

Legitimate Defense of Civil Rights or Raw Congressional Power Grab?

The Constitutionality of the Freedom of Choice Act

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After long laying dormant, the Freedom of Choice Act (FOCA), legislation by Congress purporting to sweep aside all state and federal restrictions on abortion, has again become a lightning rod for controversy. This is due to the backing of many members of the Democratic majority in Congress and to President Obama's promise that it would be the very first piece of legislation he would sign upon taking office. The issue has been raised to national prominence not only because of the normal vehemence of the abortion debate, but because of the Act's potential to remove all freedom of conscience protections and the very real counter-threat by the nation's Catholic bishops to shut down all Catholic hospitals rather than cooperate with what they believe to be an "intrinsic evil." Since these account for one-third of all hospitals in this country, the Act has the potential to destroy this country's already fragile healthcare system. Yet before that shocking scenario becomes reality, the constitutionality of FOCA must be considered. The last time the legislation was seriously proposed in 1993, it was generally considered a valid exercise of congressional power, but since then a number of Supreme Court opinions have sharply limited that power. In this paper, I will argue that the Freedom of Choice Act is a questionable exercise of Congress' power under the Commerce Clause and an improper exercise of Congress' power under Section Five of the Fourteenth Amendment.

I. Background on the Freedom of Choice Act

The Freedom of Choice Act's stated intent is to codify the holding in *Roe v. Wade* as federal statutory law (though we will see it is likely to go far beyond that.) In 1989, Democrats feared that the Supreme Court - stocked with eight years of Reagan appointees and at least four years of George H. W. Bush appointees - would overturn

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Roe. Supporters of abortion rights were spurred to act by the Supreme Court's decision in *Webster v. Reproductive Health Services*, which upheld a Missouri law restricting the use of public funds to promote or provide abortions, forbidding government doctors from performing abortions not necessary to save the mother's life, and requiring viability testing before abortions performed beyond the twentieth week of pregnancy.¹

Representative Don Edwards and Senator Alan Cranston of California introduced the first version of the Act on November 17, 1989, and it was reintroduced in 1991 and 1993. The House and Senate versions of the 1989 bill were functionally identical, and contained a simple prohibition on *state* governments "restrict[ing] the right of a woman . . . to terminate a pregnancy . . . before fetal viability; or at any time, if such termination is necessary to protect the life or health of the woman[.]" with an exception for "medically necessary" requirements.² There were no restrictions on the federal government.

The 1991 version was initially the same as the 1989 version,³ but the Senate revised it in July 1992 to add congressional findings about the importance of the right to abortion and how states had restricted it, and asserting power to enact FOCA under the Commerce Clause and Section Five of the Fourteenth Amendment.⁴ It indicated its purpose was the restoration of the strict scrutiny standard of *Roe* and cases through 1988,⁵ but retained the same basic operative text as the previous versions (including the medical necessity exception.)⁶ However, it also included "Rules of Construction" that added a conscience clause for health care workers, permission for states to refuse to fund

¹ 492 U.S. 490, 501 (1989).

² Freedom of Choice Act of 1989, H.R. 3700, S. 1912, 101st Cong. § 2 (Nov. 17, 1989).

³ Freedom of Choice Act of 1991, H.R. 25, S. 25, 102d Cong. (Jan. 1991).

⁴ Freedom of Choice Act of 1992, S. 25, 102d Cong. § 2(a) (July 1992).

⁵ *Id.* at § 2(b). This basically retains everything before *Webster*.

⁶ *Id.* at § 3(a).

abortion, and permission to require parental notification for minors.⁷ The 1993 version of the bill was essentially identical to this second Senate version, and we will use that for most comparisons with FOCA's modern incarnation.⁸

The Act's momentum was blunted by several events inside and outside Congress. Democrats debated over the exact content of the bill. As one FOCA opponent put it, "To the extent that the debate focused on what the bill would do, it lost support."⁹ Liberal interest groups focused on "more pressing priorities" like health care.¹⁰ Meanwhile, much as FOCA was propelled by fear of *Roe*'s demise, it was stalled by the comparatively "reasonable and moderate" decision in *Planned Parenthood v. Casey*, which permitted additional restrictions on abortion, but reaffirmed the right itself.¹¹ In light of *Casey*, FOCA "floundered before the Democratic Congress despite promises at the Democratic party convention to enact it swiftly into law." It was halted altogether by the Republican Revolution of 1994. In retrospect, some viewed it as "politically impractical[,] a waste of legislative energy."¹²

Nevertheless, recent legal and political events have given abortion supporters new hope for FOCA's passage and drawn renewed opposition from its foes. A new version was introduced in 2007 by Representative Jerrold Nadler of New York and Senator Barbara Boxer of California.¹³ Given President Bush's staunch support for the pro-life position and the inability to overcome his certain veto of the bill, its introduction was at the time almost certainly symbolic. Since then, Democrats have substantially increased

⁷ *Id.* at § 3(b).

⁸ Freedom of Choice Act of 1993, S. 25, 103d Cong. (Jan. 25, 1993).

⁹ Kevin Merida, *Abortion Bill Overtaken by Health Reform – Rights Groups Focus on Ensuring Access*, WASH. POST, Mar. 21, 1994, at A1 (quoting Douglas Johnson of the National Right to Life Committee).

¹⁰ *Id.* (quoting Pamela J. Maraldo, President of the Planned Parenthood Federation of America).

¹¹ Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 111 (1992).

¹² Assoc. Press, *Abortion Foes Celebrate Gains*, COLUMBIAN (Vancouver, Wash.), Aug. 18, 1995, at B2.

¹³ See Freedom of Choice Act, H.R. 1964, S. 1173, 110th Cong. (Apr. 19, 2007).

their majorities in Congress and a Democratic President has promised to sign it,¹⁴ turning an empty symbol into a very real threat for the pro-life movement.

II. Statutory Analysis of the Freedom of Choice Act

Before discussing the constitutionality of the Freedom of Choice Act, we will examine whether it will do what its opponents claim. FOCA is currently a moving target. Even if it becomes law, the text may differ significantly from previous propositions, so this analysis is necessarily imprecise, but it will provide a sketch of the accusations being made about FOCA and what effect it is actually likely to have if enacted.

A. Methods of Interpretation

At the moment, there are three dominant forms of statutory interpretation, examining: “(1) the actual or presumed intent of the legislature enacting the statute (‘intentionalism’); (2) the actual or presumed purpose of the statute (‘purposivism’ or ‘modified intentionalism’); and (3) the literal commands of the statutory text (‘textualism’).”¹⁵ We will look primarily at FOCA’s text because the other forms of interpretation are of limited utility with an unenacted statute.

There are a whole collection of canons designed to systematize textual statutory interpretation, but they have been widely discredited.¹⁶ The most famous criticism was leveled by Professor Karl Llewelyn, who demonstrated that “for every canon one might

¹⁴ In 2007, then-Senator Obama declared to the Planned Parenthood Action Fund: “The first thing I’d do, as president, is sign the Freedom of Choice Act. That’s the first thing I’d do.” Melinda Henneberger, *Lose-Lose on Abortion*, SLATE, Nov. 24, 2008, <http://www.slate.com/toolbar.aspx?action=print&id=2205326>.

¹⁵ William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990). There have been a proliferation of other theories, but interestingly, systems meant to simplify them tend to come back around to these. See J. Clark Kelso & Charles D. Kelso, 53 SMU L. REV. 81, 81-82 (2000) (proposing “Formalism”, “Holmesian”, “Natural Law”, and “Instrumental” as “theories of decision-making” that underlie methods of statutory interpretation, with the theories corresponding to textualism, intentionalism, expanded intentionalism, and purposivism, respectively).

¹⁶ Richard A. Posner, *Statutory Interpretation-In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 801 (“[T]here is a fine literature debunking the canons of construction[.]”).

bring to bear on a point there is an equal and opposite canon[.]”¹⁷ Most textual approaches today therefore rest on the text itself, read “reasonably, to contain all that it fairly means.”¹⁸ Words should neither be construed strictly, with no regard for context, nor stretched beyond “a limited range of meaning.”¹⁹ We start with the most recent proposed text of the Freedom of Choice Act:

(b) Prohibition of Interference- A government may not--

(1) deny or interfere with a woman's right to choose--

(A) to bear a child;

(B) to terminate a pregnancy prior to viability; or

(C) to terminate a pregnancy after viability where

termination is necessary to protect the life or health of the woman;

or

(2) discriminate against the exercise of the rights set forth in

paragraph (1) in the regulation or provision of benefits, facilities, services,

or information.²⁰

B. Dissecting FOCA’s Text

From this starting point, we will examine a number of major claims being made about FOCA: (1) it would repeal the federal partial-birth abortion ban and prevent states from enacting their own such bans; (2) it would require federal and state funding of abortion; (3) it would prohibit informational requirements and waiting periods permitted

¹⁷ *Id.* at 806 (citing K. LLEWELYN, *THE COMMON LAW TRADITION* 521-35 (1960)).

¹⁸ ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 23 (1998).

¹⁹ *Id.* at 23-24.

²⁰ H.R. 1964, S. 1173, at § 4(b). This is the operative section of FOCA. The bill also contains Findings explaining the benefits accruing from *Roe v. Wade* and how *Roe* accords with fundamental values enshrined in the Constitution. *See id.* § 2. Finally, it authorizes a private right of action for violations. *Id.* at § 4(c).

by *Planned Parenthood v. Casey*²¹ and go further to strike down even parental consent requirements for minors; (4) it would interfere with a broad range of legitimate state activity, like medical licensing, zoning, etc.; (5) it would eliminate federal and state freedom-of-conscience exemptions. The first, third, and fourth contentions are almost certainly true, the second contention is likely true if the government provides health care funding, and the fifth is debatable, but possible.

The first claim – that FOCA would repeal all federal and state partial-birth abortion bans – is clearly true. The bill abrogates any law “deny[ing] or interfer[ing] with a woman’s right to choose . . . to terminate a pregnancy prior to viability; or . . . to terminate a pregnancy after viability where termination is necessary to protect the life or health of the woman.”²² It specifically criticizes *Gonzales v. Carhart*,²³ which upheld the federal partial-birth abortion ban.²⁴ Since the federal ban prohibits a specific method of abortion at any time during pregnancy except when necessary to save the mother’s life,²⁵ it is plainly repealed by FOCA, and state bans would certainly meet the same fate.²⁶

Whether FOCA would require federal and state funding of abortion will likely depend on the type of funding. Are state legislatures required to pass positive legislation funding abortion? Probably not. While states receive unfunded mandates from Congress

²¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

²² H.R. 1964, S. 1173, at § 4(b).

²³ 550 U.S. 124 (2007).

²⁴ *Id.* at § 2(9) (“The majority decision in *Gonzales v. Carhart* . . . fails to protect a woman’s health, a core tenet of *Roe v. Wade*.”).

²⁵ H.R. 1964, S. 1173, at § 2(9). *See also* 18 U.S.C. 1531(a) (2006) (partial-birth abortion ban).

²⁶ It should be noted that - as with the Supreme Court’s treatment of RFRA - regardless of the constitutionality of FOCA as it applies to the states, the provisions regarding the federal government would almost certainly be held constitutional and remain in effect.

all the time,²⁷ and while the broad language forbidding “discriminat[ion] . . . in the regulation or provision of benefits, facilities, services, or information”²⁸ could be interpreted to require states to provide funding for abortions, this opens up a bottomless pit of debate over what constitutes “discriminat[ion].” Does a state have to be funding reproductive services to be liable if they don’t fund abortion? Women’s health? Health care in general?²⁹ Even if a court were inclined to interpret FOCA that way, the Supreme Court’s Commerce Clause jurisprudence clearly prohibits the federal government from commandeering state legislatures,³⁰ and the canon of constitutional avoidance³¹ would thus counsel against such a construction of the Act.

A more likely reading of the Act is that it sweeps aside specific funding bans like the Hyde Amendment, which since 1976 has prohibited programs like Medicare and Medicaid from funding abortion.³² In 1993, Congress seemingly had this understanding of FOCA; they included a provision stating that the Act should not be construed to “prevent a state from declining to pay for the performance of abortions[.]”³³ Without this protection for the prerogatives of the States, the Hyde Amendment and its equivalents in thirty-three states and the District of Columbia would be abandoned,³⁴ and the federal and state Executives would not only be free to fund such programs, but actively required to

²⁷ See, e.g., Paul Gillmor & Fred Eames, *Reconstruction of Federalism*, 31 HARV. J. ON LEGIS. 395, 395-96 (1994) (discussing how the federal government’s overzealous regulation of atrazine in drinking water led to state expenditures that instead could have paid for 2300 teachers).

²⁸ H.R. 1964, S. 1173, at § 4(b)(2).

²⁹ Cf. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 510 n.8 (1989) (suggesting the Constitution may require state funding / permission for abortion where “a particular State had socialized medicine and all of its hospitals and physicians were publicly funded. This case might also be different if the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose.”).

³⁰ See *infra* Section III.B.

³¹ This is one of the few canons most scholars agree is legitimate.

³² See Consolidated Appropriations Act, Pub. L. No. 110-161, § 507 (2008).

³³ Freedom of Choice Act of 1993, S. 25, 103d Cong. § 3(b)(2) (May 1, 1993).

³⁴ Letter from Caroline Fredrickson & Gregory T. Nojeim, ACLU, to Sen. Barbara Boxer and Cong. Jerrold Nadler Thanking the Lawmakers for Introducing the Freedom of Choice Act (“FOCA”) (Apr. 17, 2006), available at <http://www.aclu.org/reproductiverights/abortion/25062leg20060417.html>.

do so by the mandate that the state not “discriminate . . . in the regulation or provision of benefits, facilities, services, or information.”³⁵

Professor Douglas Kmiec questions this reasoning, asserting that FOCA would not interfere with the federal Hyde Amendment, which since 1976 has prohibited Medicare, Medicaid, and similar funding from being used for abortion. He argues that because the Hyde Amendment is renewed each year, “Congress has it well within its power to renew the Hyde Amendment after FOCA, which by well-settled, last-in-time interpretative principles would keep the abortion funding limitation in place.”³⁶ He is correct, but that simply means Congress is entitled to change the law (not exactly a novel proposition), and he neglects to mention an important detail. Setting aside the fact that this would permit federal funding for abortion between the passage of FOCA and the renewal of the Hyde Amendment (which Kmiec does not contest), the last-in-time rule only applies absent specific statutory text to the contrary. In this case, the proposed Freedom of Choice Act specifies that it applies to “every Federal . . . statute . . . enacted . . . before, on, or *after* the date of enactment of this Act.”³⁷ Thus, Congress would need to both renew the Hyde Amendment *and* include specific text indicating it applied notwithstanding FOCA.³⁸

In *Planned Parenthood v. Casey*,³⁹ the Supreme Court upholds several Pennsylvania laws that required the doctor to provide specific information to the patient, obtain her informed consent,⁴⁰ and wait twenty-four hours before performing an

³⁵ Freedom of Choice Act, H.R. 1964, S. 1173, 110th Cong. § 4(b)(2) (Apr. 19, 2007).

³⁶ Mara Vanderslice, *Kmiec Responds to Criticism on Abortion Reduction “Scam”*, BELIEFNET (Oct. 3, 2008), <http://blog.beliefnet.com/progressiverevival/2008/10/kmiec-responds-to-criticism-on.html>.

³⁷ H.R. 1964, S. 1173, at § 6 (emphasis added).

³⁸ See *supra* note 26.

³⁹ *Planned Parenthood of Se. Pa.*, 505 U.S. 833 (1992).

⁴⁰ *Id.* at 881-85.

abortion.⁴¹ In doing so, the Court discards the rigid trimester framework of *Roe* which had prohibited essentially all regulation in the first trimester.⁴² They substitute an “undue burden” standard which requires the courts to determine whether a particular “state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁴³ While *Casey* was a bitter disappointment to pro-life supporters hoping for *Roe* to be overruled, it did restrain the enthusiasm of the courts for striking down all abortion regulations, even those consistent with the traditional role of the States in regulating health care within their borders.

Under the Freedom of Choice Act, even the liberal “undue burden” standard would be swept aside in favor of an outright ban on any regulation “interfer[ing] with [the] woman’s right to choose.”⁴⁴ The Court’s opinion in *Casey* was based on its determination that “not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right[,]” a conclusion reflected in its “jurisprudence relating to all liberties save perhaps abortion[.]”⁴⁵ Nevertheless, FOCA makes impermissible all regulations “interfer[ing]” with abortions, and as the Court notes later in *Casey*, “[a]ll abortion regulations *interfere* to some degree with a woman’s ability to decide whether to terminate her pregnancy.”⁴⁶ Thus, the Act would probably be interpreted as abolishing everything from waiting periods to informed consent. In fact, under this reading, the Act could cut deeper than *Casey*’s reversal and prohibit parental notification and consent requirements for minors. Though the Court found these constitutional even before

⁴¹ *Id.* 885-87.

⁴² *Id.* at 881-82. The Court also overruled several of *Roe*’s progeny in the process. *Id.*

⁴³ *Id.* at 877.

⁴⁴ Freedom of Choice Act, H.R. 1964, S. 1173, 110th Cong. § 6 (Apr. 19, 2007) (emphasis added).

⁴⁵ 505 U.S. at 873.

⁴⁶ *Id.* at 875 (emphasis added).

Casey,⁴⁷ if “[a]ll abortion regulations interfere”, then these too must go. The actions of Congress in 1993 confirm this reading. In a version of FOCA drafted soon after *Casey*, Congress included a “Rule[] of Construction” directing that the Act should not be interpreted to “prevent a state from requiring a minor to involve a parent, guardian, or other responsible adult before terminating a pregnancy.”⁴⁸

A minor extension of this line of thought leads to the conclusion that FOCA would forbid not only regulations that actually mention abortion, but that in any way “interfere” with its availability, such as medical licensing decisions, zoning regulations, etc. As the Court states: “Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure.”⁴⁹ This might seem to stretch the argument too far, but here the parallels between FOCA and the Religious Freedom Restoration Act (RFRA)⁵⁰ are both useful and striking. In RFRA, Congress attempted – under their Section Five enforcement power – to protect religious freedom by restoring a stricter standard of review for regulations that “substantially burden[ed] a person's exercise of religion even if the burden results from a rule of general applicability[.]”⁵¹

In *City of Boerne v. Flores*,⁵² the Court reads RFRA to do exactly what I suggest FOCA will do. RFRA is a similarly spare statute whose plain reading has the potential to cut deeply into areas traditionally reserved to the states, and *Boerne* dealt with a classic domain of state authority: the denial of a building permit for the expansion of a church in

⁴⁷ See, e.g., *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 510-19 (1990); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

⁴⁸ Freedom of Choice Act of 1993, S. 25, 103rd Cong. § 3(b)(3) (May 1, 1993).

⁴⁹ *Id.* at 874.

⁵⁰ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 (Nov. 16, 1993).

⁵¹ *Id.* at § 3(a).

⁵² 521 U.S. 507 (1997). *Boerne* is also an important interpretation of Section Five of the Fourteenth Amendment, which we will discuss in Section IV, *infra*.

a historic district.⁵³ The Court determines that RFRA, by intruding into such decisions, “displac[ed] laws and prohibit[ed] official actions of almost every description[.]”⁵⁴ which was “a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”⁵⁵ FOCA should be read the same way; for reasons we will discuss below, it is similarly unconstitutional.

But the most controversial accusation being made about FOCA is that it will displace federal and state freedom of conscience laws. Religious leaders, especially Catholic bishops charged with overseeing many of the nation’s hospitals, are worried and angry about this possibility. There is serious debate over whether FOCA would sweep that broadly. I believe, and I will argue below, that it could.

The country’s Catholic bishops have always been opposed to abortion, but they have been particularly vocal in this case, since they supervise Catholic hospitals, and they believe permitting abortions in those facilities would be “material cooperation with an intrinsic evil.”⁵⁶ The bishops believe FOCA would set aside most restrictions on abortion, including conscience clauses,⁵⁷ but they are not giving in without a fight. For example, Bishop Paul Loverde of Arlington, Virginia, said, “I’m not closing this hospital, we will not perform abortions, and you can go take a flying leap.”⁵⁸ He said authorities

⁵³ *Id.* at 512.

⁵⁴ *Id.* at 532.

⁵⁵ *Id.* at 534.

⁵⁶ Henneberger, *supra* note 14.

⁵⁷ John C. Nienstedt, *Freedom of Choice Act Is Bad Legislation*, THECATHOLICSPIRIT.COM, Oct. 29, 2008, http://thecatholicspirit.com/index.php?option=com_content&task=view&id=706&Itemid=108 (“FOCA would knock down laws protecting the conscience rights of nurses, doctors and hospitals with moral objections to abortion[.]” (quoting Archbishop Justin Cardinal Rigali of Philadelphia)).

⁵⁸ Kathleen Gilbert, *Catholic Bishop: “Go Right Ahead and Arrest Me” Rather Than Obey Freedom of Choice Act*, LIFESITENEWS.COM, Dec. 2, 2008, <http://www.lifesitenews.com/ldn/printerfriendly.html?articleid=08120209>.

will have to “arrest [him]” and “drag [him] out[.]”⁵⁹ Such a scenario may be unlikely, but it should be clear that Catholic hospitals will never be permitted to perform abortions. Since they account for a third of hospitals in the United States,⁶⁰ their consequential closing could push a stretched health care system beyond its breaking point.

Jill Morrison of the National Women’s Law Center says FOCA would not force private doctors and hospitals to provide abortion. For that to happen, she notes that health-care providers would need to be classified as state actors, and believes that their acceptance of federal funding is insufficient to classify them as such.⁶¹ Her conclusion is questionable. In *Taylor v. St. Vincent’s Hospital*, the district court found jurisdiction because the hospital received federal Hill-Burton funds for construction / improvement of its facilities.⁶² It then “enjoined St. Vincent's so that a patient's tubal ligation could be performed there.”⁶³ Congress reacted by passing the Church Amendment,⁶⁴ the first conscience clause legislation, which “prohibit[ed] any court from finding that a hospital which receives Hill-Burton funds is acting under color of state law[,]”⁶⁵ and the court was forced to dismiss the case. Congress’ swift and decisive action might lead you to believe *Taylor* was a rogue decision they felt compelled to redress, but the court’s actions were not unprecedented. Before *Taylor*, “[s]imilar findings of state action ha[d] been so based in a variety of . . . actions against hospitals.”⁶⁶

⁵⁹ *Id.*

⁶⁰ Henneberger, *supra* note 14.

⁶¹ Emily Douglas, *What Would FOCA Really Do?* (Nov. 25, 2008), <http://www.rhrealitycheck.org/print/8833>.

⁶² 369 F. Supp. 948, 950 (D. Mont. 1973).

⁶³ Lisa C. Ikemoto, *When a Hospital Becomes Catholic*, 47 MERCER L. REV. 1087, 1115 (1996).

⁶⁴ 42 U.S.C. § 300a-7 (2009).

⁶⁵ 369 F. Supp. at 950.

⁶⁶ Richard Wasserman, Note, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237, 259 (1974).

Ms. Morrison believes the Church Amendment would be preserved because “FOCA must be read consistently with existing federal law, unless the new law explicitly provides that it is intended to repeal existing law.” The problem with that conclusion is that FOCA clearly repeals a wide variety of other legislation...if it didn’t, there would be no point in passing it. Conscience clauses like the Church Amendment explicitly single out abortion.⁶⁷ FOCA abrogates laws that “interfere with a woman’s right to choose[.]”⁶⁸ If waiting periods, licensing regulations, and similar state restrictions interfere, then certainly reducing the number of available doctors and hospitals would do the same. Though I don’t believe FOCA would require positive regulation by the state (mandating that all doctors provide abortions as a condition of licensing, just as pharmacists in some states are now required to provide contraception), I believe it would abrogate protective statutes (like conscience clauses) that facially discriminate against abortion.⁶⁹

Critics may be right that freedom of conscience laws will not be affected and the “doomsday scenario” involving a standoff between the federal government and principled health-care providers is nothing but a political storm created to infuriate values voters. One would certainly expect that any time a government mandate requires someone to choose between their job and the dictates of their conscience, the potential ramifications would first be clearly stated and carefully considered. It is hard to imagine courts requiring doctors, nurses, and hospitals to provide abortions against their will. Of course, some would argue it was equally hard to imagine the state requiring pharmacists to

⁶⁷ 42 U.S.C. § 300a-7(b) (2009) (“The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction by any individual or entity does not authorize any court or any public official or other public authority to require . . . such individual to perform or assist in the performance of any . . . abortion if his performance or assistance in . . . such . . . abortion would be contrary to his religious beliefs or moral convictions[.]”).

⁶⁸ *Id.* at § 4(b).

⁶⁹ *See, e.g.*, 42 U.S.C. 300a-7 (the Church Amendment, the federal conscience clause).

provide birth control despite their conscientious objections. But pharmacists in some states are now both required to do so and criticized for refusing in the first place.⁷⁰ It's not hard to imagine that principled doctors, nurses, and hospitals are the next target.

III. Constitutionality Under the Commerce Clause

Congress advances two constitutional bases for its authority to pass the Freedom of Choice Act: first, its authority to regulate interstate commerce;⁷¹ second, its authority to enforce the guarantees of the Fourteenth Amendment.⁷² Until recently, the Commerce Clause argument would have been a slam dunk. For much of the twentieth century, the Supreme Court rubber-stamped congressional exercises of Commerce Clause power. The past fifteen years have seen a resurrection of boundaries on this power, proceeding in two parallel lines of precedent: the first limiting the substantive reach of the Commerce Clause to activities actually affecting commerce, and the second restricting the methods Congress can use to effect their will.

Between the late 1800s and 1937, the Supreme Court was strongly opposed to government economic regulations and took a narrow view of the Commerce power.⁷³ In the early 1930s, they invalidated important New Deal legislation, and came under significant political pressure to take a more permissive view of the Commerce Clause's reach.⁷⁴ After Justice Owen Roberts' famous "switch in time that saved nine," the Court overruled several of its earlier decisions and permitted "almost unlimited" congressional

⁷⁰ See, e.g., *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E. 2d 373, 380 (Ill. 2008) (quoting Gov. Rod Blagojevich as saying, after promulgating a rule requiring pharmacies to provide contraception, "Pharmacists--like everyone else--are free to hold personal religious beliefs, but pharmacies are not free to let those beliefs stand in the way of their obligation to their customers.").

⁷¹ See U.S. CONST. art. I, § 8, cl. 3. ("The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes[.]").

⁷² See U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

⁷³ See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 247-54 (3d ed. 2006).

⁷⁴ *Id.* at 254-56.

authority.⁷⁵ The test eventually formulated by the Court asked whether any activity, taken cumulatively, had a substantial effect on interstate commerce.⁷⁶ In practical effect, this restriction meant nothing; from 1937 to 1995, the Court didn't declare a single law unconstitutional as exceeding the substantive scope of the Commerce power.⁷⁷

A. Restricting the Substantive Reach of the Commerce Clause

The first line of authority, restricting the substantive scope of the regulatory power of Congress, began in 1995 with *United States v. Lopez*.⁷⁸ Alfonso Lopez was a high school senior arrested for carrying a loaded .38 caliber gun to school, which the Gun-Free School Zones Act of 1990 made a federal offense.⁷⁹ He was convicted, and ultimately appealed to the Supreme Court, which struck down the law. Chief Justice Rehnquist's majority opinion uses the same rule that had for so long led to the opposite result: the activity must have a substantial effect on interstate commerce.⁸⁰ The Court concludes that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce" and that neither had Lopez moved in interstate commerce

⁷⁵ *Id.* at 243, 256-59.

⁷⁶ *Id.* at 259. As Chemerinsky points out, "[I]n some cases, the Court even deleted the word 'substantial' and declared that Congress could regulate anything under the commerce clause so long as there was a rational basis for believing that there was an effect on commerce." *Id.*; see, e.g., *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981) ("A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.").

⁷⁷ CHEMERINSKY, *supra* note 73, at 259.

⁷⁸ 514 U.S. 549 (1995).

⁷⁹ *Id.* at 551.

⁸⁰ *Id.* at 559. The Chief Justice also acknowledged Congress' ability to regulate the "channels" and "instrumentalities" of interstate commerce. *Id.* at 558-59; see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (channels); *Shreveport Rate Cases*, 234 U.S. 342 (1914) (instrumentalities).

himself nor was there a “hook” requiring the weapon’s interstate movement.⁸¹ Thus, the Court holds the Act unconstitutional.⁸²

The Court extends this line of authority in *United States v. Morrison*, striking down the provision of the Violence Against Women Act “provid[ing] a federal civil remedy for the victims of gender-motivated violence.”⁸³ Rehnquist, again writing for the Court, concludes that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”⁸⁴ He thus “reject[s] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”⁸⁵

But for those hoping the Supreme Court’s federalist pruning of the Commerce power would forbid FOCA, these two cases just don’t go quite far enough. They still permit Congress to regulate essentially all “commerce,” and abortion is a medical service generally provided in exchange for payment.⁸⁶ The question of whether it is commerce “among the several states” is far more debatable. Unfortunately, the Court’s decision in *Wickard v. Filburn*⁸⁷ forecloses the argument that it is not, as *Wickard* essentially reads the “interstate” portion out of the Interstate Commerce Clause. The result in that case was particularly perverse: under an act designed to enforce wheat quotas and thereby prop up the price, a farmer was punished for growing extra wheat to feed his family, a

⁸¹ *Lopez*, 514 U.S. at 567.

⁸² *Id.* at 567-68.

⁸³ 529 U.S. 598, 601-02 (2000).

⁸⁴ *Id.* at 613.

⁸⁵ *Id.* at 617.

⁸⁶ See BLACK’S LAW DICTIONARY (8th ed. 2004) (“Commerce - The exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations.”); NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 89 (1833) (“Commerce - interchange of commodities, trade.”). *But see* Jordan Golberg, Note, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 *FORDHAM L. REV.* 301, 329 (2006) (“[A]bortion is not necessarily an ‘economic activity[.]’”).

⁸⁷ 317 U.S. 111 (1942).

punishment upheld because otherwise they would have to turn to the market for the wheat, and the absence of their demand, though “trivial by itself[,]” affects prices when aggregated with the activities of others.⁸⁸ Under *Wickard*, Congress can reach into every farm, garden, and windowsill planter if they can convince the courts that widespread use of windowsill planters will depress the market value of rosemary.

Wickard has been criticized by conservative commentators like Prof. Stephen Calabresi, who notes: “[G]rowing crops at home for one’s own consumption is an activity that so thoroughly lacks a nexus to interstate commerce that I do not think Congress has the power to regulate it.⁸⁹ Cases like *Morrison* and *Lopez* gave hope that *Wickard* might be vulnerable. The case of *Gonzales v. Raich*⁹⁰ provided an interesting vehicle to test that theory. Angel McClary Raich is a patient authorized by the state of California to use marijuana to alleviate her medical conditions.⁹¹ She brought suit against the United States to enjoin its enforcement of the Controlled Substances Act which, notwithstanding state law, prohibits the possession of marijuana.⁹² Raich, described as “the world’s most sympathetic plaintiff,” suffers from “fibromyalgia, endometriosis, scoliosis, uterine fibroid tumors, paralysis, asthma, and rotator cuff syndrome. She has an inoperable brain tumor, seizures, and struggles to consume enough calories to live.”⁹³

⁸⁸ *Id.* at 127, 128.

⁸⁹ Stephen G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL’Y 875, 894 (2008).

⁹⁰ 545 U.S. 1 (2005).

⁹¹ *Id.* at 6-7.

⁹² *Id.* at 7-8.

⁹³ Dahlia Lithwick, *Dude, Where’s My Integrity?*, SLATE, Nov. 29, 2004, <http://www.slate.com/id/2110204/>.

She has tried thirty-five alternative medicines without success.⁹⁴ She is awake only two hours a day, so it is unlikely she is dealing in her spare time.⁹⁵

Nevertheless, the Court concludes that the Controlled Substances Act is constitutional, even for local cultivation and possession. In so doing, it embraces *Wickard* and distinguishes *Lopez* and *Morrison*.⁹⁶ But the cruelest cut comes from someone normally celebrated in conservative circles: Justice Antonin Scalia. Concurring in the judgment, he concludes that the Necessary & Proper Clause⁹⁷ augments the authority Congress receives from the Commerce Clause. It is the source of congressional power for Chief Justice Rehnquist's third category of regulation (activities that substantially affect interstate commerce), but reaches further, permitting proscription of "those intrastate activities that do not themselves substantially affect interstate commerce" "[w]here necessary to make a regulation of interstate commerce effective."⁹⁸

It has been questioned whether Justice Scalia took this stance primarily because *Raich* is a drug case.⁹⁹ As Dahlia Lithwick put it, "he isn't going to go off tripping lightly to the land of Cheech and Chong with those loonies on the 9th Circuit[.]"¹⁰⁰ Drug regulation seems to motivate unusual or noteworthy decisions, demonstrated by cases like *Employment Division v. Smith*, in which the Court upheld Oregon's prohibition of peyote

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Raich*, 545 U.S. at 17-19, 23-26.

⁹⁷ U.S. CONST. art. 1, §8, cl. 18.

⁹⁸ *Raich*, 545 U.S. at 34-35 (Scalia, J., concurring in the judgment).

⁹⁹ See Martin D. Carcieri, *Gonzales v. Raich: Congressional Tyranny and Irrelevance in the War on Drugs*, 9 U. PA. J. CONST. L. 1131 (2007) ("It may be that Justices Scalia and Kennedy, who had sided with the 'conservatives' in earlier Commerce Clause cases, sided with the 'liberals' in *Raich* to ensure that Congress retains power to frustrate liberal social policy."); Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507 (2006).

¹⁰⁰ Lithwick, *supra* note 93.

as it applied to religious use, abandoning a previously applied strict scrutiny standard.¹⁰¹

In *Morse v. Frederick* (the “Bong Hits 4 Jesus” case), the Court added a new exception to the protections for student speech, permitting suppression of pro-drug messages.¹⁰²

Strangely, the Court has been down this path before with the Commerce Clause. In the late nineteenth and early twentieth centuries, Congress passed several articles of “morals” legislation under its Commerce power. The first challenge to these came in *Champion v. Ames*, in which the Court upheld a law banning interstate lotteries.¹⁰³ A. Christopher Bryant notes: “The Lottery Case supplied precedent for numerous federal statutes selectively forbidding interstate transport in an attempt to suppress goods and conduct deemed dangerous to public health or morals.”¹⁰⁴ But the justices’ view of dangerousness likely differed from that of the public when they struck down prohibitions on child labor in *Hammer v. Dagenhart*.¹⁰⁵ This produced a confusing jurisprudence where the Court seemed to be following their own caprice rather than constitutional command.¹⁰⁶ Bryant argues this opened them up to political attacks, leading to the New Deal abdication of their authority to police the boundary between state and nation.¹⁰⁷

Bryant concludes that this scenario is playing out again, and that *Raich* will ultimately prove the undoing of this new federalist revolution; the Court cannot long give Congress the power to regulate drugs with one hand, while taking away the power to

¹⁰¹ 494 U.S. 872, 883-86 (1990).

¹⁰² 551 U.S. 393, 127 S. Ct. 2618, 2629. *But cf. id.* at 2634 (indicating that the Court’s “jurisprudence now says that students have a right to speak in schools except when they don’t” and did even before *Morse*).

¹⁰³ 188 U.S. 321 (1903).

¹⁰⁴ A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J.L. & PUB. POL’Y 101 (2007).

¹⁰⁵ 247 U.S. 251 (1918).

¹⁰⁶ Bryant, *supra* note 104, at 123 (“Many [contemporary] commentators savaged the majority on the ground that the ruling was glaringly inconsistent with the long line of decisions sustaining congressional regulations of perceived moral vices.”).

¹⁰⁷ *Id.* at 134-38.

regulate violence with the other.¹⁰⁸ But what he doesn't anticipate is that the Court (specifically Justices Scalia and Kennedy) would find something they dislike more...unfettered, unregulated access to abortion, beyond any state control. If the Freedom of Choice Act becomes law and is challenged (as it surely will be), I believe Scalia and Kennedy will choose to overrule *Wickard* (and *Raich*) rather than permit that.

Scalia's hatred of the abortion right is well-known. His dissent in *Casey* is legendary, mocking the "august and sonorous" tone of the plurality and criticizing "[t]he Imperial Judiciary" for believing that the desire to "stand firm against public disapproval" should alter the outcome of a case.¹⁰⁹ While emphasizing elsewhere that his difference with the Court "is a legal rather than a moral one" and that he would permit a state to legalize abortion on demand,¹¹⁰ in *Casey* he notes the "moral opprobrium that had attached to [abortion]" before *Roe*.¹¹¹ Combined with his votes to curtail federal power in *Lopez* and *Morrison*, I believe this will persuade him to reexamine *Wickard* and *Raich*.

Kennedy was part of the plurality in *Casey*, but believed that its reasoning was taken too far in *Stenberg v. Carhart*, which struck down Congress' first partial-birth abortion ban.¹¹² His dissent in *Stenberg* demonstrates his "visceral horror" at the procedure.¹¹³ He surely took satisfaction in authoring the opinion in *Gonzales v. Carhart*,

¹⁰⁸ See *id.* at 155 ("[E]ven if *Lopez* and *Morrison* held promise of a return to meaningful judicial enforcement of the enumerated powers scheme, *Raich* will, sooner or later, prove fatal to that hope.").

¹⁰⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 984, 996, 998 (1992) (Scalia, J., dissenting).

¹¹⁰ Antonin Scalia, *God's Justice and Ours*, FIRST THINGS (May 2002), http://www.firstthings.com/article.php3?id_article=2022 ("[M]y difficulty with *Roe v. Wade* is a legal rather than a moral one: I do not believe . . . that the Constitution contains a right to abortion. And if a state were to permit abortion on demand, I would . . . vote against an attempt to invalidate that law . . . because the Constitution gives the federal government (and hence me) no power over the matter.").

¹¹¹ *Casey*, 505 U.S. at 996 (Scalia, J., dissenting).

¹¹² 530 U.S. 914 (2000).

¹¹³ Garrett Eps & Dahlia Lithwick, *Will the Real Anthony Kennedy Please Stand Up?*, SLATE, Apr. 27, 2007, <http://www.slate.com/id/2165133/>; see also *Stenberg*, 530 U.S. at 956 (Kennedy, J., dissenting).

upholding Congress' second attempt at a ban¹¹⁴ and all but overruling *Stenberg*. The Freedom of Choice Act would repeal the ban and preempt any state attempt at regulating abortion. Considering Kennedy's views from both *Carhart* cases with his votes to limit federal power in *Lopez* and *Morrison*, I believe he will reconsider *Wickard* (and *Raich*) should the Freedom of Choice Act come before the Court.

Note that I am not suggesting that either Justice Scalia or Justice Kennedy has been unfaithful to the Constitution or would overrule cases based simply on their own preferences. I believe, based on their votes in *Morrison* and *Lopez*, that they may take a more narrow view of congressional authority under the Commerce Clause than is reflected by *Wickard* and *Raich*. That they maintained the status quo in those cases demonstrates the influence of *stare decisis*, a desire to ensure that changes in the law are careful and measured. When a decision would upset long-settled authority (as overruling *Wickard* would) and a justice is concerned about the potential results, it is perfectly acceptable to rest on precedent. In *Raich*, they may have been concerned with upsetting federal drug laws and potentially federal regulatory power in other areas. Scalia, despite his defense of an originalist reading of the Constitution, admits that “[i]n its undiluted form . . . it is medicine that seems too strong to swallow” and recommends leavening it with respect for *stare decisis*.¹¹⁵ But he has also said that *stare decisis* is a pragmatic rule of decision separate from the real meaning of the Constitution.¹¹⁶ The potential for completely unregulated abortion availability may lead both justices to discard this pragmatic inaction and reexamine the Constitution's true text.

¹¹⁴ 550 U.S. 124 (2007).

¹¹⁵ Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861 (1989).

¹¹⁶ SCALIA, *supra* note 18, at 140 (“As I have explained, *stare decisis* is not *part* of my originalist philosophy; it is a pragmatic exception to it.”).

If the Court overrules *Wickard*, then FOCA becomes vulnerable to a Commerce Clause challenge. As one commentator says, “First, the purpose of FOCA . . . appears to be unrelated to interstate commerce. Second, the Act lacks a jurisdictional element connected with commerce[.]”¹¹⁷ He notes FOCA includes congressional findings linking abortion with interstate commerce,¹¹⁸ but these are not conclusive. Though the Court made note of the lack of findings in *Lopez*,¹¹⁹ it struck down the law in *Morrison* despite extensive findings.¹²⁰ If individual abortion procedures are not taken in the aggregate, they have little effect on interstate commerce. They are generally performed by local physicians on local patients, and have little influence on the national “marketplace” for healthcare.

B. Restricting the Methods Congress May Use

The second line of authority, restricting the methods Congress can use even when they can permissibly regulate, rests on constitutional principles of federalism and state sovereignty. Supreme Court jurisprudence now protects state legislatures and employees from federal commandeering – from requiring them to directly implement a federal program – but this protection is limited, and comes after a long period of vacillation over the proper line to draw. Judicial protection of federalism, though more evident than in years past, remains scattershot, and is believed by some to be ultimately unworkable.¹²¹

¹¹⁷ Goldberg, *supra* note 86, at 340.

¹¹⁸ *Id.*

¹¹⁹ *United States v. Lopez*, 514 U.S. 549, 562-63 (1995).

¹²⁰ *United States v. Morrison*, 529 U.S. 598, 614-15, 617 (2000).

¹²¹ See JOHN A. FERREJOHN, JACK N. RAKOVE & JONATHAN RILEY, CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 255 (2001) (“The conventional wisdom among law professors has been that juridical federalism is unworkable”); Lino A. Graglia, Essay, *Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL’Y 761, 792-93 (2008) (“The conclusive reason that the Court should not protect federalism is that a Court with the power to disallow policy choices by the national government on federalism grounds will necessarily have power to disallow them on other grounds, as well as to disallow policy choices by the States. The Court itself is the greatest enemy of federalism.”).

In *Garcia v. San Antonio Metropolitan Transit Authority*,¹²² the Court holds that the employment regulations in the Fair Labor Standards Act could be applied to the states. It cast the judiciary as playing a limited role in mediating such disputes between the states and the federal government. Justice Blackmun's opinion for the Court placed great emphasis on "[t]he extent to which the structure of the Federal Government itself was relied on [by the Framers] to insulate the interests of the States[.]"

But the Court has since carved some narrow exceptions, protecting state legislatures and executive officials from "commandeering." In *New York v. United States*,¹²³ the Court reasserts its role in policing the boundary between the federal government and the states. A provision in the Low-Level Radioactive Waste Policy Act required states unable to provide for disposal of radioactive waste generated there to take ownership of that waste.¹²⁴ The Court concludes that this strong-arming of the states exceeds Congress' power to regulate under the Commerce Clause¹²⁵ and that portion of the Act was held unconstitutional.¹²⁶ In *Printz v. United States*,¹²⁷ the Court reviews the provisions of the Brady Handgun Violence Prevention Act requiring state law enforcement officials to perform background checks whenever notified of a potential gun sale by a local dealer. It concludes: "We held in *New York* that Congress cannot compel

¹²² 469 U.S. 528 (1985).

¹²³ 505 U.S. 144 (1992).

¹²⁴ *Id.* at 153-54.

¹²⁵ *Id.* at 188 ("The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them.").

¹²⁶ *Id.*

¹²⁷ 521 U.S. 898 (1997).

the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly.”¹²⁸

This line of precedent only informs our Commerce Clause inquiry in a very limited way. It prevents Congress from requiring the states to fund abortion directly (though, as discussed above, they may have the power to require abortion to be provided if the state ventures into the business of providing health care.) Also, states cannot be directly forced to repeal their abortion regulations, though should FOCA be held constitutional and interpreted to abrogate them, the Supremacy Clause would require even state courts to hold them invalid.¹²⁹ One commentator examined the 1994 version of FOCA and concluded that the Commerce Clause gave Congress the necessary authority.¹³⁰ He believed this to be an unusual result, though, noting that “the Commerce Clause is a frail reed upon which to base such a broad and wide-ranging piece of social legislation that infringes so heavily upon state sovereignty.”¹³¹ He argued that the Tenth Amendment should provide a countervailing limitation upon the Commerce Power, and *Garcia* should be distinguished.¹³² Writing without the benefit of *Morrison* or *Lopez*, it is understandable that he would not see the potential in a challenge to the substantive reach of the Commerce power, but now that seems to be the most logical approach.

IV. Constitutionality Under Section Five of the Fourteenth Amendment

Even if the Freedom of Choice Act is held to be an unconstitutional exercise of Congress' Commerce power, it also asserts authority under Section Five of the

¹²⁸ *Id.* at 935.

¹²⁹ U.S. CONST. art. VI, par. 2.

¹³⁰ See Douglas A. Axel, Note, *The Constitutionality of the Freedom of Choice Act*, 45 HASTINGS L.J. 641, 645-46 (1994).

¹³¹ Axel, *supra* note 130, at 643.

¹³² *Id.* at 653-56.

Fourteenth Amendment,¹³³ which gives Congress the “power to enforce [its guarantees] by appropriate legislation[.]”¹³⁴ This provision has sometimes been seen as a broad grant of legislative power, but more recent jurisprudence reserves the determination of substantive rights to the courts alone, though Congress has broad discretion in determining the appropriate method of protecting those rights. Specifically, in *City of Boerne v. Flores*,¹³⁵ the Supreme Court held that such laws needed “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹³⁶ This same test should be applied to FOCA, and because the Act sweeps so broadly into areas of traditional state control without evidence of past practices of discrimination or regard for the Supreme Court’s decisions on the scope of abortion rights, FOCA should be held unconstitutional as it applies to the states.

Over the years, the Enforcement Clause of the Fourteenth Amendment has received significant attention, with scholars and courts taking a wide range of views on its precise meaning and scope. The power it granted to Congress was rooted in a fear that in *Dred Scott*¹³⁷ the Supreme Court had “subvert[ed] basic freedoms in the name of enforcing them.”¹³⁸ As such, some have argued that the best course is to make Congress and the Court co-protectors of civil liberties, with the broadest interpretation always taking precedence. The most notable proponent of this view was Justice William Brennan. Writing for the Court in *Katzenbach v. Morgan*, he concluded that “§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in

¹³³ Freedom of Choice Act, H.R. 1964, S. 1173, 110th Cong. § 2(14) (Apr. 19, 2007).

¹³⁴ U.S. CONST. amend. XIV, § 5.

¹³⁵ 521 U.S. 507 (1997).

¹³⁶ *Id.* at 520.

¹³⁷ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

¹³⁸ Michael W. McConnell, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 164 (Jack M. Balkin, ed. 2001).

determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”¹³⁹ He emphasized that this discretion operates in only one direction: “Congress [has] no power to restrict, abrogate, or dilute the[] guarantees” of the Fourteenth Amendment. This theory has been referred to as “Brennan’s ratchet.”¹⁴⁰

But how do we know which way the ratchet is turning?¹⁴¹ Frequently, situations involve balancing the rights of one individual against another or against those of society. As William Cohen asks, “could a congressional expansion of the power of courts to issue gag orders to the press in criminal cases be justified as an enhancement of fair trial without the necessity of any judicial determination of the freedom of the press issue?”¹⁴² Justice Scalia also addresses this, criticizing a decision of the Court permitting a sexually abused child to testify without the presence of the defendant,¹⁴³ violating (in his opinion) the Confrontation Clause of the Constitution.¹⁴⁴ To arguments that this protects the child’s right not to be traumatized, Scalia replies, “I have no doubt that the society is, as a whole, happy and pleased with what my Court decided. But we should not pretend that the decision did not *eliminate* a liberty that previously existed.”¹⁴⁵ Nevertheless, some still adhere to Brennan’s view. For example, Justice Stevens has now argued in several

¹³⁹ *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

¹⁴⁰ William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975) (internal quotations omitted).

¹⁴¹ *See id.* at 606-07.

¹⁴² *Id.*

¹⁴³ *See Maryland v. Craig*, 497 U.S. 836 (1990).

¹⁴⁴ *Id.* at 870 (Scalia, J., dissenting) (“The Court has convincingly proved that the Maryland procedure . . . gives the defendant virtually everything the Confrontation Clause guarantees . . . I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.”); *see also* U.S. Const. amend. VI (“[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

¹⁴⁵ SCALIA, *supra* note 18, at 44.

cases that the Court should decline certiorari where a state is overprotecting constitutional rights.¹⁴⁶ One commentator has called this “Stevens’s Ratchet.”¹⁴⁷

The Court’s most recent examination of Section Five came in *City of Boerne v. Flores*,¹⁴⁸ in which it considered an attempt by Congress to protect religious rights. *Boerne* was a result of *Employment Division v. Smith*,¹⁴⁹ in which the Court upheld the denial of employment benefits to two men for religious use of peyote¹⁵⁰ and set a more lenient standard of review for laws allegedly infringing on religious liberties.¹⁵¹ Congress believed the Court abdicated its responsibility to guard religious rights and passed the Religious Freedom Restoration Act (RFRA), which set a standard of strict scrutiny for “substantial[] burden[s on] a person’s exercise of religion[.]”¹⁵² Like FOCA, it applied to any action of the federal government or any state.¹⁵³

In *Boerne*, the Archbishop of San Antonio challenged the denial of a building permit for the expansion of a church in a historic district.¹⁵⁴ The Court determines that “Congress [does not have] the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be *enforcing* the Clause.”¹⁵⁵ This accords with the plain text of the Amendment, but the Court also musters a very persuasive argument

¹⁴⁶ See, e.g., *Kansas v. Marsh*, 548 U.S. 163, 200-01 (2006) (Stevens, J., dissenting) (“In this case, . . . the State of Kansas petitioned us to review a ruling of its own Supreme Court on the grounds that the Kansas court had granted more protection to a Kansas litigant than the Federal Constitution required. A policy of judicial restraint would allow the highest court of the State to be the final decisionmaker in a case of this kind.”).

¹⁴⁷ Joel A. Flaxman, *Stevens’s Ratchet: When the Court Should Decide Not to Decide*, 105 MICH. L. REV. FIRST IMPRESSIONS 94 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/flaxman.pdf>.

¹⁴⁸ 521 U.S. 507 (1997).

¹⁴⁹ 494 U.S. 872 (1990).

¹⁵⁰ *Id.* at 890.

¹⁵¹ *Id.* at 882-89.

¹⁵² Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, at § 3 (Nov. 16, 1993).

¹⁵³ *Id.* at § 5(1).

¹⁵⁴ 521 U.S. at 512.

¹⁵⁵ *Id.* at 519 (emphasis added).

based on the history of its Framing. Congress was apparently still concerned with giving itself “too much legislative power[.]”¹⁵⁶ Considering the anger over the *Dred Scott* decision and the desire to restrain the recalcitrant Southern states after the long Civil War, this is surprising, but the Court is convincing. Congress was afraid this would fundamentally alter the constitutional structure, changing it from a body with enumerated powers to one with general legislative power, subject only to specific prohibitions like the Bill of Rights.¹⁵⁷ Thus, they abandoned initial drafts with that potential, and adopted the current Amendment, in which the “Enforcement Clause . . . authorize[s] Congress to pass . . . corrective legislation, that is, such as may be necessary and proper for counteracting” laws contrary to the Fourteenth Amendment’s guarantees.¹⁵⁸

Working from this historical basis, the Court determines that the remedial purpose of the Enforcement Clause sometimes permits prophylactic legislation,¹⁵⁹ but “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁶⁰ Considering RFRA specifically, it notes that the Act “displac[ed] laws and prohibit[ed] official actions of almost every description[.]”¹⁶¹ which was “a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”¹⁶² It further questions the lack of geographic and temporal tailoring that would make its remedial purpose more apparent, and contrasts it in this respect with the Voting

¹⁵⁶ *Id.* at 520.

¹⁵⁷ *Id.* at 520-22.

¹⁵⁸ *Id.* at 525 (internal quotations omitted).

¹⁵⁹ *Id.* at 530.

¹⁶⁰ *Id.* at 520.

¹⁶¹ *Id.* at 532.

¹⁶² *Id.* at 534.

Rights Act.¹⁶³ Considering all these elements, it finds that “RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning”¹⁶⁴ and holds it unconstitutional as it applies to the states.

All of the same can be said about the Freedom of Choice Act. As we have seen, it too displaces laws and governmental actions at all levels, without any limits on its duration or its geographic reach. It interferes in a wide swath of state activity, including zoning decisions (for siting abortion clinics), medical licensing regulations, and funding of health care for its citizens. As with RFRA, these are regulations that the Supreme Court deem permissible restrictions, though Congress disagrees. But the legislature should not be given deference merely for an “understanding of constitutional values that differs from the Supreme Court.”¹⁶⁵ In a federal system, perfect uniformity is neither necessary nor desirable.¹⁶⁶

Congress’ attempt to turn back a decision of the Court is different here than it was in *City of Boerne*. Instead of substituting another judicially-created test for the one the Court decided was appropriate, Congress bans all restrictions entirely. Perhaps we should applaud their creativity, but such an action should not be more acceptable simply because it is more clever. At least the strict scrutiny standard in RFRA allowed for some state regulation. As currently drafted, FOCA allows for none. Cutting deeper into the ability of a state and its citizens to govern should not be rewarded with greater judicial deference.

¹⁶³ *Id.* at 533.

¹⁶⁴ *Id.* at 532.

¹⁶⁵ Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 67 (1995) (referring to RFRA).

¹⁶⁶ See *New York State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)

Conclusion

The Freedom of Choice Act has the potential to radically expand the right to abortion and cut deeply into the reserved powers of the states. Congress asserts authority for it under the Commerce Clause and Section Five of the Fourteenth Amendment. The former claim is at least questionable, and the latter claim is clearly invalid.

FOCA will eliminate partial-birth abortion bans and probably require government funding of abortion. For health-care providers, it is likely to radically constrict their “freedom of choice” by eliminating the protection of conscience clauses. States face the elimination of their ability to sensibly regulate abortion, but FOCA goes further, constricting their ability to regulate areas central to sovereign control over their own territory and protection of their citizens.

This goes well beyond the intentions of the Framers of Constitution, both those who met in Independence Hall so long ago, and those who came together after the divisive destruction of the Civil War. Though abortion is commerce, it has little interstate effect. Currently, the Court practically ignores the “interstate” portion of the Commerce Clause, but hopefully it will change its stance when confronted with such a radical attempt to displace state authority. In addition, FOCA is neither congruent nor proportional to any violation of rights secured by the Fourteenth Amendment.

The Freedom of Choice Act is an attempt by Congress to turn back the progress of the pro-life movement, push the abortion agenda further than they ever have before, and invade the personal autonomy of conscientious health care providers. But in doing so, they exceed their enumerated powers and violate the sovereignty of the states.