test, which replaced the *Sherbert/Yoder* test in Free Exercise cases, holds that neutral laws of general applicability, which incidentally burdens a person's religion, will be enforced.

73. See *Boerne*, 117 S. Ct. at 2169. The Court noted that the evidence was anecdotal but most evidence of this kind will be anecdotal. The Court did not mean to imply that the legislative record must be filled with scientifically adequate evidence but its choice of words is significant. It suggests that the Court was skeptical both of the claimed legal theory and the record. Indeed, it is tautology: there is no recent evidence of discrimination and the recent evidence of undue burdens is "anecdotal" and, therefore, suspect. See *id.*

74. In *City of Rome*, 446 U.S. at 180-81, the Court used the Congressional record to justify the 1975 extension of the Voting Rights Act. The city argued that the evidence did not support the extension in light of the progress in minority voting strength. See *id.* at 180. Nevertheless, the Court did not measure the act against the problems identified in the record. Rather, it accepted Congress' statement that the act was necessary to protect minority voting gains. See *id.* at 182. In other words, the Court looked at the existence of a record as support for congressional action.

which sustain congressional legislation and . . . to deference to Congressional judgment upon questions of degree and proportion."⁷⁵ The Court has signaled a determination to more closely review congressional actions similarly in other areas. The most important decision is *United States v. Lopez*.⁷⁶

IV. OFFERTORIUM: LOPEZ, RATIONAL BASIS, AND THE REVIEW OF CONGRESSIONAL FINDINGS

In *United States v. Lopez*, the Supreme Court held that Congress could not use the commerce power to outlaw the mere possession of a firearm in a school zone.⁷⁷ Possession of a firearm was not an activity that "[arose out of or was] connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."⁷⁸ The Court agreed that it did not require that Congress make formal findings. Congressional findings in close cases, like *Lopez*, would help the Court to evaluate the interstate effect of the regulated activity.⁷⁹ The Court then rejected the government's argument that violent crime substantially affected interstate commerce by raising insurance costs, reducing interstate travel, and weakening education thereby leading to less productive citizens.⁸⁰ According to the Court, accepting this argument would allow Congress to regulate any activity under the guise of its commerce power.⁸¹

Lopez suggested that the Court would defer to most Congressional claims under the commerce power if the activity being regulated was economic. Thus,

75. Cox, *supra* note 14, at 107.

76. 514 U.S. 549 (1995).

77. See *id.* The Gun-Free School Zones Act of 1990 prohibited the knowing possession of a firearm in a school zone. See 18 U. S.C. § 922 (q)(1)(A) (1988). The Act defined a "school zone" to include an area within a distance of 1,000 feet from the school grounds as well as the grounds themselves. See 18 U.S.C. §921(a)(25) (1988).

78. *Lopez*, 514 U. S. at 561.

79. The Fifth Circuit opinion expressly relied on the lack of findings to strike down the law. See *United States v. Lopez*, 2 F.3d 1342, 1363-64 (5th Cir. 1993). The Fifth Circuit concluded that federal courts should defer to Congress when formal or informal findings provided any rational basis for the regulation. See *id.* at 1363. The absence of findings supporting the Gun Free School Zones Act of 1990 failed to provide any basis to evaluate whether or not the regulation affected commerce. See *id.* at 1364. Moreover, it failed to show that Congress had "consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved powers of the states. Indeed, as in this case, there is no substantial indication that the commerce power was even invoked." *Id.* at 1364.

80. The Court termed these the "cost of crime" and "national productivity" arguments. See *Lopez*, 514 U.S. at 564.

81. The Court would "have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

even the home-grown wheat in *Wickard v. Filburn*⁸² fell within the commerce power. Consuming the wheat at home was an economic choice to forego purchases in the open market.⁸³

On the other hand, the Court will more closely review claims when the activity being regulated is non-economic. It is on this point that Justice Kennedy joined by Justice O'Connor concurred. Justice Kennedy described *Lopez* as a limited holding. Neither the defendant nor the conduct had a commercial character and neither the purposes nor the design of the statute had an evident commercial nexus.⁸⁴

The issue that divided the justices was how much to credit Congress' judgment that the activity substantially affected interstate commerce. Chief Justice Rehnquist's opinion announces the substantiality test but then proceeds to ignore it.⁸⁵ A standard application of the rational basis test would have allowed the court to uphold the statute even without Congressional findings.⁸⁶ Yet, the Chief Justice did not defer to the fictional rational legislator. Instead,

82. 317 U.S. 111 (1942).

83. See *id.* at 128.

84. See *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring). Justice Kennedy's opinion is a mini-lecture on federalism. He recognized that a judicial role in enforcing limits on the commerce power was fraught with difficulty. Nevertheless, judicial intervention is required when a statute "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power . . ." *Id.* at 580 (Kennedy, J., concurring). This is a circular proposition, however, because deciding that something upsets the federal balance is the same as declaring it unconstitutional. In the end, Justice Kennedy rests on the factual failure: "Absent a stronger connection or identification with the commercial concerns that are central to the Commerce Clause, [the statute] contradicts the federal balance the Framers designed and that this Court is obligated to enforce." *Id.* at 583 (Kennedy, J., concurring). Justice Kennedy's concerns for the proper role of the court in a government of limited powers also animated his opinion in *Boerne*. Once again, however, his conclusion rested on his assessment of the failure of the facts in the congressional record to justify the exercise of congressional power.

Justice Thomas also concurred but he would perform more radical surgery on the Commerce Clause jurisprudence. He argued that the substantiality test should be abandoned and replaced with a standard that more accurately reflected the text and history of the Commerce Clause. See *id.* at 584 (Thomas, J., concurring).

85. See Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 647 (1996) (stating that *Lopez* is a significant decision because "at a crucial point, it abandon[s]" the substantial effects test). Nagel suggests that a strict application of *Lopez* would have required the Court to invalidate the provisions of the Civil Rights Act at issue in *McClung*. See *id.* Nevertheless, he concludes that "what we are witnessing is an aspect of normal, predictable doctrinal gyrations, not the beginning of a significant political transformation." *Id.* at 648.

86. See Melvyn R. Durchslag, *Will the Real Alfonso Lopez Please Stand Up: A Reply to Professor Nagel*, 46 CASE W. RES. L. REV. 671, 679 (1996) (noting if ordinary rational basis test was applied, then Justice Breyer's dissent would have been the majority opinion). See also Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996) where Professor Epstein argues that *Lopez* constitutes a step back from rational basis review toward something resembling intermediate scrutiny.

he imposed a categorical requirement—that the regulated activity be economic in nature—as a precondition to the application of rational basis.⁸⁷

Compare the majority opinion on this point to Justice Breyer and Justice Souter's dissents. Justice Breyer's dissent is a kind of Brandeis brief showing the economic effects of gun possession on education and, consequently, on commerce.⁸⁸ For Justice Breyer, the Court should accept the government's arguments about the economic effects of gun possession unless they are irrational.⁸⁹ Breyer's opinion falls squarely within the post New Deal practice of deferring to the Congressional factual judgments. Justice Souter's dissent discusses the application of the rational basis test.⁹⁰ For Justice Souter, the rational basis test has no preconditions. If any rational basis exists (in the weakest sense) for the conclusion that gun possession affects interstate commerce, then the court is obligated to uphold Congressional action.⁹¹ Moreover, Justice Souter saw no reason to make the degree of review vary by

87. Justice Kennedy also adopts this position by suggesting that rational basis review does not apply absent some commercial character or nexus. See *Lopez*, 514 U.S. at 580 (Kennedy, J. concurring). See also Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause*, 44 U. KAN. L. REV. 217, 238 (1996).

88. See *Lopez*, 514 U.S. at 615 (Breyer, J., dissenting). Justices Stevens, Souter, and Ginsburg joined Justice Breyer's dissent. Justice Breyer's opinion contained a great deal of empirical evidence to show the connection between gun possession, school violence, and interstate commerce. He concluded that upholding the statute "would recognize that, in today's economic world, gun-related violence near the classroom makes a significant difference to our economic, as well as our social, well-being." *Id.* (Breyer, J., dissenting).

Justice Breyer made three general criticisms of the majority opinion in addition to his empirical argument. First, he believes that the holding is at odds with prior cases upholding Congressional actions with much less of a connection to interstate commerce. See *id.* at 625 (Breyer, J., dissenting). Second, he claims that the majority opinion improperly distinguished between commercial and non-commercial activity. See *id.* at 627 (Breyer, J., dissenting). This resurrects the flawed commerce/manufacturing distinction and misconstrued cases like *Perez*. In any event, it placed schools on the wrong side of the commercial/non-commercial line. Finally, the decision threatens legal uncertainty in a previously settled area of law. See *id.* at 630 (Breyer, J., dissenting).

89. See *id.* at 617 (Breyer, J., dissenting). Breyer argued that courts must allow Congress "a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce" *Lopez*, 514 U.S. at 616 (Breyer, J., dissenting).

90. See *Lopez*, 514 U.S. at 602 (Souter, J., dissenting).

91. "The only question is whether the legislative judgment is within the realm of reason [T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it [I]t is entirely irrelevant for constitutional purposes whether the . . . challenged distinction actually motivated the legislature." *Lopez*, 514 U.S. at 613 (Souter, J. dissenting). Interestingly, Justices Breyer and Souter dissented in *Boerne* but neither joined the part of Justice O'Connor's opinion which concluded that if *Smith* is the correct standard, then Congress exceeded its constitutional authority under Section Five. This is consistent with their views expressed in *Lopez* on judicial deference to congressional decisions and the application of the rational basis test.

the nature of the subject.⁹² If the activity being regulated falls within the congressional power, it does not matter if it has been ordinarily reserved to the states. The issue involves congressional power and does not involve state sovereignty.⁹³ Consequently, the existence or nonexistence of congressional findings should have no basis on the standard of review or the validity of the exercise of power.⁹⁴

Lopez was the first case in more than 60 years in which the court struck down congressional legislation under the Commerce Clause.⁹⁵ After the New Deal, the Court seemed to embark on a course where clever lawyers could bring almost everything within the ambit of the Commerce Clause.⁹⁶ Thus, *Lopez* stands in sharp contrast to this "valley of deference."⁹⁷ Cautionary voices existed during this time, however. Justice Stewart noted in dissent that:

92. See *Lopez*, 514 U.S. at 613 (Souter, J., dissenting).

93. Cf. Tom Stacy, *What's Wrong With Lopez*, 44 U. KAN. L. REV. 243 (1996) (Federalism is better served by national political process rather than *Lopez*' doctrinal concepts).

94.

The question for the courts, as all agree, is not whether as a predicate to legislation Congress in fact found that a particular activity affects interstate commerce. The legislation implies such finding, and there is no reason to entertain claims that Congress acted *ultra vires* intentionally. Nor is the question whether Congress was correct in so finding. The only question is whether the legislative judgment is within the realm of reason. . . . Congressional findings do not, however, directly address the question of reasonableness; they tell us what Congress actually has found, not what it could rationally find. If, indeed, the Court were to make the existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot.

Lopez, 514 U.S. at 613 (Souter, J., dissenting).

95. The last cases to do so were *A.L.A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935) and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) where the Court struck down wage and hour regulations of employees engaged in intrastate operations. In 1937, the Court upheld the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), marking the apparent end of active judicial review of Commerce Clause cases. For discussions of the development of Commerce Clause law, see Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 *FORDHAM L. REV.* 105 (1992); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 *VA. L. REV.* 1387 (1987); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 *HARV. L. REV.* 645 (1946); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946 Part Two*, 59 *HARV. L. REV.* 883 (1946); Robert L. Stern, *The Commerce Which Concerns More States Than One*, 47 *HARV. L. REV.* 1335 (1934).

96. See, e.g., Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 *CASE W. RES. L. REV.* 685, 686 (1996) [*hereinafter Fuzzy Logic*] where Merritt shows how "[e]ven wearing moccasins in the privacy of my own home is interstate commerce. Wearing moccasins, after all, is related to the demand of moccasins. . . ."; Deborah Jones Merritt, *Commerce!*, 94 *MICH. L. REV.* 674 (1995) [*hereinafter Commerce*] ("When I graduated from law school in 1980, my classmates and I believed that Congress could regulate any act—no matter how local—under the Commerce Clause.")

97. See Frickey, *supra* note 19, at 702.

it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime can have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.⁹⁸

Chief Justice Rehnquist presaged his *Lopez* opinion in a 1980 concurring opinion. He noted that "one of the greatest fictions of federal system is that the Congress exercises only those powers delegated to it while the remainder is reserved to the States or to the people. The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction."⁹⁹ It would be a mistake, he argued, "to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited."¹⁰⁰ Some activities are simply too local to be considered part of interstate commerce and some people or activities may not have any real connection to interstate commerce.¹⁰¹ He then introduced the substantiality test saying: "Our cases have consistently held that the regulated activity must have a substantial effect on interstate commerce. Moreover, simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."¹⁰²

These concerns manifested themselves in *Lopez*. After *Lopez*, Congress is entitled to little deference if it attempts to regulate an activity that is neither commercial nor connected to interstate commerce. This is not a factual matter; it is jurisdictional.¹⁰³ Thus, not only the legal conclusion but also the congressional facts supporting this conclusion are subject to judicial scrutiny. Congress may no longer simply assert an interstate connection. It must now prove it.

98. *Perez*, 402 U. S. at 157-58.

99. *Hodel v. Virginia Surface Mining Reclamation Ass'n, Inc.*, 452 U.S. 264, 307 (Rehnquist, J., concurring).

100. *Id.* at 310 (Rehnquist, J., concurring).

101. *See id.* (Rehnquist, J., concurring).

102. *Id.* at 310-11 (Rehnquist, J., concurring).

103. "Congress' findings must be supported by a 'rational basis' and are reviewable by the courts. . . . In short, unlike the reserved police power of the States which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause." *Id.* at 311 (Rehnquist, J., concurring).

V. SANCTUS: A PRINCIPLED RECONCILIATION OF LOPEZ AND BOERNE

Some commentators argue that *Lopez* will have little substantive impact.¹⁰⁴ Other commentators suggest that *Lopez* was simply a warning to Congress.¹⁰⁵ Under this view, *Lopez* is a reminder to Congress that the Court is watching and will periodically assert its power.¹⁰⁶

Philip Frickey has argued that *Lopez* may be a plausible technique to encourage better congressional procedures.¹⁰⁷ Whether or not we can defend *Lopez* as a principled decision promoting legislative attention to important but often undervalued interests will depend on the extent to which its holding will apply to individual rights cases.¹⁰⁸

Lopez might result in a reordering of congressional power . . . and the power to enforce the Civil War Amendments. At a minimum, . . . a prudent Congress might wish to follow the [*City of Rome*] model when exercising its commerce power: articulate the judicial standard . . . and then document the satisfaction of that standard through facts developed in hearings and other legislative methods.¹⁰⁹

104. See Merritt (*Commerce*), *supra* note 96, at 676 (*Lopez* is “an important, but limited, rein on congressional power.”); McAllister, *supra* note 87, at 219 (*Lopez* does not work “any revolutionary curtailment of congressional power.”); Nagel, *supra* note 85, at 648 (*Lopez* is the result of “predictable doctrinal gyrations.”); Durchslag, *supra* note 86, at 672 (*Lopez* Court repackaged “a test that it has recited in virtually every Commerce Clause case decided since 1937.”); Jesse H. Choper, *Did Last Term Reveal ‘A Revolutionary States’ Rights Movement Within the Supreme Court’?*, 46 CASE W. RES. L. REV. 663, 664 (1996) (*Lopez* is a “very narrow decision.”); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 34 (1995) (*Lopez* an example of “adjudication precisely in the ordinary course”). But see Steven G. Calabresi “*A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*,” 94 MICH. L. REV. 752 (1995) (*Lopez* was “revolutionary”).

105. See, e.g., Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995) (*Lopez* caught Congress’s attention but not likely to make major change in Court’s approach.); Merritt, *Fuzzy Logic*, *supra* note 96 at 689 (*Lopez* reminds us that the Constitution imposes some limits on congressional power.). Cf. Larry Kramer, *What’s a Constitution For Anyway? Of History and Theory*, Bruce Ackerman and the *New Deal*, 46 CASE W. RES. L. REV. 885, 885-86 (1996) (Debate about *Lopez* not about what it really “means; it is about what ‘we should make it mean or do.’”). See generally PHILLIP BOBBIT, *CONSTITUTIONAL FATE: A THEORY OF THE CONSTITUTION* 191, 195 (1982) (“Court decisions sometimes “cue” Congress to reconsider the constitutionality of its actions.”).

106. See Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 771 (1996) (stating that *Lopez* has a “gentle in *terrorem* effect” on congressional procedures.); Cf. Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695 (1996) (stating that *Lopez* might bring back original meaning of Commerce Clause.).

107. See Frickey, *supra* note 19.

108. See Frickey, *supra* note 19, at 697-98.

109. Frickey, *supra* note 19, at 719-20.

Frickey discusses this as “heightened rationality” review.¹¹⁰ As in *Boerne*, however, it seems more like a precursor to standard rationality review. That is, the court first scrutinizes the legislative record to learn the actual end being sought and whether facts support the choice of the particular remedy. If the law meets these two conditions, the court defers to the legislative judgment. If not, the court declares the law unconstitutional for exceeding the scope of legislative power.

Both *Lopez* and *Boerne* follow this pattern. In *Lopez*, the “trigger” is whether or not the matter being regulated is economic in nature. In *Boerne*, the “trigger” is whether or not the action “enforces” the 14th Amendment. If the statute meets this threshold, the court applies conventional rational basis review. If the statute does not meet the threshold, the statute will likely fail. The Court will use the legislative record to decide whether the statute triggers rational review.

In both cases the Court asked whether the underlying record supported the arguments that the statutes fell within congressional power. In *Lopez*, the court had no congressional record on which to make that judgment. Such findings would have been “helpful” to decide whether the act fell within the commerce power.¹¹¹ In *Boerne*, a congressional record existed. These findings did not prove “helpful” to the legislation, however. Instead, the Court used the content of the record to rule against RFRA’s constitutionality. The Court required that Congress’ choice of means be congruent with and proportional to a proper constitutional goal. The Court measured congruence and proportionality against the actual record before Congress. In this context, the Court’s insistence that the existence of a legislative record is immaterial sounds hollow. In fact, the Court may be silently following its *Lopez* method.

Just as the Court seemed to extend its *Lopez* scrutiny to the Section Five power, it should similarly extend its Section Five standard to Commerce Clause cases. Congruence and proportionality give some content to the rather mysterious *Lopez* standard.¹¹² Unless the Court applies the congruence and

110. See Frickey, *supra* note 19, at 726.

111. See *Lopez*, 514 U. S. at 549.

112. The lower courts have not treated *Lopez* as an invitation to the revolution. See cases collected *infra* note 118 upholding the constitutionality of the Freedom of Access to Clinic Entrances Act and *infra* note 140 discussing the lower court applications of *Lopez*. *Lopez*’s vagueness prompted one federal district judge to write:

[A]lthough the Gun-Free School Zones Act exceeded the ‘outer limits’ of congressional authority, where do those ‘outer limits’ begin? And while the *Lopez* decision indicated that the Court would not sanction ‘additional expansion’ of congressional authority, did it also signal a shift in how the Court would approach what had previously been considered appropriate—or at least constitutional—congressional regulation? Finally, do congressional findings matter or should a

proportionality standards to Commerce Clause legislation, Congress can simply create a record by supplying either boilerplate findings or polemical committee hearings to justify Commerce Clause legislation.¹¹³ When it comes to enforcing the Civil War Amendments, however, *Boerne* suggests that Congress must build a detailed record to justify its legislation.

Future RFRA's will depend upon the extent of the Court's review of the legislative record. Future RFRA's under the Section Five power are likely to fail unless Congress develops some record demonstrating constitutional violations of religious liberty and crafts legislation aimed at remedying those violations.¹¹⁴

court treat them as it would any other argument made in favor of a statute's constitutionality?

Anismov v. Lake, 982 F. Supp. 531, 535 (N. D. Ill. 1997). See also Regan, *supra* note 105, at 555 (Commercial/non-commercial distinction "is an unsupported and ill-considered gloss on an already misguided theory. Justice Kennedy's opinion is an improvement, but it still takes too much of current thinking for granted."); Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 818 (1996) (noting the degree of connection to interstate commerce needed after *Lopez* is difficult to gauge); Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 765-66 (1996) (observing that *Lopez* may signal an intention to seriously review Commerce Clause measure but to do so would be a mistake).

113. The Court has revitalized some 10th Amendment limitations on the commerce power in recent years. See *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 117 S. Ct. 2365 (1997). But these decisions only reinforce the point that the Court is more concerned with formalistic values. Both of these decisions are animated by arid federalism concerns which Justice Kennedy called "etiquette of federalism." See *Lopez*, 514 U.S. at 583, (Kennedy, J., concurring). *New York* involved an interstate compact, for example. It seems excessively formal to declare unconstitutional a regulation that the states themselves asked for and crafted. In *Printz*, the Court declared unconstitutional a provision in the Brady handgun bill that required local sheriffs to conduct background checks. If taken to its logical extreme, the *Printz* decision undermines an enormous amount of contemporary legislation, including various sections of the civil rights acts. When combined with recent decisions concerning 11th Amendment immunity, the Court may be entering an era of "strikingly old fashioned" jurisprudence. See Frickey, *supra* note 19, at 729 (citing William N. Eskridge and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 640 (1992)).

114. This seems unlikely for a number of reasons. First, the Supreme Court may be right when it said that the modern religious liberty problems do not involve intentional religious persecutions. Second, if persecution does exist, it may be practiced against groups that are not politically attractive. See Professor Douglas Laycock, Address at the University of Arkansas at Little Rock, Symposium (Sept. 19 & 20, 1997). For example, politicians may be willing to champion the cause of religion in general because it resonates with that politician's religiously mainstream constituents. It may be more difficult to find any political advantage being the legislative champion for non-mainstream religions. Imagine a politician introducing legislation to protect live animal sacrifice. Cf. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating a city ordinance directed at a religious sect that practiced animal sacrifice).

Narrowly focused RFRA's dealing with commercial subjects may succeed, however.¹¹⁵ Both *Boerne* and *Lopez* demand a more searching judicial review of the congressional record but neither spell out the extent of that review precisely. Nevertheless, it would be possible to justify a narrowly focused remedial scheme given the right factual underpinnings. A prudent Congress could develop a record showing how certain decisions burdening religion affect interstate commerce. Churches buy goods in interstate commerce or goods that have moved in interstate commerce. People travel in interstate commerce to attend church services or participate in church ministries. Restrictive zoning decisions impede the flow of interstate goods and services. Thus, the many problems faced by churches in zoning and other land disputes (the very problem in *Boerne*) may fall within the commerce power. All of this seems artificial but no more so than what the lower courts have accepted in Freedom of Access to Clinic Entrances Act cases.¹¹⁶

On the other hand, an integrated *Boerne/Lopez* standard may make courts more skeptical of such artificial justifications. This may threaten future Commerce Clause RFRA's and the current FACE statute.¹¹⁷

VI. AGNUS DEI: THE COMMERCE CLAUSE FUTURE OF FACE AND RFRA

All of the federal circuit courts to decide the issue have upheld FACE. They have done so by either 1) ignoring *Lopez*' distinction between commercial and noncommercial activity, or 2) using an inappropriately deferential review of the Congressional record purporting to support FACE.¹¹⁸

115. *But see* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 59 n.103 (1995) (Commerce Clause arguments fail to satisfy either internal or external limitations on the power.).

116. See discussion *infra* note 118.

117. Even if Commerce Clause RFRA's survive *Lopez*, they may not survive the Court's revival of federalism limits. This article will not discuss these limits in detail. Suffice it to say that if the Court follows Justice Kennedy's reasoning from his concurrence in *Lopez*, it will be very difficult to justify the kind of federal intrusion into state land use matters. Moreover, *New York* and *Printz* suggest that the federal government may be categorically precluded from directly regulating states. My purpose in suggesting a Commerce Clause RFRA serves two purposes. First, it is an ironic statement meant to highlight the harshness of the Court's rejection of a substantive Section Five power. *Boerne* places religious liberty in the same position that racial equality found itself in prior to *Heart of Atlanta* and *McClung*. Those cases used the Commerce Clause to give Congress an important role in protecting equal rights. By precluding any substantive Section Five power, *Boerne* returns the focus to the commerce power. Second, it is meant to show that the conventional justifications for other Commerce Clause legislation, particularly the FACE statute, apply equally to RFRA. If the Court upholds FACE but not Commerce Clause RFRA's, it sets up a kind of hierarchy of constitutional rights where the implied right of abortion receives more protection than the express right of religious liberty.

118. Federal Circuit Courts: *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997); United States

Most decisions upholding FACE have recited the Congressional findings. These courts have concluded that 1) Congress was regulating a commercial activity, or 2) Congress was protecting a commercial activity, or 3) that protest substantially affected interstate commerce. The lower courts have reviewed the Congressional record which showed acts of violence against abortion clinics. These courts then concluded that abortion clinics buy goods which moved in interstate commerce, their patients travel in interstate commerce, clinic doctors travel across state lines to work in the clinics. Therefore, protest outside abortion clinics substantially affects interstate commerce.

The Seventh Circuit has upheld FACE in two different cases. These cases are good examples of the analytical flaws contained in the FACE decisions. In *United States v. Soderna*,¹¹⁹ the Court, in an opinion by Chief Judge Posner, concluded that the act fell within the commerce power. Judge Posner explained that abortion clinics draw staff, patients and supplies across state lines and that many protests outside abortion clinics have "succeeded in curtailing the number and activities of abortion clinics. So this is a statute that

v. Bird, 1997 WL 589684 (5th Cir. 1997); *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996) (noting the legislative record a supports finding of substantial effect); *United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (holding FACE constitutional because protest affects commerce and Congress can protect interstate commerce at clinics); *American Life League v. Reno*, 47 F.3d 642 (4th Cir. 1995) (holding FACE is within the commerce power and its remedy is not barred by principles of federalism); *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (distinguishing *Lopez* on basis of Congressional record supporting FACE and says non-commercial nature of protest immaterial). Cf. *Cook v. Reno*, 74 F.3d 97 (5th Cir. 1996) (holding district judge improperly considered merits of claim in determining standing issue).

See Randolph M. Scott-McLaughlin, *Operation Rescue Versus a Women's Right to Choose: A Conflict Without a Federal Remedy?*, 32 DUQ. L. REV. 709 (1994); Benjamin W. Roberson, *Abortion as Commerce: The Impact of United States v. Lopez on Freedom of Access to Clinic Entrances Act of 1994*, 50 VAND. L. REV. 239 (1997); Steven A. Delchin, Note, *Viewing the Constitutionality of the Access Act Through the Lens of Federalism*, 47 CASE W. RES. L. REV. 553 (1997); Arianne K. Tepper, Note and Comment, *In Your F.A.C.E.: Federal Law Enforcement of the Freedom of Access to Clinic Entrances Act of 1993*, 17 PACE L. REV. 489 (1997); Lan Hoang, Note, *Freedom of Access to Clinic Entrances Act*, 18 U.S.C. § 248, 20 SETON HALL LEGIS. J. 128 (1996); Amy H. Nemko, Note, *Saving FACE: Clinic Access Under a New Commerce Clause*, 106 YALE L. REV. 525 (1996); Kristine L. Sendek, Comment, *"Face"-ing The Constitution: The Battle Over the Freedom of Access to Clinic Entrances Shifts From Reproductive Health Facilities to the Federal Courts*, 46 CATH. U. L. REV. 165 (1996); John M. Scheib, Note, *Cheffer v. Reno: Is the Regulation of Abortion Clinic Protests the Regulation of Interstate Commerce?*, 41 VILL. L. REV. 867 (1996); Anna Kampourakis & Robin C. Tarr, Note, *About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light of Lopez*, 11 ST. JOHN'S J. LEGAL COMMENT. 191 (1995); Katherine Hilber, Note, *Constitutional Face-off: Testing the Validity of the Freedom of Access to Clinic Entrances Act*, 72 U. DET. MERCY L. REV. 143 (1994).

119. 82 F.3d 1370 (7th Cir. 1996).

really does seek to remove a significant obstruction, in a rather literal sense, to the free movement of persons and goods across state lines."¹²⁰

The aggregation principle was the applicable test, according to Judge Posner: "the test was not the effect of the particular conduct alleged, but that effect cumulated over all the conduct subject to the statute."¹²¹ Citing an antitrust case, Judge Posner concluded that the protest activities outside abortion clinics affected the interstate market for reproductive health services at least as much as the boycott of a single ophthalmological surgeon affected the ophthalmological services market in Los Angeles.¹²²

After *Lopez*, the essential question is whether or not FACE regulates an economic activity. Most of the courts have concluded that it does because of the commercial nature of the reproductive health services industry.¹²³ FACE does not regulate the clinics; it regulates protest outside clinics, a noncommercial activity. *Lopez* held that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."¹²⁴ Prior Commerce Clause cases did not involve Congressional regulation of a non-economic activity that affected the economic activity being regulated.¹²⁵

Lopez presented this very problem. Gun possession was neither economic activity nor an activity that "arose out of or [was] connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."¹²⁶ The Court rejected the government's arguments that gun possession when aggregated substantially affected the commerce connected to

120. *Id.* at 1373.

121. *Id.*

122. *See id.* Judge Posner cited *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991). There is a vast difference between the two, however. First, the conduct in question—an anti-competitive boycott by the surgeon's competition—is itself economic activity, unlike protest which does not grow out of or is not connected to any commercial or economic activity. Second, regulation of such anti-competitive conduct is essential to the success of the broader program of commercial regulation found in anti-trust law. There is simply no national program of commercial regulation of the reproductive health services market to which FACE is essential. Judge Posner's reasoning has no limits. Every activity has the potential to affect interstate commerce by either increasing its volume or decreasing its volume. *Lopez* reminds us that Congress has gone too far under the Commerce Clause when upholding regulation does not provide any principled limit to congressional power.

123. *See, e.g.,* *United States v. Bird*, 124 F.3d 667, 677 (5th Cir. 1997) ("[I]n light of the national commercial market in abortion-related services recognized by Congress, we hold that Congress was justified in concluding that the regulation of intrastate activity—the activity prohibited by the Act—was necessary to ensure the availability (both in terms of access and price) of abortion services in the national commercial market."); *Cheffer*, 55 F.3d at 1520 ("Unlike the Gun-Free School Zones Act, the Access Act does regulate commercial activity, the provision of reproductive health services.").

124. *Lopez*, 514 U.S. at 560.

125. *See* Roberson, *supra* note 118, at 267.

126. *Lopez*, 514 U.S. at 561.

education. The aggregation principle applies to economic activity, like Filburn's wheat farm or Perez' loan sharking. The *Lopez* court requires more when the activity being regulated by the statute is not economic. Also, FACE attempts to regulate activity that is itself not economic, that does not grow out of economic activity, and that is not essential to the success of a larger program of commercial regulation.¹²⁷

In *United States v. Wilson*,¹²⁸ the Seventh Circuit found a rational basis for the Commerce Clause basis of FACE. The Court's opinion conflates the rational basis standard with the commercial/non-commercial distinction in *Lopez*. The *Wilson* court concluded that courts must decide "whether a rational basis exists for concluding that a regulated activity substantially affects interstate commerce."¹²⁹ It expressly found that the Congressional findings under FACE were "plainly rational."¹³⁰ This ignores *Lopez* which suggested that courts should impose a higher level of scrutiny on non-economic regulation.¹³¹ Instead, the Seventh Circuit focused on the rationality of the conclusion that reproductive health services are engaged in interstate commerce.¹³² That is not the question, however. In *Lopez*, schools engaged in interstate commerce in many of the ways that reproductive health clinics do. Students and teachers cross state lines to attend schools and schools purchase goods, materials, and services in interstate commerce. Nevertheless, *Lopez* says that the focus is not on the school's economic activity but on the activity of the person being regulated. Congress is not entitled to the traditional deference accorded to it under rational basis review when it regulates a

127. *But see Hoffman v. Hunt*, 126 F.3d 575, 587 (4th Cir. 1997) (FACE regulates activity that "is closely and directly connected with an economic activity.").

128. 73 F.3d 675 (7th Cir. 1995).

129. *Id.* at 680.

130. *See id.* at 681.

131. *Cf. Brickey, supra* note 112, at 810-11. Professor Brickey points out that protest activity outside abortion clinics may have the commercial nexus required by the Supreme Court. Nevertheless, she concludes that "non-commercial activity that adversely affects an economic enterprise engaged in commerce is subject to Commerce Clause jurisdiction." Brickey, *supra* note 112, at 811.

132. *See Wilson*, 73 F.3d at 681.

noncommercial activity. Thus, the Congressional findings under FACE¹³³ fail to distinguish it from *Lopez*.

The *Wilson* court acknowledges that it must also examine the means chosen by Congress to carry out its Commerce Clause goals.¹³⁴ Here the congressional finding that some abortion clinic protests decrease the flow of interstate commerce might support a Commerce Clause remedy. Nevertheless, the Court repeats its mistake by again excessively deferring to Congressional findings.¹³⁵ A post-*Boerne/Lopez* review would require more than acceptance of Congressional say-so. Instead, the Court must decide whether the chosen remedy is congruent with the exercise of power and proportional to the extent of the problem.

At best, the congressional record suggests the need for a law that prohibits using the instrumentalities of interstate commerce to close clinics, or traveling in interstate commerce to close clinics,¹³⁶ or even engaging in prohibited conduct with the purpose of harming interstate commerce.¹³⁷ FACE is not so

133. The findings were: that reproductive health facilities operate within the stream of commerce; that individual travel across state lines to work at and seek services from such facilities; that obstruction of these facilities decreased the overall availability of such services; and that local governments are not capable of dealing effectively with the problem. See H. R. Rep. No. 103-306, at 705-07 (1993), reprinted in 1994 U.S.C.C.A.N. 699. The first two findings are essentially the same. Interestingly, the Court abandoned the "stream of commerce" standard. The fourth finding—local and state inability to deal with the problem—does not provide a constitutional basis for the exercise of power. The Commerce Clause question does not turn on whether or not the problem can be characterized as national in scope. Only the third finding, obstructing commerce, might provide a basis for the exercise of the commerce power. But that leads to the questions of congruence and proportionality. It cannot justify wholesale regulation of even local protest. There would be no limit to such a principle.

134. See *Wilson*, 73 F.3d at 680 n.6.

135. See *Wilson*, 73 F.3d at 681 (criticizing the District Court for not deferring to congressional findings).

136. Cf. *Dinwiddie*, 76 F.3d at 919-20 ("Congress may protect persons who move in interstate commerce even though the threat comes from intrastate activity."); *Wilson*, 73 F.3d at 680 (holding open the possibility that FACE is constitutional under the "instrumentalities" category). This would require some interstate nexus as an element of the offense or as a jurisdictional basis. For example, Congress could make it illegal to travel in interstate commerce for the purpose of disrupting clinic activities or to disrupt the interstate flow of people, goods, or services. FACE does not require either.

137. See *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 408 (1922) (stating that actions intended to interfere with interstate commerce fall within commerce power).

Deborah Merritt has argued that the notion of fuzzy logic helps explain *Lopez*. See Merritt, *Fuzzy Logic*, *supra* note 96. She lists several factors that are important to the *Lopez* decision.

Among the factors are:

1. The more an activity is like commercial or economic conduct, the more likely it is be interstate commerce;
2. The less clearly the statute provides a jurisdictional element, the less likely the regulated activity will be interstate commerce;

limited. It prohibits even local protest which has no nexus to interstate commerce save the fact that clinics buy some interstate commerce goods. As the *Wilson* district court opinion points out, an integrated economy means that all of us buy goods that have moved through interstate commerce.¹³⁸ If congruence and proportionality matter, then surely the simple assertion that there is a national conspiracy does not make it so. There is scant evidence that every demonstration outside an abortion clinic is a "federal case."¹³⁹

3. The less explicitly Congress makes findings tying the regulated activity to interstate commerce, the less likely it is to be interstate commerce.

4. The more an activity resembles education or another area traditionally regulated by the states, the less likely it is to be interstate commerce.

See Merritt, *Fuzzy Logic*, *supra* note 96.

When she applies them to the FACE statute she does so in decidedly non-fuzzy fashion, however. According to Merritt, FACE is constitutional because 1) Congressional power depends on the effect an activity has on interstate commerce and 2) Congressional findings demonstrated the interstate connections of health clinics. None of these reasons relate to the fuzzy principles Merritt developed. Instead, she applies the Commerce Clause precedent in a very conventional manner. See Merritt, *Fuzzy Logic*, *supra* note 96.

Merritt's conventional analysis misses the mark, however. Neither her application of *Lopez* or *Perez* supports her conclusion. *Lopez* qualified the test so that the question of substantiality is qualitative and not solely quantitative. In *Lopez*, the Court suggested that findings would have helped but it is possible the result would have been the same even with findings. One possible reading of *Lopez* then is that Congress cannot regulate non-commercial activity squarely within the traditional areas reserved to the states regardless of the effect it may have on interstate commerce. The Court made a similar statement in *Boerne*. After reviewing the congressional findings, the Court said that even with better findings, RFRA exceeded congressional power because it was not a proper subject for regulation.

The Congressional FACE findings are entirely quantitative. In addition, Merritt focuses on the clinics, which are not being regulated anymore than education was being regulated in *Lopez*. Indeed, there is little doubt, as Merritt herself points out, that gun possession near schools affects commerce. See Merritt, *Fuzzy Logic*, *supra* note 96. Congress's power to regulate depends in the first instance on whether or not the subject of the regulation comes within its power, however.

In fact, Merritt's "fuzzy logic" principles themselves do not support FACE's constitutionality. Protest does not resemble economic activity; the statute does not set out a jurisdictional connection; and protest (or trespass, assault, and other violent crimes covered by FACE) are areas traditionally reserved to the states. The congressional findings are the only fuzzy factor in FACE's favor. As I point out in the text, the findings are not in proportion to the broad prohibitions in FACE. At worst, FACE's constitutionality is a much closer question than either Merritt or the federal courts believe.

Merritt says that Congressional power does not depend on the motive or means of interference with commerce. But if such things did not matter, then there can be no limit to congressional power. Thus, an additional fuzzy principle emerges: the more that an individual defendant intends to interfere with interstate commerce and uses means designed to do so, the more likely it will be within the Commerce Clause.

138. See *United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis. 1995).

139. Abortion clinic employees in Little Rock, Arkansas called the police to their facility because they feared a disruptive protest was about to begin. When the police arrived they found two Discalced Carmelite nuns standing next to their car. The nuns, who live in cloister, were making a visit to their physician when their car broke down in front of the abortion clinic. The

It can be argued that *Perez* allows Congress to dispense with proof of an interstate nexus in every case. In *Perez*, however, the commercial industry being regulated, interstate banking, was substantially affected by the illegal commerce of loan sharking. Individual loan sharks were generally connected to illegal crime. Thus, dispensing with proof in individual cases allowed prosecutors to get at soldiers in the organized crime family. Even if the individual loan sharks were not connected to and did not engage in any interstate commerce they were still within Congressional power under *Wickard's* aggregation principle. The individual loan sharks were exactly like Roscoe Filburn, the farmer in *Wickard*: they were taking money and customers out of the interstate commerce market by engaging in a competing transaction. This money overhung the market in ways similar to the wheat for home consumption. In FACE, there is no competing commercial transaction.

Thus, a principled *Lopez/Boerne* application calls for less deference to the congressional findings in FACE cases. Courts must more carefully inspect the record for the actual purposes behind FACE and then measure the scope of the remedy against these reasons. I suggest that this will result in striking down the broad FACE purview in favor of a narrower focus on the actual interstate commerce involvement. Only then would the remedy be congruent and proportional to the need for the statute.

If the Supreme Court approves the lower courts' approach to FACE, then a Commerce Clause RFRA may survive a constitutional challenge. The deferential review and the facial characterization of the regulated activity as economic will help a Commerce Clause RFRA satisfy the internal requirements of the Commerce Clause.¹⁴⁰ It may also help it satisfy the external federalism

nuns got out to inspect their car. They were completely unaware of their location. An employee of the clinic saw the nuns standing outside the clinic and jumped to the conclusion that they were the first wave of a blockade. She then called the police. See ARKANSAS DEMOCRAT-GAZETTE, May 15, 1997, at 1A.

This does not minimize the very real dangers presented by violent protest. My argument here is not that Congress can never regulate activities outside abortion clinics. Rather, I argue that Congress must tailor the regulation to conform to the nature of the power being exercised and in proportion to the scope of the problem.

140. *Lopez* has not wrought a thorough judicial revolution. In fact, lower courts have interpreted *Lopez* very narrowly, as is clear from the discussion in the text concerning FACE. Deference to Congressional findings and the willingness to find commerce almost everywhere characterize the lower courts' approach. This has resulted in a number of well-known statutes being upheld.

Drug Free School Zones Act: see *United States v. Jackson*, 111 F. 3d 101 (11th Cir. 1997); *United States v. Ehrlich*, 106 F.3d 409 (9th Cir. 1997) (unpublished opinion); *United States v. Hawkins*, 104 F.3d 437 (D.C. Cir. 1997); *United States v. Ekinci*, 101 F.3d 838 (2d Cir. 1996); *United States v. McKinney*, 98 F.3d 974 (7th Cir. 1996), cert. denied, 117 S. Ct. 1119 (1997); *United States v. Orozco*, 98 F.3d 105 (3d Cir. 1996); *United States v. Zorrilla*, 93 F.3d 7 (1st Cir. 1996); *United States v. Tucker*, 90 F.3d 1135 (6th Cir. 1996).

limits as well. FACE amounts to a serious infringement on personal liberty without local accountability by imposing the power of the Federal government directly on individuals. A Commerce Clause RFRA would not invade individual liberty to the same extent. Instead, it would set a standard for local officials to follow, leaving the ultimate decisions to these same local officials. In any event, upholding FACE against federalism challenges while striking down Commerce Clause RFRA would be ironic. Both statutes attempt to reconcile competing needs, rights, and values. A mechanical acceptance of FACE coupled with a rejection of RFRA would establish a hierarchy in which some rights are more equal than others.

VII. LIBERA ME: PARITY FOR SECTION FIVE AND THE COMMERCE POWER

If the Courts do not integrate these two cases into a unified standard, it will appear to prefer values that are "formalist rather than humanitarian [and] selectively counter-majoritarian."¹⁴¹ The Court is not willing to invest Congress with the expansive power to expand and protect human rights suggested by *Morgan* and predicted by Archibald Cox. Integrating the *Boerne* and *Lopez* standards will at least put Section Five and the commerce powers on the same footing. It will also preserve some modest role for Congress to play in expanding the protection of human rights.

Violence Against Women Act: *see* *United States v. Bailey*, 112 F.3d 758 (4th Cir. 1997); *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997); *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997); *Doe v. Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997); *United States v. Gluzman*, 953 F. Supp. 84 (S.D. N.Y. 1997); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996). *But see* *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996) (holding Violence Against Women Act exceeds Congressional authority).

Carjacking: *see, e.g.*, *United States v. Overstreet*, 40 F.3d 1090 (10th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995); *United States v. McHenry*, 97 F.3d 125 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 992 (1997); *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995).

141. Frickey, *supra* note 19, at 729.

