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IS HATE A FORM OF COMMERCE? THE QUESTIONABLE CONSTITUTIONALITY OF FEDERAL “HATE CRIME” LEGISLATION

I. INTRODUCTION

In 1998, the stories of two gruesome murders grabbed headlines across the United States. In the early morning hours of June 7, three white supremacists from Jasper, Texas, let a black man, James Byrd Jr., hitch a ride with them in the back of their pickup truck.¹ The men drove Byrd to a secluded area, where they beat him, chained him to the bumper of their vehicle and dragged him for three miles along an asphalt road.² Medical examiners believed that Byrd was still alive while the friction of the road was shredding his clothes and peeling off his skin.³ He was finally killed when a collision with a concrete culvert ripped his head and torso from his body.⁴

Four months later, on October 7, two men from Laramie, Wyoming, kidnapped Matthew Shepard, a gay college student, beat him mercilessly, tied him to a fence like a scarecrow and left him to die.⁵ Shepard was found eighteen hours later, still clinging to life.⁶ He remained in a coma for five days before he finally died.⁷ The father of one of the murderers admitted that his son became enraged after Shepard made a pass at him earlier in the evening.⁸

These senseless acts of violence sparked politicians and civil rights activists to call for stronger federal laws against these so-called “hate crimes.”⁹

1. Richard Stewart, *Trio Charged in Jasper Slaying*, HOUSTON CHRON., June 10, 1998, at 1.

2. *Id.*

3. Richard Stewart et al., *Jasper Pulled into the National Spotlight*, HOUSTON CHRON., June 11, 1998, at 25. Evidence that Byrd was still alive at the time he was chained to the truck led prosecutors to charge the defendants with kidnapping, which made the murder a capital offense. *See id.* This allowed the jury to sentence two of the defendants to death. *See* Bruce Tomaso, *2nd Jasper Killer Sentenced to Death*, DALLAS MORNING NEWS, Sept. 24, 1999, at 1A.

4. Stewart, *supra* note 1.

5. Patrick O’Driscoll, *Wyo. Attack Stuns Campus, State*, USA TODAY, Oct. 12, 1998, at 3A.

6. *Id.*

7. Charisse Jones, *Gay Student’s Brutal Death Stokes Hate Crime Debate*, USA TODAY, Oct. 13, 1998, at 1A.

8. Jim Hughes & David Olinger, *Beating Wasn’t a Hate Crime, Suspect’s Family Says*, DENV. POST, Oct. 11, 1998, at A10.

9. *See* O’Driscoll, *supra* note 5; Sonya Ross, *President Appeals to Congress to Pass Hate Crime Legislation*, THE BATON ROUGE ADVOC., Sept. 14, 2000, at 5A. The term “hate crime” is

One of the most outspoken advocates of a federal hate crime law has been Senator Edward Kennedy.¹⁰ He has attempted several times to get a bill through Congress that would make bias-motivated violence a federal offense.¹¹

According to Kennedy and other civil rights activists, federal action is required because existing laws are insufficient to address the widespread, national problem of hate crimes.¹² Although forty-eight states already have hate crime laws on their books, provisions vary significantly from one state to the next.¹³ Hate crime law advocates argue that a uniform federal law is necessary to eradicate the inconsistencies among state statutes.¹⁴ Furthermore, they contend that federal law currently does not reach far enough to protect people like James Byrd and Matthew Shepard.¹⁵ Under existing federal law, it is a crime to willfully injure or intimidate someone, based on that person's race, color, religion or national origin, and because such person is or has been engaging in a "federally protected activity."¹⁶ Kennedy's proposed legislation would expand the existing law in two ways. First, it would extend to crimes based on gender, sexual orientation and disability.¹⁷ Second, it would not

somewhat of a misnomer since it does not refer to all crimes motivated by hatred, but only to those crimes motivated by a particular bias toward the victim's class. See John S. Baker, Jr., *United States v. Morrison and Other Arguments Against Federal 'Hate Crime' Legislation*, 80 B.U. L. REV. 1191, 1206-08 (2000). However, in keeping with custom, this Comment uses the term "hate crimes" to mean bias-motivated crimes.

10. See, e.g., Edward M. Kennedy, *Hate Crimes: The Unfinished Business of America*, 44 FEB. BOSTON B. J. 6 (2000).

11. The original version of Kennedy's legislation was called the Hate Crimes Prevention Act. See S. 622, 106th Cong. (1999); S. 1529, 105th Cong. (1997). The bill was revised in 2000 and reintroduced as the Local Law Enforcement Enhancement Act. S. 2550, 106th Cong. §§ 1501-10 (2000).

12. Kennedy, *supra* note 10, at 6. FBI evidence suggests, however, that the proliferation of hate crimes may not be as severe as some civil rights activists suggest. See Baker, *supra* note 9, at 1201-04.

13. For a comprehensive list of state hate crime laws, see LU-IN WANG, *HATE CRIMES LAW* app. B1-41 (1999). For a comparative look at state hate crime statutes, see Anti-Defamation League, *Map of State Statutes*, available at http://www.adl.org/frames/front_99hatecrime.html (last visited Feb. 2, 2001).

14. See, e.g., Murad Kalam, *Hate Crime Prevention*, 37 HARV. J. ON LEGIS. 593, 604 (2000).

15. See Kennedy, *supra* note 10, at 22; Democratic National Committee, *News Release, 7/9/98 - Hate Crimes Prevention Act of 1998*, available at <http://www.democrats.org/archive/rel1998/re1070998.html> (last visited Feb. 2, 2001).

16. 18 U.S.C. § 245(b)(2) (1994). Such "federally protected activities" under the statute include enrolling in a public school, enjoying a state-sanctioned privilege or benefit, applying for employment, serving on a jury, traveling in interstate commerce, and enjoying the goods and services of businesses that serve the public, such as inns, restaurants and places of entertainment. *Id.* This law was passed in 1968 in response to attacks on civil rights workers in the South. See Kennedy, *supra* note 10, at 6.

17. S. 19, 107th Cong. § 107(a) (2001).

require a prosecutor to show that the victim was engaging in a federally protected activity.¹⁸

In 2000, Senator Kennedy's bill came close to becoming law. In June, the Senate approved adding Kennedy's legislation to a defense appropriation bill.¹⁹ On September 13, in what seemed to be a stunning victory for civil rights activists, the House also passed a bipartisan motion to add Kennedy's amendment to the defense bill.²⁰ This victory, however, proved to be temporary. Congress stripped the hate crime language from the defense bill one month later.²¹ On October 30, President Clinton begrudgingly signed the bill into law without Kennedy's hate crime provision.²²

Because of the bill's near-passage, and in light of the fact that Democrats picked up congressional seats in the 2000 election, it is likely that the hate crime debate will heat up again.²³ In one of President Clinton's final speeches in office, he urged Congress to pass hate crime legislation.²⁴ Lawmakers heeded Clinton's plea. On the first day of business following President George W. Bush's inauguration, the defeated hate crime bill was reintroduced in the Senate as the Local Law Enforcement Enhancement Act of 2001.²⁵

The bill's previous failures, however, were no accident. Laws against hate crimes have drawn intense opposition and have been criticized on many grounds. One common argument against hate crime laws is that existing laws against murder and assault are sufficient in dealing with hate-motivated violence.²⁶ When questioned about his state's failure to pass tougher hate crime legislation in the wake of the James Byrd murder, then Texas Governor George W. Bush pointed out that the perpetrators in that case were caught, tried and sentenced to death without the assistance of a special hate crime

18. *See id.*; Kennedy, *supra* note 10, at 6.

19. 146 CONG. REC. S5434 (daily ed. June 20, 2000).

20. 146 CONG. REC. H7532-41 (daily ed. Sept. 13, 2000). The vote in the House breaks down as follows: Among Democrats, 190 voted for the motion and 17 voted against; among Republicans, 41 voted in favor and 174 voted against. *See Final Vote Results for Roll Call 471*, available at <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2000&rollnumber=471> (last visited Feb. 2, 2001).

21. *Anti-Hate Language Dropped From Bill*, FT. LAUDERDALE SUN-SENTINEL, Oct. 6, 2000, at 13A.

22. *President Signs Defense Upgrade*, TULSA WORLD, Oct. 31, 2000, at 3.

23. *See* Deb Price, *Election Gives Mixed Results for Gays*, THE DETROIT NEWS, Nov. 13, 2000, at 9.

24. *See* Philippe Debeusscher, *Clinton Urges Congress to Pass Hate Crimes Bill on King Holiday*, AGENCE FR.-PRESSE, Jan. 16, 2001, available at 2001 WL 2321634.

25. S. 19, 107th Cong. (2001). Hereinafter, unless otherwise indicated, all references to a federal "hate crime bill" or "hate crime legislation" refer to this proposal.

26. *See, e.g.*, Mona Charen, *Trying to Win Ugly*, available at <http://www.townhall.com/columnists/monacharen/printmc20001027.shtml> (Oct. 27, 2000).

law.²⁷ Hate crime laws are also criticized on the grounds that they criminalize mere thoughts or that they give special treatment to certain classes of citizens.²⁸ Some conservative Christian groups are strongly opposed to giving special protection to homosexuals and have lobbied vigorously against the federal bill.²⁹

Hate crime laws have also been attacked on constitutional grounds. In 1992, the Supreme Court struck down a St. Paul, Minnesota, ordinance that criminalized certain bias-motivated speech.³⁰ The Court found the ordinance violated the First Amendment.³¹ The next year, however, the Court upheld a Wisconsin statute that provides for enhanced sentences for criminals who choose their victims based on race, religion, color, disability, sexual orientation, national origin or ancestry.³² A federal law would face even more constitutional scrutiny, though, since it would extend federal jurisdiction into areas that have traditionally been of state concern.

With this in mind, the drafters of the federal hate crime bill have included findings that attempt to show that Congress has authority under the Constitution to enact such legislation.³³ Specifically, the findings state that the legislation is consistent with Congress's authority under the Commerce Clause, which grants the power to regulate commerce among the several states.³⁴ The language also suggests that the bill is a proper exercise of congressional authority under the Thirteenth Amendment, which empowers Congress to

27. *The 2000 Campaign; 2nd Presidential Debate Between Gov. Bush and Vice President Al Gore*, N.Y. TIMES, Oct. 12, 2000, at A22.

28. See, e.g., Charen, *supra* note 26; Clyde Haberman, *Finding Flaws in the Logic of Bias Laws*, N.Y. TIMES, March 12, 1999, at B1. In testimony before the Senate Judiciary Committee, Judy Shepard, the mother of Matthew Shepard, gave a stirring rebuttal to these two arguments. See *Combating Hate Crimes: Promoting a Responsible Role for the Federal Government: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 27-30 (1999) (statement of Judy Shepard).

29. See, e.g., Traditional Values Coalition, *Traditional Values Coalition Condemns Passage of Senate Hate Crimes Amendment*, available at <http://www.traditionalvalues.org/pr062000.html> (June 20, 2000).

30. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The ordinance at issue stated: "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." *Id.* at 380.

31. *Id.* at 391 (holding that the "First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects").

32. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). The statute at issue can be found at WIS. STAT. ANN. § 939.645(1)(b) (West 1996).

33. S. 19, 107th Cong. § 102 (2001).

34. U.S. CONST. art. I, § 8, cl. 3.

enact appropriate legislation to enforce the ban on slavery and involuntary servitude.³⁵

The courts, however, may be hesitant to embrace these arguments. On May 15, 2000, the Supreme Court handed down a decision in *United States v. Morrison*,³⁶ which, following in the heels of the landmark case of *United States v. Lopez* in 1995,³⁷ casts serious doubts on how far Congress can go in controlling violent crime without running afoul of the Constitution. In *Morrison*, the Court struck down a provision of the Violence Against Women Act of 1994 that gave rape victims the right to sue their attackers in federal court.³⁸ The Court ruled that the law was an unconstitutional extension of Congress's Commerce Clause power.³⁹ The Court also held that the statute was unconstitutional under Section 5 of the Fourteenth Amendment, which gives Congress authority to protect citizens from unequal treatment by the states.⁴⁰

During the Senate debates on the hate crime legislation in June 2000, Senator Orrin Hatch recognized that Kennedy's bill raises "serious constitutional questions, especially in light of [*Morrison*]."⁴¹ He added that the law would likely be found unconstitutional under the Commerce Clause, the Fourteenth Amendment and the Thirteenth Amendment.⁴² Senator Robert Byrd was also concerned that the law would not withstand constitutional scrutiny.⁴³ He stated that relying on the Thirteenth Amendment was a "tenuous argument," and he also recognized the limits *Morrison* put on Congress's Fourteenth Amendment authority.⁴⁴ Senator John Warner followed by addressing the Commerce Clause issue.⁴⁵ He stated that the *Morrison* decision places "serious boundaries" on Congress's Commerce Clause power and concluded that he had "serious concerns" about the constitutionality of Kennedy's amendment.⁴⁶

This Comment addresses the concerns raised by the senators. It calls into question the constitutionality of the pending hate crime legislation and determines whether the bill, if passed into law, could withstand a challenge in court. Specifically, this Comment addresses whether the bill can be justified

35. U.S. CONST. amend. XIII.

36. 529 U.S. 598 (2000).

37. 514 U.S. 549 (1995).

38. 42 U.S.C. § 13981 (1994).

39. *Morrison*, 529 U.S. at 619.

40. *Id.* at 627.

41. 146 CONG. REC. S5426 (daily ed. June 20, 2000).

42. *Id.* Senator Hatch also doubted that the bill could withstand a challenge under the First Amendment. *Id.* That particular issue, however, is not addressed in this Comment.

43. *Id.*

44. *Id.*

45. 146 CONG. REC. S5427 (daily ed. June 20, 2000).

46. *Id.*

under the Commerce Clause, the Fourteenth Amendment or the Thirteenth Amendment. Although the findings in the hate crime bill do not specifically invoke the Fourteenth Amendment, this amendment warrants discussion since it has often been used to justify federal civil rights laws.⁴⁷

Section II of this Comment briefly traces the case law concerning each of the aforementioned constitutional provisions. Section III closely examines the *Morrison* case and shows how it has changed the Court's interpretations of both the Commerce Clause and the Fourteenth Amendment. Section IV analyzes the impact the *Morrison* decision has had on lower courts' understandings of the Commerce Clause. In particular, it demonstrates various methods courts have used to distinguish *Morrison*. Section V introduces the Local Law Enforcement Enhancement Act of 2001 and analyzes its constitutionality in light of *Morrison* and later Commerce Clause cases. This section also demonstrates why the bill is beyond the scope of the Fourteenth Amendment. Furthermore, this section examines whether the bill can be upheld under the Thirteenth Amendment. Finally, Section VI concludes that the legislation contains severe constitutional defects and should be abandoned as a means to combat hate crimes.

II. HISTORY

A. *The Commerce Clause*

The Commerce Clause is by far the most widely used source of authority to justify federal criminal and civil rights laws. This clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁴⁸ In the 1824 case of *Gibbons v. Ogden*, the Supreme Court established that the Commerce Clause granted Congress broad legislative power.⁴⁹ In Chief Justice Marshall's often-cited opinion, the Court took an expansive view of what the term "commerce" entailed: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse."⁵⁰ The Court held that Congress's Commerce Clause power does not stop at the boundary lines of each state but can reach matters occurring within a state so long as such activities have some commercial connection with another state.⁵¹ Marshall noted, however, that Congress cannot regulate

47. See GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 920-21 (13th ed. 1997).

48. U.S. CONST. art I, § 8, cl. 3.

49. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 187-90 (1824). The Court held that Congress had authority to supercede a state law when it granted Thomas Gibbons a license to operate a steamboat ferry between New York and New Jersey. *Id.* at 239-40.

50. *Id.* at 189.

51. *Id.* at 195-96.

activities that are purely intrastate—that do not extend to or affect other states.⁵²

The *Gibbons* decision left no bright-line definition of “interstate” or “intrastate,” making it difficult for future courts to determine when Congress was acting within its constitutional authority. This was not an immediate problem, however. At the time of *Gibbons*, most commerce in the United States was local. Thus, Congress had few motives for using its Commerce Clause authority, and courts were given few opportunities to clarify *Gibbons*.⁵³ This changed, however, in the late 1800s, as rapid industrialization and the development of railroads reformed the economic structure of the United States. Commerce became more nationalized, and Congress came under increasing pressure to pass stronger regulations.⁵⁴ New federal laws inevitably led to legal challenges. Thus, courts were once again called on to determine when Congress had acted within its constitutional bounds and when it had gone too far.

The Commerce Clause jurisprudence that developed followed along two lines. On the one hand, federal laws that sought to directly regulate interstate activity were generally found to be consistent with Congress’s Commerce Clause authority. The Supreme Court, relying on the Marshall Court’s expansive definition of “commerce” as “intercourse,”⁵⁵ upheld laws that sought to regulate the channels, methods, instruments or goods of interstate commerce.⁵⁶

A famous example of this approach can be found in *Houston, East & West Texas Railway Co. v. United States* (the “Shreveport Rate” case).⁵⁷ In that case, the Court upheld a federal order regulating the rates charged on a railway line that ran between Texas and Shreveport, Louisiana.⁵⁸ An important aspect of the case was that one of the rates regulated was on an intrastate route.⁵⁹ In

52. *Id.* at 195.

53. See Alexander Dombrowsky, Comment, *Whether the Constitutionality of the Violence Against Women Act Will Further Federal Protection From Sexual Orientation Crimes*, 54 U. MIAMI L. REV. 587, 590 (2000).

54. See *id.*

55. See *Gibbons*, 22 U.S. (9 Wheat) at 189-90.

56. Courts later recognized this as two distinct categories: regulations of the “channels” of interstate commerce and regulations of the “instrumentalities.” See *United States v. Morrison*, 529 U.S. 598, 608-09 (2000).

57. 234 U.S. 342 (1914).

58. *Id.*

59. See *id.* at 350. The railway company charged a higher rate to carry articles from Shreveport into Texas than it did to carry articles across equal distances within Texas. *Id.* at 349. When the government demanded that the rates be equal, the railway company argued unsuccessfully that equalizing the rates would require raising the rates on intrastate lines within Texas, and thus the order was an unconstitutional extension of federal authority into intrastate commerce. *Id.* at 349-50.

cases where the channels or objects of interstate commerce are regulated directly, the Court has been willing to let congressional authority extend into the interior of the state. As Marshall noted in *Gibbons*, Congress's Commerce Clause authority does not cease at the border of each state.⁶⁰ For example, in *Hipolite Egg Co. v. United States*, the Court upheld Congress's authority to confiscate eggs shipped in violation of the Pure Food and Drug Act, after they had already crossed state lines and were sitting in a baker's storeroom.⁶¹

Another important development of this broad grant of authority, as demonstrated in the *Hipolite Egg* case, is that the Court has allowed Congress to regulate channels of interstate commerce even when the purpose of the regulation is non-economic. Other examples are *Champion v. Ames*, in which the Court upheld a federal law banning the sale of lottery tickets across state lines,⁶² and *Hoke v. United States*, in which the Court upheld a federal law prohibiting the taking of a woman across state lines for immoral purposes.⁶³

The other arm of Congress's Commerce Clause power is the authority to regulate activities that are not interstate in themselves, but which have some effect on interstate commerce. Marshall recognized this authority in *Gibbons*, but left open the question of what kind of "effect" on interstate commerce needed to be present to make federal intervention constitutional. Before the Great Depression of the 1930s, the Court took a very narrow view of this authority. The Court ruled that Congress could only use its Commerce Clause power to regulate activities that had a *direct* effect on interstate commerce.⁶⁴

During the Depression, this "direct effect" test led the Court to thwart many of President Roosevelt's New Deal programs.⁶⁵ Frustrated by the Court's consistent rejection of his economic recovery acts, Roosevelt unveiled his "Court-packing" plan, in which he threatened to nominate up to six additional judges to the Supreme Court in order to obtain a favorable

60. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 194-96 (1824).

61. *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

62. *Champion v. Ames*, 188 U.S. 321 (1903).

63. *Hoke v. United States*, 227 U.S. 308 (1913).

64. One of the most extreme examples of this restriction can be found in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). In that case, the Court found that Congress could not prohibit a sugar refinery from buying out its competitors, even though the acquisition would give that one business control over ninety-eight percent of the nation's sugar refining. *Id.* The Court concluded that the purchase would have an indirect, rather than a direct, effect on interstate commerce, and thus was beyond the reach of Congress's Commerce Clause power. *Id.* at 17.

65. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating a federal regulation of maximum working hours and minimum wages for coal miners); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (prohibiting the President from imposing rules of fair competition on a poultry farmer who did all of his business within one state); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (invalidating a federally mandated retirement and pension plan for railroad workers).

majority.⁶⁶ Although the Senate ultimately rejected his idea,⁶⁷ the Court heard Roosevelt's message loud and clear and began to modify its interpretation of the Commerce Clause.⁶⁸ This led to the watershed case of *NLRB v. Jones & Laughlin Steel Corp.*, in which the Court abandoned the "direct effect" test in favor of what became known as a "substantial effects" test.⁶⁹ Under this new test, Congress was given the authority to regulate all activities that have "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens or obstructions."⁷⁰

In *Wickard v. Filburn*, the Court took the holding of *Jones & Laughlin* one step further, stating that Congress can regulate an entire class of activities when those activities, taken in the aggregate, would have a substantial effect on interstate commerce.⁷¹ The appellee in *Wickard* was a farmer who violated a federal regulation by growing excess wheat on his private farm.⁷² Congress had passed a law restricting wheat production in an effort to keep wheat prices stable.⁷³ The farmer argued that since he used the excess wheat solely on his own farm, his activity would have little if any effect on interstate commerce.⁷⁴ The Court, however, found that the activity was within Congress's Commerce Clause power, for although the farmer's activities alone might not substantially affect interstate commerce, a wide epidemic of farmers growing excess wheat for personal use would have a substantial effect on interstate commerce by lowering the demand for wheat nationwide, causing wheat prices to plummet.⁷⁵

The *Wickard* decision turned the Commerce Clause into a "catch-all" clause that could be used to justify almost any exercise of federal authority. When all else failed, Congress could simply say the magic words "Commerce

66. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 132-34 (1995).

67. See *id.* at 147-54.

68. According to conventional wisdom, the dramatic change in the Court's position was due to Justice Roberts' decision to side with the pro-Roosevelt justices in order to save the Supreme Court from the Court-packing plan. See, e.g., Michael Ariens, *A Thrice Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994). This claim, however, may be more legend than fact. See GUNTHER & SULLIVAN, *supra* note 47, at 185 n.10 (citing contrasting authorities supporting and debunking the Roberts story).

69. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

70. *Id.* at 37.

71. *Wickard v. Filburn*, 317 U.S. 111 (1942).

72. *Id.* at 114-15. The regulation at issue was passed under a provision of the Agricultural Adjustment Act of 1938. 7 U.S.C. § 1335 (1994).

73. The Agricultural Adjustment Act of 1938 directed the Secretary of Agriculture to proclaim a national acreage allotment for each year's crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. See *Wickard*, 317 U.S. at 115 (citing 7 U.S.C. § 1335).

74. *Id.* at 119.

75. *Id.* at 127-29.

Clause” in order to defend a federal law against a constitutional challenge. This was most apparent in the 1964 Supreme Court cases of *Heart of Atlanta Motel, Inc. v. United States*⁷⁶ and *Katzenbach v. McClung*.⁷⁷ At issue in those cases was Title II of the Civil Rights Act of 1964, which prohibited certain business owners from discriminating against customers on grounds of race, color, religion or national origin.⁷⁸ The Court sidestepped the issue of whether the law could be justified under the Fourteenth Amendment’s guarantee of “equal protection” when applied against private business owners.⁷⁹ The Court instead held that the act was valid under the Commerce Clause. Using the *Wickard* aggregation principle, the Court in *Heart of Atlanta* concluded that racism at hotels, if left unregulated, would have a substantial effect on interstate commerce by discouraging blacks from interstate travel.⁸⁰ Although there were no formal congressional findings that such an effect existed, the Court held that as long as there was a “rational basis” to find the connection, the law was a proper exercise of Commerce Clause power.⁸¹ The same “rational basis” approach was used in *McClung*, where the Court approved Congress’s power to prevent discrimination at a barbecue stand in Alabama.⁸²

After *Heart of Atlanta* and *McClung*, Congress began using its broad Commerce Clause authority to further expand the scope of federal criminal law. A new breed of federal crimes appeared, covering areas such as gun control,⁸³ racketeering⁸⁴ and drugs.⁸⁵ As long as Congress could articulate some rational connection between the regulated activity and interstate commerce, the Supreme Court was unwilling to interfere. Perhaps the most

76. 379 U.S. 241 (1964).

77. 379 U.S. 294 (1964).

78. 42 U.S.C. §§ 2000a-2000a-6 (1994). The statute states that “[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the grounds of race, color, religion, or national origin.” *Id.* § 2000a(a).

79. For a federal law to be valid under the Fourteenth Amendment, it must be directed toward a state or a state actor. *See* *United States v. Morrison*, 529 U.S. 598, 620-27 (2000). This “state action” requirement is discussed *infra* Section II.B. Justice Douglas, in his concurring opinion, found the law to be valid under Section 5 of the Fourteenth Amendment, arguing that the rights of citizens to travel freely should not be equated with the rights that protect cattle, fruit and other articles of commerce shipped across state lines. *Heart of Atlanta Motel*, 379 U.S. at 279 (Douglas, J., concurring).

80. *Heart of Atlanta Motel*, 379 U.S. at 253.

81. *Id.* at 258. The Court concluded that the testimony of black citizens before congressional committees formed the requisite rational basis by presenting “overwhelming evidence that discrimination at hotels and motels impedes interstate commerce.” *Id.* at 253.

82. *McClung*, 379 U.S. at 303-04.

83. 18 U.S.C. § 922 (1994 & Supp. IV 1998).

84. 18 U.S.C. § 1962 (1994).

85. 21 U.S.C. §§ 841-63 (1994 & Supp. IV 1998).

significant example of judicial deference was found in *Perez v. United States*.⁸⁶ In this case, the Court upheld a federal law against extortionate credit transactions, or “loan sharking.”⁸⁷ The Court found that although loan sharking may primarily take place on the local level, the practices are generally controlled by nationally organized criminal syndicates.⁸⁸ The criminal activities of these syndicates, in turn, create a detrimental effect on interstate commerce by siphoning away money that would otherwise be used for legitimate commercial purposes.⁸⁹ Thus, like the wheat farmer in *Wickard*, the loan shark in *Perez* engaged in a class of activities that had a substantial effect on interstate commerce.⁹⁰ Justice Stewart, in his dissent, pointed out that this “cost of crime” argument could be extended to bring virtually all criminal activity under federal jurisdiction.⁹¹

The runaway train of Commerce Clause power, however, would come to a screeching halt in the 1995 case of *United States v. Lopez*.⁹² The law at issue in *Lopez* was the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a gun within one thousand feet of a school.⁹³ In striking down the statute, the Court laid out the analytical framework it would later use in *Morrison*. Chief Justice Rehnquist, writing the majority opinion, divided Congress’s Commerce Clause authority into three categories: (1) Congress can regulate the channels of interstate commerce; (2) Congress can regulate and protect the instrumentalities of interstate commerce—persons or things that travel in interstate commerce; and (3) Congress can regulate activities that, when taken in the aggregate, have a substantial effect on interstate commerce.⁹⁴

The Court easily found that the Gun-Free School Zones Act did not fall in either of the first two categories.⁹⁵ To be constitutional, then, the statute had to pass the “substantial effects” test. The Court found the law did not pass this test for at least four reasons. First, the activity Congress sought to regulate—the possession of guns near schools—was not economic in nature.⁹⁶ Second, the statute contained no “jurisdictional element” that would have required the

86. 402 U.S. 146 (1971).

87. 18 U.S.C. § 892 (1994).

88. *Perez*, 402 U.S. at 155.

89. *Id.* at 156-57.

90. *Id.* at 154.

91. *Id.* at 157-58 (1971) (Stewart, J., dissenting).

92. 514 U.S. 549 (1995).

93. The original version of the law made it a federal crime “to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922(q)(1)(A) (1994).

94. *Lopez*, 514 U.S. at 558-59.

95. *Id.* at 559.

96. *Id.* at 561. The Court stated that the statute “has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Id.*

prosecution to prove as an element of the crime that the defendant's activity had some connection with interstate commerce.⁹⁷ Third, there were no formal congressional findings indicating that possessing a gun in a school zone had a substantial effect on interstate commerce.⁹⁸ It is not particularly surprising that Congress neglected to include formal findings, though, since the Court had stressed in *Heart of Atlanta* and *McClung* that such findings were unnecessary for a judicial determination of a substantial effect, so long as there was a "rational basis" to find a connection.⁹⁹ Finally, the Court determined that the link between the possession of a gun near a school and any effect on interstate commerce was attenuated.¹⁰⁰ The government, as it had done in *Perez*, attempted to use a "cost of crime" argument that concluded that guns near schools affected interstate commerce by hindering national productivity.¹⁰¹ The Court stated that this line of reasoning would require the Court to "pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."¹⁰² Thus, according to the Court, the law did not give due reverence to the principles of dual federalism on which the Constitution was founded.¹⁰³

After *Lopez*, it was clear that the "substantial effects" test does indeed have its limits, and the Court left four guidelines in determining where these limits lie. *Lopez*, however, did not indicate which of these four factors were the more relevant ones.¹⁰⁴ If Congress included extensive documentation indicating that a "substantial effect" existed, would that be sufficient? Would it be enough if Congress had attached a "jurisdictional element"—if it had burdened the government to show that the defendant's activities would substantially affect interstate commerce? As shown below, the Court in *United States v. Morrison*

97. *Id.* at 562. After the *Lopez* decision, the statute was amended to include a jurisdictional element. See 18 U.S.C. § 922(q)(2)(A) (Supp. IV 1998) (requiring a showing that the firearm "has moved in or . . . otherwise affects interstate or foreign commerce").

98. *Lopez*, 514 U.S. at 562-63.

99. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

100. *Lopez*, 514 U.S. at 563-67.

101. See *id.* at 564. Justice Breyer reiterated this argument in his dissent, claiming that gun violence in schools has an adverse effect on classroom learning, preventing students from receiving the skills required for future jobs, and that this in turn would substantially harm interstate commerce. *Id.* at 622-23.

102. *Id.* at 567.

103. The Court stated that maintaining a "healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

104. See Andrew St. Laurent, *Reconstituting United States v. Lopez: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 83 (1997) (stating that "[w]hich of these *Lopez* factors, if any, will emerge as the determinative ones [is] yet to be established").

answered “no” to the former question; a challenge to the hate crime legislation would answer the latter.

Also unclear was the viability of the *Lopez* decision itself. The case was a 5-4 decision, and three justices wrote particularly vigorous dissents.¹⁰⁵ Justice Kennedy wrote a separate concurring opinion, joined by Justice O’Connor, stressing that *Lopez* should be regarded as a “limited holding.”¹⁰⁶ Kennedy expressed reluctance to reverse decades of Commerce Clause case law and was comfortable with *Lopez* only because he found it did not overrule any previous Supreme Court decision.¹⁰⁷ Therefore, it remained to be seen whether *Lopez* would represent a dramatic change in Commerce Clause jurisprudence or simply prove to be an anomaly.¹⁰⁸

B. *The Fourteenth Amendment and the “State Action” Doctrine*

The Fourteenth Amendment historically has been a source of authority for federal laws protecting civil rights, although it is not relied upon in the Local Law Enforcement Enhancement Act. Ratified in 1868, the Fourteenth Amendment was one of three constitutional amendments passed in the wake of the Civil War. The main objective of these post-Civil War amendments was to ensure that former black slaves were recognized as free citizens and were endowed with all rights and privileges enjoyed by white citizens.¹⁰⁹ The Fourteenth Amendment mandates, among other things, that no state “deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁰ Section

105. Justices Stevens, Souter and Breyer all wrote dissenting opinions. *Lopez*, 514 U.S. at 602-44. Justices Ginsburg, Stevens and Souter joined with Breyer’s dissent. *Id.* at 615.

106. *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring).

107. Kennedy recognized that “the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.” *Id.* at 574. With respect to the Gun-Free School Zones Act, however, Kennedy concluded that “we have not yet said the commerce power may reach so far.” *Id.* at 580. Justice Thomas also wrote a concurring opinion in *Lopez*, although he advocated extending the majority’s holding rather than limiting it. *Id.* at 584-602. Thomas called for eliminating the “substantial effects” test altogether, finding it inconsistent with both the text of the Constitution and with earlier case law. *Id.* at 601.

108. See, e.g., Parker Douglas, *The Violence Against Women Act and Contemporary Commerce Power: Principled Regulation and the Concerns of Federalism*, 1999 UTAH L. REV. 703, 706 (recognizing that scholars regarded *Lopez* as “either a contraction of Congress’s previously expansive regulatory power under the Commerce Clause or a limited ruling that will have little or no impact on future commerce power debates”). See also *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir. 1995) (arguing that after *Lopez*, “the winds have not shifted that much.”); James M. McGoldrick, *The Civil Rights Cases: The Relevancy of Reversing a Hundred Plus Year Old Error*, 42 ST. LOUIS U. L.J. 451, 474 (1998) (predicting that “it is doubtful that *Lopez* will lead to any significant restriction on commerce power”).

109. See *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880).

110. U.S. CONST. amend. XIV, § 1.

5 of the Amendment gives Congress the power “to enforce, by appropriate legislation, the provisions of [the Amendment].”¹¹¹

The right to “equal protection,” however, has never been absolute. The Supreme Court has allowed states limited room to treat classes of citizens differently.¹¹² Under early equal protection jurisprudence, the Supreme Court allowed differences in treatment if the differentiation was reasonable and fairly related to the object of the regulation.¹¹³ The Court revamped this approach in the 1960s under the guidance of Chief Justice Warren. While retaining the old “reasonableness” standard for some types of discrimination, the Warren Court imposed a “strict scrutiny” test on other forms of differentiation.¹¹⁴ Under this test, a state’s discriminatory practices could only be constitutional if they were “necessary” to achieve a legislative end (as opposed to being “fairly related” to the end)¹¹⁵ and the legislation served a “compelling” state interest.¹¹⁶

This dual system of analysis was a target of hot debate.¹¹⁷ Courts struggled to determine which types of discrimination needed only pass the “reasonableness” (or “rational relation”) test and which were subject to the “strict scrutiny” test. The Supreme Court ruled that regulations must pass the “strict scrutiny” test if they impact fundamental rights or if they involve “suspect” classifications.¹¹⁸ However, the terms “fundamental rights” and “suspect classifications” were left open for interpretation.¹¹⁹

The Supreme Court has consistently found race to be a “suspect classification.”¹²⁰ Discrimination based on national origin is also considered “suspect” and must pass the “strict scrutiny” test.¹²¹ The Court has also

111. *Id.* § 5.

112. *See Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1995).

113. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

114. *See GUNTHER & SULLIVAN*, *supra* note 47, at 630.

115. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

116. *Shapiro v. Thompson*, 394 U.S. 618, 627, 634, 638 (1969).

117. *See, e.g., Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (arguing that the Equal Protection Clause “does not direct the courts to apply one standard of review in some cases and a different standard in other cases”).

118. *See Graham v. Richardson*, 403 U.S. 365, 375 (1971).

119. The struggle over “fundamental rights” has been the focus of countless treatises and articles, and it has sparked several controversial Supreme Court decisions. *See, e.g., San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that public education is not a fundamental right under the Constitution); *Graham*, 403 U.S. at 375 (finding that the right to welfare benefits is fundamental). However, since the hate crime bill, unlike existing federal anti-bias laws, is not limited to activities that affect federally protected rights, the equal protection discussion here will focus only on the “suspect classification” aspect of the Supreme Court’s test.

120. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

121. *See Mathews v. Lucas*, 427 U.S. 495, 504 and n.10 (1976) (citing cases).

included religious discrimination in this category.¹²² The Court, however, has refused to include characteristics such as age, mental disability or sexual orientation under the “suspect” category.¹²³ Thus, state laws that discriminate based on these latter classifications need only pass the “rational relation” test.¹²⁴ Gender originally was classified as non-suspect.¹²⁵ More recent Supreme Court decisions, however, have altered this. Although the Court has never given gender classifications full “suspect” status, it has recognized them as “quasi-suspect,” requiring a third intermediate level of scrutiny.¹²⁶

The multi-tiered classification system has given courts some guidance when determining whether a state or local law violates the Equal Protection Clause. A challenging party must show that the law fails to comport to the level of scrutiny appropriate for the particular type of discrimination at issue. However, in situations where Congress has acted affirmatively under Section 5 of the Amendment to prevent discrimination, there is an additional hurdle that has to be crossed: the federal law or regulation must involve a state or state actor.¹²⁷

The Supreme Court clarified this “state action” requirement in the *Civil Rights Cases* of 1883.¹²⁸ The cases were a consolidation of five challenges to the Civil Rights Act of 1875, which prohibited particular businesses from

122. See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 885 (1985) (referring to religious discrimination as “inherently suspect”).

123. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (explicitly refusing to recognize age as a suspect class); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (holding that a lower court erred in finding mental retardation to be a “quasi-suspect” classification, which would have triggered higher scrutiny); *Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (implicitly classifying sexual orientation as non-suspect by analyzing discriminatory amendment to Colorado’s constitution using the lower “rational relation” test).

124. *Metropolitan Life Ins. Co.*, 470 U.S. at 885 (holding that “[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions . . . our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest”).

125. See, e.g., *Reed v. Reed*, 404 U.S. 71, 76 (1971) (applying the “rational relation” standard to gender discrimination).

126. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (concluding that gender discrimination must serve “important” government objectives and must be “substantially related” to those objectives). Scholars have suggested that the Court in *Cleburne* established a fourth level of scrutiny for disability discrimination, one that was stricter than the “rational relation” test but not as stringent as the intermediate standard of *Craig*. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 632 (1997). However, in *Heller v. Doe*, 509 U.S. 312, 318-19 (1993), the Supreme Court made it clear it was applying the lower “rational relation” standard when analyzing a law that discriminated between the mentally retarded and the mentally ill.

127. The plain language of the Amendment only prohibits states from practicing discrimination; it says nothing about private actors. See U.S. CONST. amend. XIV.

128. 109 U.S. 3 (1883). The Court stated: “Individual invasion of individual rights is not the subject-matter of the amendment.” *Id.* at 11.

denying services to customers based on race, color or previous condition of servitude.¹²⁹ The Court struck down as unconstitutional the provisions of the Act that were not directed at state actors.¹³⁰ Over the years, however, the Court softened the “state action” requirement. It ruled that Congress’s Section 5 power could reach private actors who performed public functions.¹³¹ The Court also held that Congress could reach activities where the involvement of the state was merely peripheral.¹³²

The “state action” requirement continued to lose favor in the Warren Court. In the 1966 case of *United States v. Guest*,¹³³ six justices advocated an outright abandonment of the “state action” interpretation laid out in the *Civil Rights Cases*. Justice Brennan, in an opinion joined by Chief Justice Warren and Justice Douglas, wrote that he did not accept an interpretation of Section 5 that limited Congress’s power to the correction of ills caused by state laws or state actions.¹³⁴ Justice Clark, joined by Justices Black and Fortas, wrote: “[T]here now can be no doubt that the specific language of [Section] 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.”¹³⁵ These arguments, however, were made in dicta.¹³⁶ Thus, scholars were unsure how later courts would read *Guest*.¹³⁷ At the time of *United States v. Morrison*, the status of the state action requirement was still unclear.

C. The Thirteenth Amendment

The Thirteenth Amendment bans slavery and involuntary servitude.¹³⁸ Like the Fourteenth Amendment, it was passed in the wake of the Civil War in an attempt to promote equality between black and white citizens. It is also similar to the Fourteenth Amendment in that it empowers Congress to enforce

129. *Id.* at 8-9.

130. *Id.* at 18-19.

131. *See, e.g., Marsh v. Alabama*, 326 U.S. 501, 508 (1946) (holding that exclusion of Jehovah’s witnesses from company-owned town constituted a state action because town functioned like a public municipality).

132. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 19-20 (1944) (holding that judicial enforcement of a private covenant that excluded minorities from property constituted a state action); *United States v. Guest*, 383 U.S. 745, 755-56 (1966) (filing police report that falsely accused blacks of committing crimes was sufficient to satisfy the state action requirement).

133. 383 U.S. 745 (1966).

134. *Id.* at 782-83.

135. *Id.* at 762.

136. The majority concluded that the Court’s decision “require[d] no determination of the threshold level that state action must attain in order to create rights under the Equal Protection Clause.” *Id.* at 756.

137. *See* Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 34-38 (1977).

138. U.S. CONST. amend. XIII, § 1.

the Amendment's provisions.¹³⁹ The Supreme Court has interpreted this grant of power broadly, finding that Congress can not only affirmatively enforce the ban on slavery and involuntary servitude, but can also enact legislation to erase "all badges and incidents of slavery in the United States."¹⁴⁰

The scope of the "badges and incidents" language, however, has never been clear. In the 1874 case of *United States v. Cruikshank*, a federal district court ruled that the Thirteenth Amendment authorizes the federal government to prosecute those who violate the rights and privileges of black citizens.¹⁴¹ The court distinguished between ordinary crimes and crimes motivated by race.¹⁴² While the court found that ordinary crimes fall within the state's exclusive jurisdiction, it stated that crimes motivated by race fall within federal authority under the Thirteenth Amendment.¹⁴³ However, the Supreme Court, when reviewing the case, declined to comment on the lower court's Thirteenth Amendment analysis.¹⁴⁴ Later, in the *Civil Rights Cases*, the Court held that the "badges and incidents" of slavery do not include private acts of racial discrimination.¹⁴⁵

This interpretation was abandoned, however, in the 1968 case of *Jones v. Alfred H. Mayer Co.*, where the Court concluded the Thirteenth Amendment does empower Congress to fight private racism.¹⁴⁶ The Court held that a provision of the Civil Rights Act of 1866 allowing victims of racial discrimination to sue private defendants¹⁴⁷ was a valid exercise of Congress's Thirteenth Amendment authority.¹⁴⁸ The Court pointed out that unlike the Fourteenth Amendment, the Thirteenth Amendment has no "state action" requirement.¹⁴⁹ The Thirteenth Amendment, therefore, can reach a whole class of activities that are beyond the scope of the Fourteenth Amendment. For example, the Court has found that Congress has power under the Thirteenth Amendment to eliminate racial barriers in the acquisition of property,¹⁵⁰ access to amusement parks¹⁵¹ and admission to private schools.¹⁵²

139. *Id.* § 2.

140. *The Civil Rights Cases*, 109 U.S. at 20.

141. *United States v. Cruikshank*, 25 F. Cas. 707, 711-12 (C.C.D. La. 1874).

142. *Id.*

143. *Id.* at 712.

144. *United States v. Cruikshank*, 92 U.S. 542 (1875).

145. *The Civil Rights Cases*, 109 U.S. at 24-25.

146. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

147. The statute provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1994).

148. *Jones*, 392 U.S. at 413.

149. *Id.* at 438. The plain text of the Amendment simply declares that "[n]either slavery nor involuntary servitude . . . shall exist within the United States." U.S. CONST. amend. XIII, § 1.

150. *See Jones*, 392 U.S. at 409 (1968).

151. *See Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).

Although the Thirteenth Amendment was originally directed toward blacks, the Court has stated that Congress can exercise its power under the Amendment to eliminate other forms of racial discrimination.¹⁵³ The Court also implied that the Thirteenth Amendment reaches discrimination based on ethnicity and religion.¹⁵⁴ Scholars have even suggested that the Thirteenth Amendment can reach gender discrimination as well,¹⁵⁵ but the Supreme Court has never addressed this issue.

There has been a striking paucity of cases concerning Thirteenth Amendment doctrine. The Amendment last attracted Supreme Court scrutiny in 1989.¹⁵⁶ Aside from the cases cited above, Thirteenth Amendment jurisprudence has remained virtually dormant since the nineteenth century.¹⁵⁷ This is not surprising given the Court's broad interpretation of the Commerce Clause. As shown in the *Heart of Atlanta* and *McClung* cases discussed above, federal bias laws have been easily justified under the Court's broad interpretation of the Commerce Clause.¹⁵⁸ There had rarely been a need, then, for litigants to advance a Thirteenth Amendment argument. However, in light of the *Lopez* decision and its narrowing of Congress's Commerce Clause authority, the Thirteenth Amendment may prove to be a crucial "back-up" argument to justify congressional actions that may no longer fit into the Court's new view of Commerce Clause power.

D. Summary

Before the Supreme Court's decision in *United States v. Morrison*, the scope of federal authority under the Commerce Clause, the Fourteenth Amendment and the Thirteenth Amendment was anything but clear. It was apparent that *Lopez* significantly limited Congress's broad power under the Commerce Clause, but the extent to which this power was limited remained unclear. The Fourteenth Amendment's "state action" requirement seemed to survive, but significant doubt still existed about its vitality. Congress's

152. See *Runyon v. McCrary*, 427 U.S. 160 (1976).

153. See *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273, 287-88 (1976) (finding that allowing whites to bring suit under the Civil Rights Act of 1866 was consistent with Congress's enforcement power under the Thirteenth Amendment).

154. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). The Court concluded that discrimination against Jews and Arabs was covered by § 1982, the same statute the Court had found in *Jones* to be a valid exercise of Congress's Thirteenth Amendment power. *Id.* at 617-18. The Court, however, did not explicitly address the Thirteenth Amendment issue.

155. See, e.g., Emily Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313, 349-62 (1977).

156. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

157. See generally Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995).

158. See *supra* notes 76-82 and accompanying text.

Thirteenth Amendment authority was, and still remains, relatively unlitigated. Although the Supreme Court's decision in *United States v. Morrison* did not touch on the Thirteenth Amendment, it did make strides in clarifying both the Commerce Clause and the Fourteenth Amendment's "state action" requirement.

III. UNITED STATES V. MORRISON

A. *Violence Against Women Act*

At issue in the *Morrison* case was the civil remedy provision of the Violence Against Women Act of 1994 (VAWA).¹⁵⁹ The VAWA was first introduced in both the Senate and House of Representatives in 1991.¹⁶⁰ The bill was subjected to almost four years of hearings in the Senate Judiciary Committee and in various House committees as well.¹⁶¹ These hearings resulted in what one court described as "voluminous" findings and a "mountain" of legislative history.¹⁶² Through this evidence, Congress attempted to demonstrate that violence against women had become a national epidemic with devastating effects. For example, one Senate report found that domestic violence alone costs the nation as a whole between \$5 billion and \$10 billion a year on health care, criminal justice and other social costs.¹⁶³ The report also found that more than four million women are battered by their husbands or partners each year and that three of every four American women are victims of violent crimes at some point in their lives.¹⁶⁴ The report also included data suggesting that states had been lax in dealing with the problem of violence against women.¹⁶⁵

The congressional hearings also produced evidence that domestic violence had a serious detrimental effect on interstate commerce. A Senate report concluded that "[g]ender-based crimes and fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."¹⁶⁶

159. 42 U.S.C. § 13981 (1994).

160. See S. 15, 102d Cong. (1991); H.R. 1502, 102d Cong. (1991).

161. See *Dombrowsky*, *supra* note 53, at 600-01.

162. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 964, 968 (4th Cir. 1997). Justice Souter also adopted the "mountain" metaphor in his dissenting opinion in *Morrison*. *United States v. Morrison*, 529 U.S. 598, 628-29 (2000) (Souter, J., dissenting).

163. S. REP. NO. 103-138, at 41 (1993).

164. *Id.* at 38.

165. *Id.* at 44-47.

166. *Id.* at 54.

The VAWA was finally enacted on September 13, 1994, as part of the Violent Crime Control and Law Enforcement Act of 1994.¹⁶⁷ The VAWA did several things to combat the perceived epidemic of violence against women. It provided grants to states to help police officers and prosecutors fight these types of crimes.¹⁶⁸ It also established a grant to create a national toll-free domestic abuse hotline.¹⁶⁹ More significantly, however, the Act provided for criminal and civil penalties against perpetrators of gender-motivated violence. The law made it a federal offense to cross state lines (or enter or leave Indian territory) for the purpose of committing a crime of violence against women.¹⁷⁰ The most controversial provision of the Act, however, was the civil remedy provision.

The civil remedy provision, codified in § 13981 of Title 42, United States Code, provided that “[a] person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.”¹⁷¹ The statute defined a “crime of violence” as an act that could constitute a felony against the victim whether or not criminal charges have been filed.¹⁷² The statute stated that a crime was “motivated by gender” if it was committed “because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.”¹⁷³

According to the text of the statute, § 13981 drew its authority from both the Commerce Clause and Section 5 of the Fourteenth Amendment.¹⁷⁴ Unlike the criminal provision, however, § 13981 did not require that the perpetrator or victim travel across state lines or engage in any interstate or commercial activity. Furthermore, the statute did not provide a cause of action against a

167. Pub. L. No. 103-322 §§ 40001-40703, 108 Stat. 1796, 1902-55 (1994). The O.J. Simpson case, which brought the issue of domestic violence to the national forefront, may have been partially responsible for the VAWA’s passage. See, e.g., Linda Hirshman, *Scholars in the Service of Politics; Those Who Would Deny Men’s Abuse of Women Twist Statistics and Skip the Research*, L.A. TIMES, July 31, 1994, at M5; Stacey L. McKinley, Note, *The Violence Against Women Act After United States v. Lopez: Will Domestic Violence Jurisdiction Be Returned to the States?*, 44 CLEV. ST. L. REV. 345, 345-46 (1996).

168. 42 U.S.C. §§ 3796gg-3796gg-5 (1994).

169. *Id.* § 10416.

170. 18 U.S.C. § 2261 (1994).

171. 42 U.S.C. § 13981(c) (1994).

172. *Id.* § 13981(d)(2).

173. *Id.* § 13981(d)(1).

174. *Id.* § 13981(a). Some scholars suggested that the civil remedy provision could be justified under the Thirteenth Amendment as well. See *Violence Against Women: Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 101-102 (1991) (statement of Burt Neuborne, Professor, New York University School of Law). However, the Thirteenth Amendment was not used as a basis of authority in the statute’s findings.

state or state actor, nor did it require state action before the remedy could be utilized.

Women's groups immediately recognized the civil remedy provision of the VAWA as a powerful new weapon in the war against gender-motivated violence.¹⁷⁵ But the *Lopez* decision, which came out seven months after the VAWA was passed, cast doubt upon § 13981's constitutionality.¹⁷⁶ Thus, it seemed likely that invoking the VAWA's civil remedy provision would lead to a constitutional challenge in the Supreme Court. Ultimately, that is what happened, and a young woman named Christy Brzonkala would act as the test subject.

B. *Facts of the Case*

Brzonkala's story began on September 21, 1994, one week after the VAWA became law, while Brzonkala was a freshman at Virginia Polytechnic Institute (Virginia Tech).¹⁷⁷ According to Brzonkala, she was raped in her dorm room that night by two varsity football players, Antonio Morrison and James Crawford.¹⁷⁸ She claimed that Morrison requested sexual intercourse from her, but after she adamantly refused, he pinned her against her bed, ripped her clothes off and forced her to submit to vaginal intercourse.¹⁷⁹ Brzonkala claimed that when Morrison was finished, Crawford switched places with him and proceeded to rape her as well.¹⁸⁰ Brzonkala said that after that, Morrison raped her a second time and left her with a warning: "You better not have any fucking diseases."¹⁸¹ Later, Morrison was heard in the dormitory dining room declaring that he "like[d] to get girls drunk and fuck the shit out of them."¹⁸²

Brzonkala slipped into a deep depression after that.¹⁸³ She stopped attending classes and even attempted suicide.¹⁸⁴ Eventually, she sought a temporary withdrawal from the university for the 1994-95 academic year.¹⁸⁵ In April 1995, Brzonkala filed a complaint with the university against the two athletes.¹⁸⁶ At a disciplinary hearing, Morrison admitted having nonconsensual

175. See, e.g., Deborah Ellis, *Crime Bill Should Make Women Feel Safer*, N.Y. TIMES, Sept. 20, 1994, at A22.

176. See generally McKinley, *supra* note 167.

177. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 953 (4th Cir. 1997).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Brzonkala*, 132 F.3d at 953.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* She did not press criminal charges due to a loss of physical evidence over the previous seven months. *Id.* at 954.

intercourse with Brzonkala.¹⁸⁷ Crawford, however, denied having sex with her.¹⁸⁸ After hearing all the evidence, the university suspended Morrison for two semesters but found insufficient evidence to punish Crawford.¹⁸⁹

Morrison hired an attorney, who claimed that Morrison's due process rights were violated at the hearing and threatened to sue the university.¹⁹⁰ The university backed down and agreed to grant Morrison a new hearing,¹⁹¹ where Brzonkala again recounted the events of September 24, 1994.¹⁹² After seven hours, the committee re-imposed Morrison's two-semester suspension.¹⁹³

Unfortunately for Brzonkala, this was not the end of the story. The young woman, struggling to put the whole tragedy behind her, was devastated to read in a newspaper that the university's senior vice president and provost had overturned Morrison's suspension and instead found him guilty of the lesser offense of "using abusive language."¹⁹⁴ The school had not bothered to tell Brzonkala that the man who had admitted to sexually assaulting her would again be attending classes with her.¹⁹⁵ Brzonkala, fearing for her life, dropped out of Virginia Tech.¹⁹⁶

C. Lower Courts' Rulings

Brzonkala brought a federal suit against the university and several of its top officials under Title IX of the Education Amendment Act,¹⁹⁷ claiming she was treated unfairly because of her gender and was subjected to a hostile environment.¹⁹⁸ She also sued Morrison and Crawford in federal court under § 13981 of the VAWA.¹⁹⁹

Both of her claims were dismissed at the district court level. The court granted the defendants' Rule 12(b)(6) motion on the Title IX claim.²⁰⁰ On the

187. *Brzonkala*, 132 F.3d at 954.

188. *Id.*

189. *Id.*

190. *Id.* Morrison's due process claim was based on an "ex post facto" allegation: he claimed he was disciplined under a sexual assault policy that had not yet been published in the student handbook. *Id.*

191. *Id.*

192. *Brzonkala*, 132 F.3d at 954-55.

193. *Id.* at 955.

194. *Id.*

195. *Id.* at 956.

196. *Id.* at 955.

197. 20 U.S.C. §§ 1681-1688 (1994).

198. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 935 F. Supp. 772 (W.D. Va. 1996) [hereinafter *Brzonkala I*].

199. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996) [hereinafter *Brzonkala II*].

200. *Brzonkala I*, 935 F. Supp. at 779. On the "disparate treatment" claim, the court ruled that Brzonkala failed to allege facts supporting an inference of discriminatory intent on the part of

VAWA complaint, the court conceded that Brzonkala had made a valid claim under the statute,²⁰¹ but found that § 13981 was not constitutional under either the Commerce Clause or Section 5 of the Fourteenth Amendment.²⁰²

The court's Commerce Clause analysis centered on a comparison between § 13981 and the Gun-Free School Zones Act, the statute struck down in *Lopez*. The court recognized three differences between the two laws: (1) § 13981 is civil and the Gun-Free School Zones Act is criminal; (2) § 13981 is backed by legislative findings; and (3) § 13981 requires fewer steps of causation between the regulated activity and commerce.²⁰³ Nonetheless, the court concluded that these differences were "insignificant" and were overshadowed by the striking similarities between the two laws.²⁰⁴ Therefore, the court held that Congress exceeded its authority under the Commerce Clause when it passed § 13981, as it had when it passed the Gun-Free School Zones Act.²⁰⁵ The court also engaged in a lengthy discussion of Fourteenth Amendment jurisprudence, ultimately concluding that "some state involvement is necessary" for Congress to invoke this power and that the "VAWA does not address the states."²⁰⁶ Based on that discussion, the court concluded that enacting § 13981 was not a legitimate exercise of federal authority under the Fourteenth Amendment.²⁰⁷ The court sympathized with Brzonkala's plight, but stressed "Congress is not invested with the authority to cure all of the ills of mankind."²⁰⁸

The Fourth Circuit reversed the lower court's decision and reinstated Brzonkala's § 13981 claim and her Title IX claim.²⁰⁹ The three-judge panel concluded that § 13981 was a valid exercise of Congress's Commerce Clause authority.²¹⁰ Unlike the district court, the panel found the "mountain" of legislative findings supporting § 13981 to be a significant factor in

the defendants. *Id.* at 778. As to the "hostile environment" claim, the court found that the alleged actions of the university did not amount to an objective hostile environment, nor did Brzonkala allege that she perceived the environment to be hostile; rather, she feared future hostility. *Id.*

201. Brzonkala's pleadings met the minimum requirements under the statute because the characteristic of the alleged rape combined with Morrison's disparaging comments constituted a claim of "gender animus." *Brzonkala II*, 935 F. Supp. at 785.

202. *Id.* at 801.

203. *Id.* at 789.

204. In particular, the court found these similarities: both regulated local criminal activity, both lacked a jurisdictional element and both inappropriately tipped the balance of power away from the states. *Id.* at 791-92.

205. *Brzonkala II*, 935 F. Supp. at 793.

206. *Id.* at 794, 800.

207. *Id.* at 801.

208. *Id.*

209. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997) [hereinafter *Brzonkala III*]. The Fourth Circuit disagreed with the district court with respect to Brzonkala's "hostile environment" claim but affirmed the lower court's dismissal of her "disparate treatment" claim. *Id.* at 961, 962.

210. *Id.* at 974.

distinguishing the case from *Lopez*.²¹¹ Pointing out that *Lopez* was a “limited holding,”²¹² the panel affirmed § 13981’s constitutionality and remanded the case.²¹³ Because the court found § 13981 constitutional under the Commerce Clause, it did not address whether the section was valid under the Fourteenth Amendment.²¹⁴

The Fourth Circuit vacated this decision six weeks later after rehearing the case en banc.²¹⁵ The full Fourth Circuit affirmed the district court’s decision with respect to both the Title IX²¹⁶ and § 13981 claims.²¹⁷ Circuit Judge Luttig,²¹⁸ in a rather colorful opinion, seemed to mock the petitioners for trying to use “interstate commerce” power to regulate a “non-commercial intrastate” activity.²¹⁹ He found § 13981 to be beyond the scope of Congress’s Commerce Clause power.²²⁰ Finding otherwise, he argued, would violate fundamental principles of federalism.²²¹ Furthermore, Luttig refused to ignore the Fourteenth Amendment’s “state action” requirement.²²² Thus, the court upheld the district court’s ruling and dismissed the case.²²³ The Supreme Court granted certiorari to decide whether § 13981 was constitutional,²²⁴ but it denied certiorari as to Brzonkala’s Title IX claim.²²⁵

D. Supreme Court’s Commerce Clause Analysis

Chief Justice Rehnquist, the author of *Lopez*, wrote for the majority in *Morrison*. Addressing the Commerce Clause issue first, Rehnquist applied the

211. *Id.* at 968.

212. *Id.* at 969 (quoting *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring)).

213. *Id.* at 974.

214. *Brzonkala III*, 132 F.3d at 964 n.8.

215. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) [hereinafter *Brzonkala IV*].

216. *Id.* at 827 n.2.

217. *Id.* at 889.

218. Luttig dissented in the previous Fourth Circuit decision. *Brzonkala III*, 132 F.3d at 974-78.

219. *Brzonkala IV*, 169 F.3d at 826.

220. Luttig wrote: “Because section 13981 neither regulates an economic activity nor includes a jurisdictional element, it cannot be upheld on the authority of *Lopez* or any other Supreme Court holding demarcating the outer limits of Congress’ power under the substantially affects test.” *Id.* at 836.

221. *See id.* at 840-43.

222. Luttig stated that upholding the VAWA under Section 5 of the Fourteenth Amendment would force the court to “extend the reach of Section 5 . . . beyond a point ever contemplated by the Supreme Court since the Amendment’s ratification over a century and a quarter ago.” *Id.* at 827.

223. *Id.* at 889.

224. *United States v. Morrison*, 120 S. Ct. 11 (1999).

225. *United States v. Morrison*, 120 S. Ct. 1578 (2000).

three-prong test he had established five years earlier in *Lopez*.²²⁶ He first established, and petitioners had conceded, that § 13981 did not fall under either of the first two categories: it did not seek to regulate a channel of interstate commerce, nor did it seek to regulate an instrumentality of interstate commerce.²²⁷ Like the Gun-Free School Zones Act, § 13981 could only be constitutional under the Commerce Clause if it passed the “substantial effects” test as defined in *Lopez*.²²⁸ The Court used the four *Lopez* factors to determine whether the action sought to be regulated, gender-motivated violence, was one that had a substantial effect on interstate commerce. Unlike *Lopez*, however, the *Morrison* Court gave some indications as to which of the four factors were more important to the analysis.

1. The nature of the conduct regulated

The Court made it clear that this factor should be given the greatest weight. The majority chastised the petitioners and Justice Souter’s dissent for failing to recognize that the non-economic, criminal nature of the conduct at issue in *Lopez* was “central” to the decision in that case.²²⁹ As he did in *Lopez*, Chief Justice Rehnquist pointed out that every time the Court upheld a statute under the “substantial effects” test, “the activity in question had been some sort of economic endeavor.”²³⁰ Even though § 13981 was a civil rather than a criminal statute, the majority had no trouble finding that gender-motivated violence was not economic in nature.²³¹

2. Jurisdictional element

The Court was less clear on the importance of the jurisdictional element. Depending on how one reads a statement in the opinion, this factor is either critical or is barely significant. The Court stated that “a jurisdictional element may establish that the enactment [§ 13981] is in pursuance of Congress’ regulation of interstate commerce.”²³² This seems to hint that had § 13981 contained a jurisdictional element, it would have been constitutional despite its non-economic nature. On the other hand, this phrase can be interpreted as an implied warning that since a jurisdictional element “may” establish constitutionality, it also may not, and thus a jurisdictional element, standing alone, would not be sufficient to show constitutionality. In addition, the majority stated that a jurisdictional element would merely “lend support” to the

226. *United States v. Morrison*, 529 U.S. 598, 608-09 (2000).

227. *Id.* at 609.

228. *Id.*

229. *Id.* at 610.

230. *Id.* at 611 (citing *United States v. Lopez*, 514 U.S. 549, 559-600 (1995)).

231. Rehnquist wrote: “Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.” *Morrison*, 529 U.S. at 613.

232. *Id.* at 612

argument that the statute has a sufficient link to interstate commerce.²³³ Like the Gun-Free School Zones Act, § 13981 also lacked a jurisdictional element.²³⁴

3. Congressional findings

The key distinction between the Gun-Free School Zones Act and § 13981 was the congressional findings listed in the latter along with the “mountain” of findings that came out of almost four years’ worth of committee reports. The majority conceded that the findings supporting the VAWA’s constitutionality were “numerous.”²³⁵ However, the Court made it clear that “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”²³⁶ The Court restated that whether an activity has a substantial effect on interstate commerce is a “judicial rather than a legislative question” and that the Supreme Court has the final say on the matter.²³⁷ The Court abandoned the “rational basis” test used in *Heart of Atlanta* and *McClung*, which limited the Court’s review of a congressional finding of substantial effects.²³⁸ Instead, the Court made it clear that congressional findings need to be more than just rational; they need to convince the Court that a substantial effect indeed exists.

4. Attenuation of the link to interstate commerce

The Court used a two-pronged analysis to determine whether the link between gender-motivated violence and interstate commerce was attenuated. First, the Court pointed out that the causal connection relied upon in the congressional findings was based on the same “cost of crime” and “national productivity” chain of inferences that the Court had found insufficient in *Lopez*.²³⁹ In rejecting this approach once again, the Court made it clear that it would not apply the aggregation principle of *Wickard* to regulations of non-economic violent crimes.²⁴⁰

Second, the Court found the link to be attenuated because it, when taken to its logical extremes, put no limit on Congress’s power under the Commerce

233. *Id.* at 613.

234. *Id.*

235. *Id.* at 614.

236. *Morrison*, 529 U.S. at 614.

237. *Id.*

238. The phrase “rational basis” appears nowhere in the majority opinion. *See id.* at 601-27. Contrast this with *Lopez*, where the Court at least acknowledged the precedents supporting the “rational basis” test. *See United States v. Lopez*, 514 U.S. 549, 557 (1995).

239. *Morrison*, 529 U.S. at 615.

240. The Court stated: “We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” *Id.* at 617.

Clause.²⁴¹ Thus, it would allow Congress to inappropriately intrude upon matters that are traditionally left to the states. Stressing that “the limitation of congressional authority is not solely a matter of legislative grace,” the Court emphasized that a line must be drawn between what is of national concern and what is of local concern.²⁴² The Court found that regulation and punishment of intrastate violence has always been a matter for the states.²⁴³ As if that were not enough, the Court further stated that “we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”²⁴⁴

Neither Justice Kennedy nor Justice O’Connor chose to write separately in *Morrison*. Rather, they joined Rehnquist’s opinion, sending a clear message that the *Lopez-Morrison* test is now the proper one to use when analyzing federal laws passed under the Commerce Clause. Thus, contrary to some predictions, the Supreme Court used its first post-*Lopez* Commerce Clause case to strengthen *Lopez* rather than to distinguish it as a limited holding.²⁴⁵ Justice Thomas wrote a brief concurring opinion in *Morrison*, in which he reprised an argument he made in *Lopez*, calling for the elimination of the “substantial effects” test.²⁴⁶

E. Supreme Court’s Fourteenth Amendment Analysis

The Court’s analysis of Section 5 of the Fourteenth Amendment was strikingly clear. The Court unambiguously held that it would follow the principle set out in the *Civil Rights Cases* that the Fourteenth Amendment prohibits only state action. Rehnquist called this a “time-honored principle” that is “firmly embedded in our constitutional law.”²⁴⁷ The Court stressed that the Amendment “erects no shield against merely private conduct.”²⁴⁸

The petitioners tried to argue that this principle had been abandoned in *Guest*, where six justices agreed that Congress should be given more power to punish private actors under Section 5. However, Rehnquist stated that this “naked dicta” could not supplant the “enduring vitality” of the state action requirement.²⁴⁹ The Court easily found, as had the en banc Fourth Circuit and

241. *Id.* at 615-16.

242. *Morrison*, 529 U.S. at 616-18.

243. *Id.* at 618.

244. *Id.*

245. *See supra* note 108.

246. *Morrison*, 529 U.S. at 627.

247. *Id.* at 621 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 and n.12 (1948)).

248. *Id.* (quoting *Kraemer*, 334 U.S. at 13 and n.12).

249. *Id.* at 624.

the district court, that § 13981 was not directed at a state or state actor and thus could not be constitutional under Section 5 of the Fourteenth Amendment.²⁵⁰

F. Dissenting opinions

Justices Souter and Breyer dissented in *Morrison*. Souter, who wrote the longer of the two opinions, attacked the majority's Commerce Clause analysis on several grounds. First, he took issue with the majority's conclusion that the "substantial effects" question is one for the courts to answer.²⁵¹ According to Justice Souter, the majority departed from the decisions of *Heart of Atlanta* and *McClung*, which stressed that the judiciary's role is not to second-guess whether a "substantial effect" on interstate commerce exists, but rather to determine whether Congress had a "rational basis" to find such an effect.²⁵² He pointed out that mere anecdotal evidence of a substantial effect was sufficient to satisfy the "rational basis" test in *Heart of Atlanta* and *McClung*.²⁵³ Yet, in *Morrison*, the majority determined that Congress's "mountain" of statistical, scientific evidence was not sufficient.²⁵⁴ Justice Souter found these conclusions irreconcilable.²⁵⁵

Justice Souter also disagreed with the Court's emphasis on the "nature of the activity regulated" factor. He argued that case law made it clear that the nature of an activity that causes a burden on interstate commerce is irrelevant in determining whether the activity can be regulated under the Commerce Clause.²⁵⁶ To Justice Souter, the majority erred by making the "substantial effects" test dependent upon the nature of the *cause*.²⁵⁷ He also disagreed with the majority over the importance of a statute's infringement into traditionally state matters. He argued that the majority's belief that the Constitution divides power into easily definable "state" and "federal" spheres is mistaken.²⁵⁸ Federalism, he argued, is better protected by procedural safeguards than by judicially created limits on federal power.²⁵⁹

Like Justice Souter, Justice Breyer also criticized the majority for focusing on causes rather than on effects.²⁶⁰ He further chastised the majority for

250. *Id.* at 626-27.

251. *Morrison*, 529 U.S. at 628 (Souter, J., dissenting).

252. *Id.*

253. *Id.* at 635.

254. *Id.* at 614.

255. *Id.* at 634-35 (Souter, J., dissenting).

256. *Morrison*, 529 U.S. at 640-45 (Souter, J., dissenting).

257. *Id.* at 644 n.13. Justice Souter wrote: "For if substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial?" *Id.*

258. *Id.* at 645-46.

259. *Id.* at 650.

260. *Id.* at 657 (arguing that "only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant") (Breyer, J., dissenting).

creating an amorphous “economic or non-economic” test that he believed would lead to confusion and inconsistencies among lower courts.²⁶¹ Also, Justice Breyer argued that it is inappropriate for the Court to continue to limit federal authority during a time when the country is becoming increasingly nationalized.²⁶² Unlike Justice Souter, however, Justice Breyer also expressed unease about the majority’s Fourteenth Amendment analysis. Although he refrained from attacking the majority’s conclusion head-on, he did state that he had “serious doubts” about the validity of the “state action” requirement.²⁶³ He questioned why Section 5 would not allow Congress to provide a remedy against a private actor.²⁶⁴

IV. *MORRISON*’S IMPACT ON LATER COMMERCE CLAUSE CASES

Justice Breyer’s dissent notwithstanding, the *Morrison* opinion has definitely cleared the air with respect to Section 5 and the “state action” doctrine. Reading the opinion, one might predict that the decision would also spark a dramatic change in lower courts’ interpretations of the Commerce Clause. This, however, has not been the case. As shown below, most lower courts hearing Commerce Clause challenges to federal laws have construed *Morrison* in its narrowest sense. Thus, the overwhelming trend is to distinguish *Morrison* rather than to apply it to other federal laws.

One way courts have downplayed the impact of *Morrison* is by ignoring the fact that the Supreme Court failed to use the “rational basis” test in the case to determine whether a substantial effect on interstate commerce was present. Although the Court did not explicitly reject the “rational basis” test, its conclusion in the case implied that it did. As Justice Souter pointed out in his dissent, the “mountain” of evidence supporting the VAWA was a much stronger indicator of a rational basis than was the anecdotal evidence used to support Title II in *Heart of Atlanta* and *McClung*.²⁶⁵ It is more reasonable to conclude, then, that the Court abandoned the “rational basis” test (or drastically changed it) rather than to conclude that the “mountain” of evidence did not meet the “rational basis” standard. Despite this logic, however, many lower courts have concluded that the “rational basis” test survived *Morrison*.²⁶⁶

261. *Morrison*, 529 U.S. at 656-57 (Breyer, J., dissenting).

262. *Id.* at 660.

263. *Id.* at 664-66. Justice Breyer stated: “I need not, and do not, answer the § 5 question” *Id.* at 666.

264. *Id.* at 665 (Breyer, J., dissenting).

265. *Id.* at 635 (Souter, J., dissenting).

266. See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483, 490 (4th Cir. 2000) (concluding that *Morrison* modified but did not supplant the “rational basis” test); *United States v. Angle*, 234 F.3d 326, 337 (7th Cir. 2000) (stating that it is bound to apply the “rational basis” test); *United States v. Gregg*, 226 F.3d 253, 261-62, 263, 267 (3d Cir. 2000) (applying the “rational basis” standard without

Courts have also misinterpreted the fourth factor of the *Lopez-Morrison* test, the “attenuation” factor. Some courts have failed to acknowledge that the attenuation test must be used in light of the distinction between state and federal spheres of authority.²⁶⁷ For example, the Fifth Circuit, in *Groome Resources Ltd. v. Parish of Jefferson*,²⁶⁸ limited its “attenuation” analysis to a question of whether the causal chain relied on the prohibited “cost of crime” or “national productivity” arguments.²⁶⁹ The court did not address the broader question of whether the chain of reasoning would potentially allow the federal government to infringe upon matters traditionally left to the states.²⁷⁰ Other courts have construed this fourth factor in a similar fashion.²⁷¹

Perhaps the most significant uncertainty about the Commerce Clause after *Morrison* is the relative weight the courts should give to each of the four “substantial effects” factors. For example, in *United States v. Visnich*,²⁷² a federal district court in Ohio found that *Morrison* was merely a shift of emphasis away from the “congressional findings” factor.²⁷³ In upholding the constitutionality of a federal law prohibiting certain people under protective orders from possessing firearms,²⁷⁴ the *Visnich* court found the statute’s jurisdictional element to be sufficient in distinguishing it from the VAWA’s civil remedy provision.²⁷⁵ The court downplayed the importance of the “nature

reference to *Morrison*); *United States v. Fleischli*, 119 F. Supp. 2d 819, 822 (C.D. Ill. 2000) (declining to read *Morrison* as a modification of the “rational basis” test).

267. The Court in *Morrison* criticized the petitioners for using “a view of causation that would obliterate the distinction between what is national and what is local . . .” *Morrison*, 529 U.S. at 616 n.6 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)). Furthermore, it is clear that the state/federal distinction was critical to the Court’s analysis in *Morrison*. See *Morrison*, 529 U.S. at 618 (stating that the activity regulated by § 13981 of the VAWA “has always been the province of the States”).

268. 234 F.3d 192 (5th Cir. 2000).

269. *Id.* at 214-15.

270. See generally *id.*

271. See, e.g., *Allied Local & Reg’l Mfrs. Caucus v. U.S. Env’t Prot. Agency*, 215 F.3d 61, 82 (D.C. Cir. 2000). The court in that case concluded that the link between air pollution and interstate commerce was not attenuated, but it did not examine whether the scope of the federal regulation at issue would infringe on matters traditionally of state concern. *Id.* See also *United States v. Feliciano*, 223 F.3d 102, 119 (2d Cir. 2000) (ignoring the fourth factor altogether).

272. 109 F. Supp. 2d 757 (N.D. Ohio 2000).

273. *Id.* at 761. The court concluded that *Morrison* was “neither a change nor a modification in Commerce Clause jurisprudence, but merely a change in emphasis on one of the several factors the Court considers in evaluating legislation based on Congress’s Commerce Clause powers.” *Id.*

274. 18 U.S.C. § 922(g)(8) (1994 & Supp. IV 1998).

275. *Visnich*, 109 F. Supp. 2d at 761-62. Apparently, members of Congress also concluded that the lack of a jurisdictional element was the fatal flaw of § 13981. In July 2000, the civil remedy provision was reintroduced in the House of Representatives with additional language requiring a link to interstate commerce. H.R. 5021, 106th Cong. (2000).

of the activity” and the “attenuation” factors and declined to engage in any discussion of congressional findings.²⁷⁶

The relative importance of the “jurisdictional element” factor is an especially controversial matter. The favored approach among lower courts is the *Visnich* approach,²⁷⁷ to hold that a jurisdictional element alone can save a statute from the wrath of *Morrison*.²⁷⁸ One striking exception, however, can be found in *United States v. Faasse*.²⁷⁹ In that case, the Sixth Circuit struck down the Child Support Recovery Act, which makes it a federal crime to fail to pay child support for a child who lives in another state.²⁸⁰ Although the *Faasse* decision was later vacated by the Sixth Circuit,²⁸¹ it nonetheless is significant because it was the first case after *Morrison* to find a statute unconstitutional in spite of a jurisdictional element.²⁸² The court concluded that this jurisdictional “hook” was not enough to overcome its conclusion that child support obligations were not commercial in nature.²⁸³ Unlike the *Visnich* court, the *Faasse* court apparently read the *Morrison* decision to rely almost entirely on the “economic nature” factor and on the “attenuation” factor, with a special emphasis on the “infringement into state concerns” element. The *Faasse* court stated that it was giving due regard to the *Morrison* Court’s warning against overly elastic conceptions of the Commerce Clause that give Congress authority over areas traditionally reserved for the states.²⁸⁴

In the 2001 case of *United States v. Sweet*,²⁸⁵ a federal court in Oregon recognized that the lack of a jurisdictional element was not the sole reason that the *Morrison* Court struck down § 13981 of the VAWA.²⁸⁶ Like *Visnich*, the *Sweet* case also considered the constitutionality of a provision of the federal

276. See *Visnich*, 109 F. Supp. 2d at 761 n.5.

277. The choice of the *Visnich* case as an example is purely arbitrary, as is the label “*Visnich* approach.” There is nothing particularly compelling about the *Visnich* case that would set it apart from the other cases that have adopted the same approach. However, for the sake of expediency, the practice of using a statute’s jurisdictional element to uphold its constitutionality will hereinafter be referred to as the “*Visnich* approach.”

278. See, e.g., *United States v. Napier*, 233 F.3d 394, 402 (6th Cir. 2000); *United States v. Wesela*, 223 F.3d 656, 660 (7th Cir. 2000); *United States v. Malone*, 222 F.3d 1286, 1295 (10th Cir. 2000); *United States v. Fleischli*, 119 F. Supp. 2d 819, 822 (C.D. Ill. 2000); *United States v. Suggs*, No. 3:99CR244 (JBA), 2000 WL 1658591, at *6 (D. Conn. Sept. 7, 2000).

279. 227 F.3d 660 (6th Cir. 2000).

280. 18 U.S.C. § 228 (1994 & Supp. IV 1998).

281. *United States v. Faasse*, 234 F.3d 312 (6th Cir. 2000).

282. The statute’s jurisdictional element is found at § 228(a).

283. *Faasse*, 227 F.3d at 670. The court stated that holding otherwise would turn the “Interstate Commerce Clause” into the “Interstate Clause.” *Id.*

284. *Id.* at 671-72 (citing *United States v. Morrison*, 529 U.S. 598, 615-16 (2000)).

285. No. CR 00-99-01-PA, 2000 WL 1845779 (D. Or. Sept. 7, 2000).

286. *Id.* at *5.

firearms statute.²⁸⁷ In the court's decision, Judge Panner criticized earlier Ninth Circuit decisions that found the same statute constitutional merely because it contained a jurisdictional element.²⁸⁸ Panner suggested that the circuit court erred by failing to consider the other three *Lopez-Morrison* factors.²⁸⁹ He also hinted that the statute exceeded Congress's Commerce Clause authority; yet he stated that he was bound to follow Ninth Circuit precedent, and he ruled the statute constitutional.²⁹⁰

Although the *Faasse* decision did not stand, the *Sweet* decision indicates that the reasoning behind the *Faasse* opinion has support in other jurisdictions. Thus, it is still uncertain whether the *Visnich* approach or the *Faasse* approach will eventually prevail. One thing that is certain about the *Morrison* decision is that it, like *Lopez*, has opened the floodgates for constitutional challenges to federal laws.²⁹¹ Eager litigants have used *Morrison* to attack the constitutionality of everything from anti-racketeering laws²⁹² to federal laws protecting abortion clinics.²⁹³ In light of this, there is little doubt that if a hate crime bill is passed into law, it will eventually meet the same fate.²⁹⁴

V. THE FEDERAL HATE CRIME BILL

A. Provisions of the Legislation

The Local Law Enforcement Enhancement Act of 2001 would add a new section 145 to title 18 of the United States Code.²⁹⁵ This new section would be divided into two parts. Section (a)(1) would forbid "willfully caus[ing] bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempt[ing] to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person."²⁹⁶ Section (a)(2) would criminalize the same acts when based on

287. At issue in *Sweet* was the section banning convicted felons from carrying firearms. See 18 U.S.C. § 922(g)(1) (1994).

288. *Sweet*, 2000 WL 1845779, at *5.

289. *Id.*

290. *Id.*

291. The *Lopez* decision sparked a flood of cases attacking the constitutionality of federal statutes. For a discussion of the proliferation of Commerce Clause challenges in the wake of *Lopez*, see Antony Barone Kolenc, Note, *Commerce Clause Challenges After United States v. Lopez*, 50 FLA. L. REV. 867 (1998).

292. See *United States v. Feliciano*, 223 F.3d 102, 119 (2d Cir. 2000).

293. See *Norton v. Reno*, No. 4:00-CV-141, 2000 WL 1769580 (W.D. Mich. Nov. 24, 2000).

294. See, e.g., Traditional Values Coalition, *Hate Crimes Update: The Kennedy Amendment Details*, available at http://www.traditionalvalues.org/hc_ken.html (last visited Feb. 2, 2001) (predicting that "the questionable constitutionality of Kennedy's hate crime legislation . . . would undoubtedly be the subject of judicial challenge").

295. S. 19, 107th Cong. § 107(a) (2001).

296. Section (a)(1) would read as follows:

religion, national origin, gender, sexual orientation or disability.²⁹⁷ While (a)(1) does not require the government to show any connection to interstate

(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN- Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(i) death results from the offense; or

(ii) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

Id.

297. Section (a)(2) would read as follows:

(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, OR DISABILITY-

(A) IN GENERAL- Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B), willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(I) death results from the offense; or

(II) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) CIRCUMSTANCES DESCRIBED- For purposes of subparagraph (A), the circumstances described in this subparagraph are that—

(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—

(I) across a State line or national border; or

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A): the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)—

(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(II) otherwise affects interstate or foreign commerce.

Id. Note that religion and national origin are mentioned in both sections. This is due to the doubt concerning the Thirteenth Amendment's applicability to these types of discrimination. See Sara Sue Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal*

commerce, (a)(2) requires a showing that the defendant used a channel or an instrumentality of interstate commerce or that the defendant engaged in an activity that substantially affects interstate commerce.²⁹⁸ Neither section provides a cause of action against a state or state actor.

Included in the language of the act are several congressional findings that attempt to justify the legislation on Commerce Clause grounds.²⁹⁹ Among these are: that the problem of hate crime is sufficiently interstate in nature;³⁰⁰ that perpetrators cross state lines to commit these crimes;³⁰¹ that perpetrators use instruments that have traveled in interstate commerce to commit these crimes;³⁰² and that such crimes affect interstate commerce by preventing members of targeted groups from traveling across state lines and from purchasing goods and services in the interstate market.³⁰³ The findings also claim federal jurisdiction under the Thirteenth Amendment.³⁰⁴ They claim that “eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.”³⁰⁵

Due to the differences between sections (a)(1) and (a)(2) in the proposed bill, each one would merit a unique constitutional analysis. Therefore, the following discussion looks at sections (a)(1) and (a)(2) separately. This Comment examines whether (a)(1) or (a)(2) can be supported under the Commerce Clause or under the Thirteenth Amendment as the findings claim. Furthermore, it shows why the Fourteenth Amendment would not apply.

B. *Constitutionality of the Legislation*

1. Section (a)(1)

As discussed above, the *Lopez-Morrison* test divides Congress’s Commerce Clause power into three categories: authority to regulate the channels of interstate commerce, authority to regulate instruments or things in interstate commerce, and authority to regulate activities that have a substantial

Enforcement?, 80 B.U. L. REV. 1227, 1235 n.27 (2000). The bill’s drafters contend that religion and national origin should be considered “races” for purposes of the Thirteenth Amendment. S. 19, 107th Cong. § 102(11) (2001).

298. S. 19, 107th Cong. § 107(a) (2001).

299. *Id.* § 102.

300. *Id.* § 102(1).

301. *Id.* § 102(7).

302. *Id.* § 102(9).

303. S. 19, 107th Cong. § 102(6) (2001).

304. *Id.* § 102(10).

305. *Id.*

effect on interstate commerce.³⁰⁶ For (a)(1) to be constitutional under the Commerce Clause, it must fit into one of these three categories.

First, it will likely be uncontested that the legislation does not fall under the first category. Courts have defined the channels of interstate commerce as “navigable rivers, lakes, and canals of the United States; the interstate railroad track system; . . . interstate telephone and telegraph lines; air traffic routes; television and radio broadcast frequencies.”³⁰⁷ To fall under this category, the law must regulate these channels directly rather than regulate an activity that merely “implicates” or “invokes” the use of these channels.³⁰⁸ Clearly, the hate crime bill speaks to none of these channels directly.

Likewise, the act does not regulate a thing or instrument in interstate commerce. Under this category, the mere character of the activities sought to be regulated makes them the subject of federal regulation.³⁰⁹ Vehicles used to transport goods across state lines fall within this category,³¹⁰ as does money deposited in a federally insured bank.³¹¹ An “instrumentality” can also be an intangible item, such as a debt.³¹² Although Congress has found that instrumentalities of interstate commerce are used in hate crimes,³¹³ (a)(1) regulates the behavior, not the instruments themselves. Interpersonal human behavior is clearly distinguishable from commercial objects or debts. Thus, the act cannot draw its authority under the second *Lopez-Morrison* category and must pass the four-factor “substantial effects” test if it is to be constitutional.

Clearly the first factor, the nature of the activity regulated, will be troublesome for (a)(1). The activity sought to be regulated, causing or threatening bodily injury, does not appear to be any more economic in nature than rape or carrying a gun near a school. Courts have been liberal in classifying an activity as “economic” by including those activities that are not economic in themselves, but which are part of a larger federal scheme to regulate interstate commerce.³¹⁴ But it is still unlikely that this expansive definition of “economic activity” will encompass the activity regulated in (a)(1). The purpose behind the legislation is not economic; it is to protect the safety of citizens.

306. *United States v. Morrison*, 529 U.S. 598, 608-09 (2000); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

307. *Gibbs v. Babbitt*, 214 F.3d 483, 490-91 (4th Cir. 2000) (quoting *United States v. Miles*, 122 F.3d 235, 245 (5th Cir. 1997)).

308. *United States v. Faasse*, 227 F.3d 660, 668 (6th Cir. 2000).

309. *United States v. Owens*, 159 F.3d 221, 226 (6th Cir. 1998).

310. *See, e.g., United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995).

311. *See Owens*, 159 F.3d at 226.

312. *See United States v. Sage*, 92 F.3d 101, 105 (2d Cir. 1996).

313. S. 19, 107th Cong. § 102(8) (2001).

314. *See United States v. Lopez*, 514 U.S. 549, 600 (1995).

The second factor, the jurisdictional element, is absent in this section. The third factor, congressional findings, is present, but as the Court concluded in *Morrison*, this alone will not be enough to demonstrate a statute's constitutionality. In any case, the findings supporting this legislation are nowhere near as voluminous as those supporting the VAWA.

The fourth factor, the attenuation of the link, also weighs heavily against this section's constitutionality. This is especially true if a court adopts the proper reading of *Morrison* and considers the statute's potential infringement into areas of traditional state concern. Indeed, the Court stated in *Morrison* that it could think of "no better example" of a power reserved for the states "than the suppression of violent crime and vindication of its victims."³¹⁵ The hate crime bill goes even further than § 13981 in seeking to suppress violent crime because it is a criminal rather than a civil statute.

By comparing (a)(1) with the unconstitutional § 13981, a court would discover that (a)(1) has an equally weak showing of the first two factors, and an equal or lesser showing under the third and fourth factors. The only logical conclusion to draw from this analysis is that (a)(1), like § 13981, cannot be supported under the Commerce Clause.

Section (a)(1) also cannot be valid under Section 5 of the Fourteenth Amendment. Despite the fact that (a)(1) seeks to protect discrimination against so-called "suspect" classes, *Morrison* made it clear that congressional action under Section 5 must be aimed at a state or state actor. Proponents of the legislation may try to argue that (a)(1) is aimed at the states in that it acts as a remedy for people who are not being protected under state law. This argument, however, is unlikely to succeed. The Supreme Court has previously stated that Congress's power under the Fourteenth Amendment does not reach a state's failure to act.³¹⁶ Furthermore, the hate crime bill is not limited to those states in which hate crimes are not being prosecuted. The *Morrison* decision indicated that one of the flaws of § 13981 was that it applied to all states, even those that were effective in handling gender-motivated violence.³¹⁷ The hate crime bill would face an even steeper battle on this front, since there is little evidence showing that states have been lax in prosecuting hate crimes.³¹⁸

315. *United States v. Morrison*, 529 U.S. 598, 618 (2000).

316. *See DeShaney v. Winnebago County Soc. Servs. Dept.*, 489 U.S. 189, 196 (1989) (stating that the purpose of the Fourteenth Amendment is "to protect the people from the State, not to ensure that the State [protects] them from each other").

317. *Morrison*, 529 U.S. at 626-27.

318. Senator Orrin Hatch argued this point in the Senate hate crimes debates in June 2000. 146 CONG. REC. S5426 (daily ed. June 20, 2000). Senator Hatch sponsored a bill that would have required a comprehensive analysis to determine whether states were failing or refusing to prosecute hate crimes to the full extent of the law. S. 1406, 106th Cong. (1999); 146 CONG. REC.

The Thirteenth Amendment is the only constitutional provision on which (a)(1) could arguably be based.³¹⁹ By finding (a)(1) constitutional under the Thirteenth Amendment, a court would avoid the “state action” roadblock that hinders federal action under the Fourteenth Amendment. The Supreme Court unambiguously held in *Jones v. Alfred H. Mayer Co.*³²⁰ that the Thirteenth Amendment reaches private actors.³²¹ As noted above, one court has even ruled, albeit over a century ago, that the Amendment allows Congress to prosecute people who commit crimes based on racial bias.³²² A court, then, could reasonably conclude that (a)(1) is an appropriate congressional means to eliminate the “badges and incidents of slavery.”

It is not certain, however, that (a)(1) would survive under a Thirteenth Amendment analysis. At least three problems arise. First, although courts have recognized that the Amendment addresses discrimination against blacks, it is still unclear whether the Amendment can also be used to eliminate the wide categories of discrimination listed in (a)(1). Although the Supreme Court has implied that the Amendment reaches other forms of racial discrimination and may also reach discrimination based on religion, the Court has never come to a clear conclusion on these matters.³²³ Thus, there is room for interpretation, and it cannot be said that a court must find that the Thirteenth Amendment allows Congress to protect all groups listed in (a)(1).

A second problem is one recognized by Professor Baker of Louisiana State University.³²⁴ He argued that even if a court found the hate crime bill constitutional under the Thirteenth Amendment, the bill would still be suspect under the Due Process Clause of the Fifth Amendment because of its race-based classifications.³²⁵ He concluded that the Supreme Court would be unwilling to approve a bill that puts two constitutional amendments in conflict.³²⁶

Finally, although it may be reasonable for a court to find (a)(1) constitutional under the Thirteenth Amendment, it is not the necessary conclusion. A court could conceivably distinguish the hate crime law from the statute upheld in *Jones* by recognizing that the former is a criminal statute while the latter provides a civil remedy. Also, a court seeking to reject the

S5425. The Senate approved his amendment on the same day it approved Senator Kennedy's proposal. 146 CONG. REC. S5425-28.

319. See Baker, *supra* note 9, at 1220.

320. 392 U.S. 409 (1968).

321. *Id.* at 439.

322. See *United States v. Cruikshank*, 25 F. Cas. 707 (C.C.D. La. 1874) and *supra* text accompanying notes -.

323. See *supra* notes 153-54 and accompanying text.

324. Baker, *supra* note 9, at 1220-21.

325. *Id.* at 1220.

326. *Id.* at 1221.

Thirteenth Amendment basis could look to the Supreme Court's decision in *United States v. Cruikshank*,³²⁷ which declined to confirm the lower court's conclusion that the Amendment reaches criminal prosecutions of race-based violence.³²⁸ Although these arguments may not be overly convincing, they show that it is at least possible for a court to find (a)(1) to be beyond Congress's Thirteenth Amendment authority.

Given that a court can reasonably take either path with respect to (a)(1)'s validity under the Thirteenth Amendment, it seems highly unlikely that a ruling of constitutionality would survive an appeal to the current Supreme Court. The trend among recent Supreme Court decisions clearly has been in favor of state autonomy at the expense of federal power.³²⁹ Thus, given two options, the Court would be inclined to choose the one that limits federal authority. It is hard to imagine the current Supreme Court opening the doors for a new avenue of federal power, especially one that could have far-reaching effects.

Thus, section (a)(1), in its current form, cannot be justified under the Commerce Clause due to its lack of a jurisdictional element and due to the fact that it is a criminal statute that does not seek to regulate an economic activity. The section also cannot be justified under Section 5 of the Fourteenth Amendment, since it is not directed at a state or state actor. Finally, section (a)(1) might be justifiable under the Thirteenth Amendment, at least with respect to certain forms of discrimination, but it is unlikely that the Supreme Court will look with favor on such an interpretation.

2. Section (a)(2)

Section (a)(2) differs from (a)(1) in two respects. First, (a)(2) protects against three forms of discrimination—discrimination based on sexual orientation, gender and age—which have neither been classified by the courts as “suspect classifications” nor been suggested by the courts to fall under the purview of the Thirteenth Amendment.³³⁰ Second, this subsection contains a jurisdictional element, limiting its application to matters involving interstate

327. 92 U.S. 542 (1875)

328. *Id.* at 553.

329. *See, e.g.,* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that states are immune from federal lawsuits filed under the Age Discrimination in Employment Act); *Printz v. United States*, 521 U.S. 898, 935 (1997) (forbidding the federal government from requiring state law enforcement officers to enforce federal handgun regulations).

330. Case law indicates that the Thirteenth Amendment could cover discrimination against national origin and religion, both covered in (a)(2). *See supra* note 154 (discussing *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987)). If this view prevails, a Thirteenth Amendment analysis with respect to these classes would be identical to the analysis under (a)(1). This Comment's remaining (a)(2) analysis, therefore, is limited to those types of discrimination beyond the reach of the Thirteenth Amendment.

commerce. It is clear that the drafters of the bill intended (a)(2) to fall exclusively under Congress's Commerce Clause power.

Because (a)(2) is identical to (a)(1) in all other respects, it is unnecessary to replay the analysis under the first two categories of the *Lopez-Morrison* test. It is apparent that (a)(2), like (a)(1), cannot be justified under either the "channels" or "instrumentalities" categories. The jurisdictional element in (a)(2), however, would significantly change the "substantial effects" analysis. The question, then, is whether this jurisdictional element would be enough to uphold (a)(2) as constitutional.

It seems a court could take one of two paths on this issue. It could either follow the *Visnich* approach, which emphasized the importance of the jurisdictional element factor,³³¹ or it could follow the Sixth Circuit's interpretation in *Faasse*, which held that a jurisdictional element is not enough in the face of a strong showing of non-economic nature and an infringement into state matters.³³² It is unclear at this point which path is more consistent with current Commerce Clause jurisprudence. Reasonable arguments can be made on both sides.

In support of the *Faasse* approach, one could argue the point made by Chief Justice Rehnquist in *Morrison*, that the Supreme Court has never used aggregation under the "substantial effects" test to uphold a law that was not economic in nature.³³³ In contrast, the Court has repeatedly upheld laws that lacked either a jurisdictional element or express congressional findings. If one assumes that *Heart of Atlanta* and *McClung* are still good law, then one could reasonably conclude that the economic nature of the activity is the key factor. The statute at issue in those cases had *neither* a jurisdictional element nor support from formal congressional findings, yet both regulated economic activity, and thus both were constitutional.³³⁴

Another argument in support of the *Faasse* approach is the language used by the Court in *Morrison*. The contrast between the discussion of the economic nature and the discussion of the jurisdictional element is striking. Although § 13981 was lacking in both elements, the Court emphasized that the non-economic nature of the regulated activity was "central" to the Court's analysis.³³⁵ The Court went out of its way to emphasize that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of

331. *United States v. Visnich*, 109 F. Supp. 2d 757 (N.D. Ohio 2000). For an explanation of the term "*Visnich* approach," see *supra* note 277.

332. *United States v. Faasse*, 227 F.3d 660, 670 (6th Cir. 2000).

333. *United States v. Morrison*, 529 U.S. 598, 611 (2000).

334. See also *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000) (finding the Fair Housing Amendments Act constitutional under the Commerce Clause because even though the statute lacks a jurisdictional element, it regulates an economic activity).

335. *Morrison*, 529 U.S. at 610.

intrastate activity only where that activity is economic in nature.”³³⁶ On the other hand, the best the Court could say about the jurisdictional element is that it “may” establish constitutionality, or that it would “lend support” to such a position.³³⁷

If a court follows the *Faasse* conclusion that the jurisdictional element factor is only a minor one, it would not be surprising if the court found (a)(2) unconstitutional in spite of its jurisdictional element. As shown above in the discussion of (a)(1), the minor factors of a jurisdictional element and congressional findings would be far outweighed by a particularly weak showing of the two major factors: the nature of the activity regulated and the attenuation of the link to interstate commerce.

It is not altogether clear, though, that the *Faasse* approach is the proper one. For one, as mentioned above, the *Faasse* decision was vacated.³³⁸ Furthermore, it had expressed a minority position with respect to the constitutionality of the Child Support Recovery Act. In *Faasse*, the Sixth Circuit departed from the decisions of the Third, Fifth and Ninth Circuits, which found the same statute to be valid under the Commerce Clause.³³⁹

Opponents of the *Faasse* approach can also find support in the language of the *Morrison* decision. While the Court did recognize that it never upheld a regulation of intrastate non-economic activity under the Commerce Clause, the Court also stated, in the same sentence, that “we need not adopt a categorical rule against aggregating the effects of any non economic activity in order to decide these cases”³⁴⁰ This indicates that the Court was unwilling to do away with the “minor” *Lopez* factors and to let the “economic nature” factor bear the entire burden.

Another argument against applying the *Faasse* approach is that the jurisdictional element found to be insufficient in that case is significantly different than the one found in (a)(2). The Child Support Recovery Act’s jurisdictional element only requires that the parent live in a different state from the child. As the *Faasse* court pointed out, the Act has the “interstate” part but is lacking the “commerce” part.³⁴¹ In contrast, (a)(2) requires that either the defendant or victim have traveled in interstate or foreign *commerce*, have used a facility or instrumentality of interstate or foreign *commerce*, or have engaged in any activity otherwise affecting interstate or foreign *commerce*.³⁴² This jurisdictional element is strikingly similar to the one found in the federal

336. *Id.* at 613.

337. *Id.* at 612, 613.

338. *See supra* note 281 and accompanying text.

339. *See United States v. Parker*, 108 F.3d 28 (3rd Cir. 1997); *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997); *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996).

340. *Morrison*, 529 U.S. at 613.

341. *United States v. Faasse*, 227 F.3d 660, 670 (6th Cir. 2000).

342. S. 19, 107th Cong. § 107(a) (2001).

firearms statute, which the Supreme Court, in *Lopez*, used as an example of a valid jurisdictional element.³⁴³ Furthermore, the *Faasse* court even acknowledged that if the jurisdictional element of the Child Support Recovery Act had been more limiting, it might have withstood constitutional scrutiny.³⁴⁴

Therefore, it is possible that (a)(2)'s jurisdictional element would be enough to uphold it under the Commerce Clause. But even if a court found it facially constitutional, the question remains as to what sort of jurisdictional "hook" would need to be shown to pass constitutional muster. Taking the Matthew Shepard case as an example, would it have been enough if the prosecution could prove that the kidnapers drove Shepard in a car that had traveled in interstate commerce, or that they had used an interstate highway, or that they had used the telephone to plan the attack?

The case law is unclear on where to draw the line, if a line does indeed exist, between constitutional jurisdictional elements and unconstitutional ones. The prevailing view is that when a jurisdictional element invokes the full power under the Commerce Clause, a party need only show a "de minimis" connection with interstate commerce.³⁴⁵ For example, in order to convict under the federal firearms statute, a prosecutor only needs to show that the defendant's gun traveled in interstate commerce at some point in time.³⁴⁶ Lower courts, however, have had difficulty determining when this "de minimis" test has been satisfied, especially when the prosecution must show a "de minimis" effect on interstate commerce. Two cases involving the federal Hobbs Act illustrate this point.³⁴⁷ In *United States v. Bailey*,³⁴⁸ the Seventh Circuit found that an attempted robbery of a cocaine dealer satisfied the act's jurisdictional element.³⁴⁹ The court reasoned that the money the defendant attempted to rob would have been used by the dealer to purchase cocaine, which is an article of interstate commerce.³⁵⁰ In contrast, the Sixth Circuit, in *United States v. Wang*,³⁵¹ found the nexus was not established in the robbery of a restaurant owner, even though the money taken was intended by the restaurateur to be used to purchase goods in interstate commerce.³⁵²

343. *United States v. Lopez*, 514 U.S. 549, 561-62 (1995).

344. *Faasse*, 227 F.3d at 670.

345. *See, e.g.*, *United States v. Rea*, 223 F.3d 741, 743 (8th Cir. 2000).

346. *Scarborough v. United States*, 431 U.S. 563, 575 (1977).

347. The Hobbs Act prohibits any robbery or extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a) (1994).

348. 227 F.3d 792 (5th Cir. 1997).

349. *Id.* at 798.

350. *Id.*

351. 222 F.3d 234 (6th Cir. 2000).

352. *Id.*

This confusion also has arisen in cases involving the federal arson statute. The Ninth Circuit held that the fact that a torched house had once received gas from interstate commerce was not sufficient to satisfy the jurisdictional element of the statute.³⁵³ In *United States v. Jones*,³⁵⁴ the Seventh Circuit disagreed with its sister court on this particular issue.³⁵⁵ The Supreme Court had the chance to settle the dispute when it granted certiorari to the *Jones* case.³⁵⁶ However, the Court sidestepped the constitutional question by finding that the jurisdictional element in the federal arson statute is limited to buildings that are “used” in interstate commerce, not ones that “affect” interstate commerce, which, the Court said, would have invoked the full extent of Commerce Clause authority.³⁵⁷ Because (a)(2)’s jurisdictional element extends to activities that “affect” interstate commerce, it does invoke the full power of the Commerce Clause, and thus *Jones* would be of no help in drawing the line.

Jones was decided one week after *Morrison*. This would seem to suggest that the Court was sending out the message that its *Lopez-Morrison* “substantial effects” standard would apply only to facial challenges to federal laws, and not to determinations of jurisdictional elements. The Ninth Circuit apparently adopted this interpretation. It stated that it was “not prepared to say the teachings of *Morrison* apply to statutes . . . that do contain a precise statement of a jurisdictional element.”³⁵⁸ Other circuits have adopted this approach as well.³⁵⁹ These courts seem to conclude that two different tests should be used: a broad one when determining whether a jurisdictional element is satisfied, and a more narrow one when determining whether a Commerce Clause regulation is constitutional on its face.

The Sixth Circuit, however, seems to have shied away from this interpretation. In the *Wang* case, the court, when looking for a “substantial effect” under a jurisdictional nexus, gave regard to the *Lopez* Court’s admonition against piling “inference upon inference” in order to find an effect on commerce.³⁶⁰ On the other hand, the *Wang* court did make it clear that “the de minimis standard . . . survived *Lopez*.”³⁶¹ The Sixth Circuit even re-emphasized this point in *United States v. Carmichael*,³⁶² decided after

353. *United States v. Pappadopoulos*, 64 F.3d 522, 528 (9th Cir. 1995); *Cf. United States v. Denalli*, 73 F.3d 328, 330 (11th Cir. 1996) (also finding an insufficient link between a residential house and interstate commerce).

354. 178 F.3d 479 (7th Cir. 1999).

355. *Id.* at 480.

356. *Jones v. United States*, 120 S. Ct. 1904 (2000).

357. *Id.* at 1911.

358. *United States v. Jones*, 231 F.3d 508, 514-15 (9th Cir. 2000).

359. *See, e.g., United States v. Peterson*, 236 F.3d 848, 852 (7th Cir. 2001); *United States v. Malone*, 222 F.3d 1286, 1294-95 (10th Cir. 2000).

360. *United States v. Wang*, 222 F.3d 234, 239 (6th Cir. 2000).

361. *Id.* at 238.

362. 232 F.3d 510 (6th Cir. 2000).

Morrison, when it stated that “even a very minimal connection to interstate commerce is sufficient” to satisfy a jurisdictional element.³⁶³ A more recent Sixth Circuit case, however, seems to have departed from the *Carmichael* approach. In *United States v. Corp*,³⁶⁴ the court recognized that “*Morrison* and *Lopez* have required that the jurisdictional components of constitutional statutes are to be read as *meaningful restrictions*.”³⁶⁵ The defendant in *Corp* was charged with producing and possessing pornographic photographs of a minor in violation of federal law.³⁶⁶ The court concluded that the defendant’s use of photographic paper that was manufactured out-of-state was not enough to bring him under federal jurisdiction.³⁶⁷ Although the *Corp* court declined to find the child pornography statute facially unconstitutional, the court did find that the statute’s jurisdictional element was unconstitutionally broad when applied to the defendant.³⁶⁸ It is important to note that unlike the Supreme Court’s opinion in *Jones*, the Sixth Circuit in *Corp* did not frame its argument as a matter of statutory construction but rather found constitutional defects in the statute as written. While the *Corp* decision did not go so far as to eliminate the “de minimis” test altogether, the Sixth Circuit at least has given more regard to *Lopez* and *Morrison* than has its sister courts.

The Sixth Circuit has started down the correct path, but it has not gone far enough. Common sense dictates that the “de minimis” test be put to rest entirely. *Lopez* and *Morrison* have clearly shown that Congress must show more than a “de minimis” link to interstate commerce to support a statute on its face. It is only logical, then, that a party must also show more than a “de minimis” link in order to satisfy a jurisdictional element. To reason otherwise would lead to bizarre conclusions. For example, say that the VAWA did contain a jurisdictional element that required the plaintiff to show that a sexual assault “affected” interstate commerce. This would force the plaintiff to recycle the same arguments that Congress made in its findings: that the crime discouraged the plaintiff from traveling in interstate commerce, reduced her employment opportunities, increased her health expenditures, and reduced her consumer spending. This would seem to be enough to satisfy many circuits’ idea of a “de minimis” test, although it is clearly not enough to satisfy the “substantial effects” test under *Morrison*. Thus, failing to equate the two tests would allow an end-run around *Morrison*, by allowing plaintiffs (or prosecutors) to use the same attenuated links to interstate commerce that Congress is now prohibited to use.

363. *Id.* at 516.

364. 236 F.3d 325 (6th Cir. 2001).

365. *Id.* at 332 (emphasis added).

366. *Id.* at 326-27.

367. *Id.* at 326, 333.

368. *Id.* at 332-33.

Therefore, while it is possible that (a)(2) may be facially constitutional thanks to its jurisdictional element, a court, in order to be consistent with *Lopez* and *Morrison*, would have to require a prosecutor to show a stronger link to interstate commerce than what has traditionally been accepted. Stacking “inference upon inference” is no longer an option. Thus, proving the jurisdictional element of a hate crime would not be the mere formality the bill’s proponents expect it to be. Instead, it could be a significant hindrance and could render (a)(2) a criminal statute without teeth.

VI. CONCLUSION

It is apparent that the Local Law Enforcement Enhancement Act of 2001 will run into constitutional problems under the Commerce Clause and under the Fourteenth and Thirteenth Amendments. The *Morrison* decision shows that (a)(1) cannot be justified under the Commerce Clause due to its non-economic nature and lack of a jurisdictional element. Precedent could lead a court to uphold (a)(1) under the Thirteenth Amendment. However, it is unlikely that the Supreme Court would adopt such an interpretation. Furthermore, while (a)(2) may arguably be constitutional under the Commerce Clause, *Morrison* requires that prosecutors show a strong connection to interstate commerce rather than just a vague relation. Finally, *Morrison* shows that neither (a)(1) nor (a)(2) can be justified under the Fourteenth Amendment since neither addresses state actions.

Morrison further shows that the obvious trend in the Supreme Court is to limit federal power. Perhaps *Morrison*’s greatest significance is that it proved that *Lopez* was not an anomaly but rather was a shift in paradigm.³⁶⁹ Though it seems unlikely that this current trend will create a complete reversal of almost a century of Commerce Clause jurisprudence, the Court so far has been more than willing to extend its new Commerce Clause attack on recently adopted laws. Federal laws like drug laws have gained general acceptance, and upsetting them would cause a dramatic shake-up of a massive federal bureaucracy. Contrast this with the Gun-Free School Zones Act and the VAWA’s civil remedy provision, which the Court quickly killed before they could become part of the national culture. Therefore, absent a change in the population of the Supreme Court, an infant hate crime statute would not stand a chance.

Hate crimes are indeed a prevalent problem in the United States, and Senator Kennedy and civil rights activists should be commended for at least addressing the problem. Federalizing all hate crimes, however, is not the

369. See, e.g., *Norton v. Reno*, No. 4:00-CV-141, 2000 WL 1769580, at *5 (W.D. Mich. Nov. 24, 2000) (recognizing that “[i]n *Morrison*, the court made clear that its decision in *United States v. Lopez* . . . was not an isolated, confined case but rather one with potentially substantial impact on all Commerce Clause analyses”).

answer. The hate crime bill pending in the Senate would extend the long arm of federal jurisdiction into areas never before imagined. Its broad “threat of force” language could make a squabble between a husband and wife or a schoolyard fistfight matters for the FBI. The legislation would not only blur the line between state and federal jurisdiction; it would erase it entirely.

For more than two centuries, fighting local crime has been a matter for local authorities, officials who have a legitimate stake in whether perpetrators are brought to justice. Federal agents have no such motivation.³⁷⁰ This is why the Founding Fathers wisely chose to limit federal authority to specific enumerated powers. It is unfortunate that Congress, and often the courts, forget this fact.

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370. See also Baker, *supra* note 9, at 1215 (arguing that many federal crimes go unprosecuted due, in part, to the heavy backlog on federal court dockets).

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