

ENDING FEDERAL DISCRIMINATION AGAINST PRO-LIFE PROTESTERS: TWO DOWN, ONE TO GO

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In the 1980s and 1990s, the federal judiciary sanctioned efforts by pro-abortionists to thwart peaceful, prayerful pro-life protest. However, as of 2006, the U.S. Supreme Court has deprived pro-abortion forces of two of the three main weapons in their federal arsenal. These legal developments are substantial victories for the pro-life movement. Nevertheless, the Freedom of Access to Clinic Entrances Act (FACE) remains a significant impediment to saving pre-born lives. The defeat of this statute, which seems at least possible at the Supreme Court level, is a paramount goal for the pro-life community.

(Section Editor's Note: The author, a young lawyer, clearly and strongly supports Operation Rescue as a response to abortion. The appearance of his article should not be construed in any way as an endorsement of Operation Rescue or pro-life civil disobedience by the SCSS or the Editorial Board of this journal. Members of the SCSS no doubt have views on both sides of this; some have even been critical of this approach in their published writing. Regardless of views on Operation Rescue, the author analyzes well legal developments and the problematic character of the FACE Act, all of which have implications not just for Operation Rescue-type activity, but also for other, entirely legal pro-life actions and approaches.)

On February 28, 2006, the Supreme Court handed down its ruling in *Scheidler v. National Organization for Women, Inc. Scheidler III*. This was the third time the Court had considered whether the Racketeer Influenced and Corrupt Organizations Act ("RICO") could be applied to those protesting abortion. By all accounts, the 2006 decision brought to an end a twenty-year legal odyssey for Joe Scheidler and his fellow pro-lifers. This was indubitably an important development for the protection of pre-born babies and the equitable treatment of those in the trenches working against abortion. *Scheidler III* came thirteen years after the pro-life triumph in *Bray v. Alexandria Women's Health Clinic*, where the Court held that pro-life Protesters cannot be sued under the Klu Klux Klan Act.

Sadly, there is still much work to be done in this vital area. Specifically, the Freedom of Access to Clinic Entrances Act

(“FACE” or “the Act”), enacted by Congress in 1994, represents a large impediment to the successful execution of the most effective direct action pro-life activity, the rescue. FACE is unjust, arguably unconstitutional, and needs to be squarely handled by the Court. Only then can pro-lifers take the necessary steps to revive the Rescue Movement.

Rescues were one of the most visible and remarkable manifestations of pro-life activity since serious efforts to protect pre-born babies from abortion began almost forty years ago. In a “rescue,” pro-lifers put their own bodies between the abortionist and the pre-born baby, so that the murder is physically prevented. Thus, though arrests are often involved, a rescue should be distinguished from a protest or an act of civil disobedience. The primary goal of a rescue is to save the lives of the individual children scheduled for abortion death on the day of the rescue, through the fullest non-violent means possible, even though other goods may flow from this activity as well, such as media attention for the pro-life position. The Rescue Movement had a real and substantial effect upon public life. Between 1987 and 1994, approximately 70,000 pro-lifers were arrested. According to an official U.S. Senate report, between 1977 and April 1993, there were 6,000 rescues. More to the point, many innocent human persons were saved from murder at the hands of abortionists.

Due to several different factors, the Rescue Movement has declined precipitously during the last decade. By the mid-1980s, pro-abortionists were using civil RICO lawsuits to hinder the efforts of pro-life activists, as illustrated by *National Organization for Women, Inc. v. Scheidler* and *Northeast Women’s Center v. McMonagle*, a 1987 case. Additionally, during the heyday of rescue, pro-abortion forces convinced various federal courts that rescuers violated the so-called “Ku Klux Klan Act,” a civil rights measure originally passed by Congress in 1871. In 1994, Congress passed the Freedom of Access to Clinic Entrances Act, which specifically prohibited rescues. FACE had both a criminal and civil provision, and threatened harsh penalties for pro-lifers found in violation of it. Though some pro-lifers have braved these significant legal obstacles, there can be no doubt that the size and frequency of rescues have been much reduced since the mid-1990s. Human burnout also contributed to the wane of rescuing, as both rescue leaders and rank-and-file members felt the strain of physical abuse, jail stays, and court time. Another factor that adversely affected direct action efforts was the increased willingness of local law enforcement officials to quickly and effectively end rescues. Sadly, for both pre-born babies and their mothers, it is currently not unfair to describe the Rescue Movement as “seriously ill.”

In 1993, in *Bray v. Alexandria Women's Health Clinic*, the Supreme Court addressed the constitutionality of the use of the Ku Klux Klan Act by pro-abortionists against Rescue groups. The Klu Klux Klan Act specifically “provides, in pertinent part, that ‘[i]f two or more persons...conspire or go in disguise on the highway or...premises of another, for the purpose of depriving...any person or class of persons of...equal protection...or...privileges and immunities,’ the injured party may recover ‘against any one or more of the conspirators.’” In an opinion written by Justice Scalia, the Court gave a clear answer:

Trespassing upon private property is unlawful in all States, as is, in many States and localities, intentionally obstructing the entrance to private premises. These offenses may be prosecuted criminally under state law, and may also be the basis for state civil damages. They do not, however, give rise to a federal cause of action simply because their objective is to prevent the performance of abortions, any more than they do so (as we have held) when their objective is to stifle free speech.

Prima facie, the Court's ruling deprived pro-abortion forces of one of their main weapons in their struggle against pro-life activists. Bray's immediate impact was lessened because some federal courts retained jurisdiction over rescue cases due to the pro-abortionists' state law claims, under the legal doctrine of pendent jurisdiction. Furthermore, federal courts disagreed as to the proper interpretation of *Bray* some dismissed outright the Ku Klux Klan Act claims against rescuers, while others allowed pro-abortion forces the chance to prove their case in light of what the Court stated in *Bray*. Thus, while the situation is not entirely clear, one can confidently say that it would be considerably more difficult—if not outright impossible—for pro-abortionists to bring a Ku Klux Klan Act cause of action in the wake of a rescue.

Ten years after *Bray*, the Supreme Court gave another considerable boost to the Rescue Movement. In 1994, in *National Organization for Women, Inc. v. Scheidler* (“*Scheidler I*”), the Court had ruled that a RICO claim did not require an economic motive as to “either the racketeering enterprise or the predicate acts of racketeering...” This decision allowed the National Organization for Women's (“NOW”) suit to proceed against Scheidler and his fellow pro-lifers. However, in 2003, in *Scheidler v. National Organization for Women, Inc.* (“*Scheidler II*”), the Court held the following:

Because we find that petitioners did not obtain or attempt to obtain property from respondents, we conclude that there was no basis upon which to find that they committed extortion....Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed.

When the 8-1 ruling came down, it was generally viewed as a total victory for pro-life activists. However, in 2004 and 2005, there was further wrangling over the *Scheidler* matter in the lower courts. The Seventh Circuit's lingering questions were answered definitively on February 28, 2006, when the Court handed down a unanimous decision, 8-0 with Justice Alito not taking part, in *Scheidler III*. By any reasonable account, this case ends any possibility of using civil RICO against pro-life Protesters.

FACE provides considerable challenges to pro-life rescues, in both the language of the statute and the way it has been interpreted by courts. Enacted in 1994, FACE specifically punishes anyone who:

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

If a rescuer is charged criminally for violating the statute, he faces up to a \$10,000 fine or as much as six months in jail, or both. Penalties are harsher for subsequent violations. Furthermore, if the pro-abortion side achieves a civil FACE judgment, a pro-life activist could be liable for \$5,000. The civil suit avenue is also available to the U.S. Attorney General. As to a civil violation, federal courts seem to be in agreement that the defendants in aggregate are liable for the statutory damages. Thus, if a group of pro-lifers was sued for violating FACE, they would collectively have to pay a \$5,000 penalty for each rescue they carried out, plus possible additional costs; however, the pro-abortionists could not seek to collect the \$5,000 fine from each member of the group for each rescue that occurred.

There have been a number of unsuccessful challenges to the constitutionality of FACE. In *Hoffman v. Hunt*, the Fourth Circuit Court of Appeals rejected an argument that FACE violated the First

Amendment free speech rights of pro-life activists. The Seventh Circuit found that FACE was not unconstitutionally vague, while the D.C. Circuit Court dismissed a charge that the statute was overbroad. Federal courts have held FACE valid, despite claims that it violates the Equal Protection Clause of the Fourteenth Amendment, the Eighth Amendment's proscription of cruel and unusual punishment or excessive fines, and the Free Exercise Clause of the First Amendment. Additionally, among others, the Fourth, Sixth, Seventh, and Eighth Circuits have ruled that Congress legitimately enacted FACE under its Commerce Clause powers. The Supreme Court has refused to hear any case concerning the constitutionality of FACE.

Pro-life activists can take heart that two of the three primary federal impediments to carrying out rescues have been eliminated. Nevertheless, FACE still casts a dark shadow on the prospects of a revival of the Rescue Movement in America. In the wake of the *Scheidler III* decision, the pro-life community must set its sites upon neutralizing FACE.

Although it has thus far refused to hear any direct challenge to the Act, there is reason to believe that the Supreme Court could overturn FACE. The two federal courts that have found the Act unconstitutional have done so, in part, because they determined that it exceeded Congress's power under the U.S. Constitution's Commerce Clause. In two important decisions, *U.S. v. Lopez* and *U.S. v. Morrison*, the Rehnquist Court narrowed Congressional authority in this area. Following these precedents, in *U.S. v. Bird*, the district judge held that in enacting FACE, Congress had overstepped the bounds of its Commerce Clause authority. Specifically, the court found that the Act focused on activity that was both non-economic and intrastate in nature, which *prima facie* is not allowed under the Commerce Clause. At the same time, it failed to satisfy the substantial effects test, which legitimizes Congressional action that might otherwise be considered the province of the states. The district court stressed that "Even if the activities prohibited by [FACE] are considered under the aggregation theory, it does not strengthen the relationship between the statute's prohibitions and the Commerce Clause...Here, as in *Lopez* and *Morrison*, the analysis consists of too many inferences and leaps in constitutional logic to reach congressional authority to regulate this activity under the Commerce Clause."

An analysis of the relevant cases reveals that, if a challenge was mounted against FACE on the Commerce Clause basis, one could cautiously predict that Justices Scalia, Thomas, and Kennedy would invalidate the Act. Moreover, there is evidence that Chief Justice

Roberts and Justice Alito have a narrow view of Congress's Commerce Clause power, which suggests that both men would find FACE unconstitutional. To summarize, it is far from certain that the Court will accept a FACE case, let alone overturn the Act. However, it is perhaps fair to say that the chances of the Court's invalidating the Act are currently much better than the Court's reconsidering and overturning *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.