
COMMENT

FEDERAL HATE CRIME LAWS AND *UNITED STATES v. LOPEZ*: ON A COLLISION COURSE TO CLARIFY JURISDICTIONAL-ELEMENT ANALYSIS

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INTRODUCTION

With the United States Supreme Court's decision in *United States v. Lopez*,¹ the Court began its long effort to reverse the sixty-year trend toward increasing federal dominion over traditionally local activities. Surprising to many at the time of its decision, *Lopez* signaled the modern Court's resistance to allowing Congress to exercise a general legislative power through the Commerce Clause, particularly in cases involving non-economic criminal activity.²

Lopez involved the Gun-Free School Zones Act of 1990 (GFSZA),³ which made it a federal crime to possess a firearm within one thousand feet of a school.⁴ The Court, in an opinion written by Chief Justice Rehnquist, held that Congress did not have the power to pass the law because it was not substantially related to interstate commerce.⁵ In so doing, the Court announced a new framework for deciding whether a particular statute is within Congress's authority under the Commerce Clause.⁶ Under this new framework, the Court will be extremely deferential to Congress in cases involving statutes that regulate some form of economic activity, but less so in evaluating regulations that involve non-economic activity.⁷ The Court found that the GFSZA involved non-economic activity, and struck down the law after determining that the regulated activity did not substantially affect interstate commerce.⁸

¹ 514 U.S. 549 (1995).

² See *infra* Part II.A.1.

³ Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844 (1990) (codified as amended in scattered sections of 18 U.S.C. (2006)).

⁴ See *id.*, 104 Stat. at 4845 (codified at 18 U.S.C. § 921(a)(25)(B)) (defining "school zone" as "within a distance of 1,000 feet from the grounds of a public, parochial or private school").

⁵ See *Lopez*, 514 U.S. at 567 (striking down the GFSZA because possession of a gun in a school zone could not be shown to substantially affect interstate commerce).

⁶ See *United States v. Morrison*, 529 U.S. 598, 609 (2000) (noting that *Lopez* "provides the proper framework" for analyzing a statute under the Commerce Clause).

⁷ See *infra* notes 93-95 and accompanying text.

⁸ *Morrison*, 529 U.S. at 610-11.

To an outside observer, neither the Court's holding nor its reasoning is very surprising. Merely possessing a gun in a school zone does not seem like an activity that would substantially affect interstate commerce, and it makes sense that the Court would be suspicious of Congress's attempts to criminalize this type of non-economic activity under its power to "regulate Commerce . . . among the several states."⁹ What made *Lopez* such a shocking turn of events, however, is the fact that it marked the first time since 1937 that the Supreme Court had struck down a federal statute on the grounds that it was beyond Congress's power under the Commerce Clause.¹⁰ Beginning with the Supreme Court's landmark decision in *NLRB v. Jones & Laughlin Steel Corp.*,¹¹ the Commerce Clause had been regarded as a general grant of legislative power, and, indeed, Congress had used it as such.¹² The shock of *Lopez* came not from its outcome, but from its stunning departure from established Commerce Clause precedent.

Rather than overrule the previous sixty years of Commerce Clause cases, *Lopez* reinterpreted many of the earlier cases to make them fit within its new framework. While *Lopez* was a surprising shift in Commerce Clause doctrine at the time of the Court's decision, two major subsequent cases, *United States v. Morrison*¹³ and *Gonzales v. Raich*,¹⁴ have reinforced the *Lopez* framework and continued the effort to pull back on what the Court has seen as the increasing federalization of control over traditionally local activities. Since 1995, federal courts have been more willing to strike down federal laws as exceeding Congress's power under the Commerce Clause, particularly those laws that have dealt with non-economic criminal activities.¹⁵

⁹ U.S. CONST. art. I, § 8.

¹⁰ Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 2 (2004) ("From 1937 until 1995, not one federal law was invalidated as exceeding the scope of Congress' Commerce Clause authority.")

¹¹ See 301 U.S. 1, 37 (1937) (upholding legislation that, in aggregate, has a "close and substantial relationship to interstate commerce").

¹² See THE HERITAGE FOUND., THE HERITAGE GUIDE TO THE CONSTITUTION 103-04 (Edwin Meese III et al. eds., 2005) (claiming that through its decisions between 1937 and 1995 the Court "turned the commerce power into the equivalent of a general regulatory power and undid the Framers' original structure of limited and delegated powers"); Chemerinsky, *supra* note 10, at 2 (observing that before *Lopez*, the commerce power was the most frequent source of authority for federal legislation under which countless criminal and civil laws were enacted).

¹³ 529 U.S. 598 (2000).

¹⁴ 545 U.S. 1 (2005).

¹⁵ See, e.g., *United States v. Maxwell*, 386 F.3d 1042 (11th Cir. 2004) (holding that 18 U.S.C. § 2252A, which prohibited knowing possession of child pornography, was

During this same time, some high-profile and gruesome murders caught national headlines and led many prominent politicians and civil rights leaders to join in a call for stronger federal laws against bias-motivated crimes of violence, or “hate crimes.”¹⁶ On June 7, 1998, James Byrd, Jr., an African-American man, accepted a ride home from three men who turned out to be white supremacists.¹⁷ Rather than driving him home, the three men took him to a secluded area where they beat him, chained him to the back of a pickup truck, and dragged him for three miles along a paved road.¹⁸ Medical examiners believed that Byrd lived through most of this until a collision with a drainage culvert ripped his head and torso from his body.¹⁹

Later that same year, on October 7, 1998, two men murdered Matthew Shepard, a homosexual college student, after they became enraged when Shepard made sexual advances toward them.²⁰ The two men kidnapped Shepard, beat him, tied him to a fence like a scarecrow, and left him to die.²¹ A biker found Shepard the next day, barely alive.²² After five days in a coma, Shepard died from his injuries.²³

unconstitutional as applied to a defendant whose intrastate possession of child pornography had too attenuated a connection to intrastate commerce), *vacated*, 546 U.S. 801 (2005), *rev'd*, 446 F.3d 1210 (11th Cir. 2006); *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003) (granting plaintiffs a preliminary injunction against enforcement of the Federal Controlled Substances Act), *rev'd*, *Gonzales v. Raich*, 545 U.S. 1 (2005); *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) (holding that the Commerce Clause does not provide Congress with the authority to enact a federal civil remedy for victims of gender-based violence), *aff'd*, *Morrison*, 529 U.S. 598. *But see* Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held A Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 371, 378-91 (describing the ways in which lower courts have applied *Lopez* and finding that, although some courts have been willing to strike down federal statutes based on that decision, most have tended to limit it to its facts).

¹⁶ See Cordula Meyer, *Liberty Bell Rally Seeks Protection for Gays Through Hate-Crime Laws*, PHILA. INQUIRER, Oct. 23, 1998, at B2 (describing the actions of individuals in Philadelphia to influence legislators to create hate crime laws that protect gays and lesbians in Pennsylvania); see also Dan Hasenstab, Comment, *Is Hate a Form of Commerce? The Questionable Constitutionality of Federal “Hate Crime” Legislation*, 45 ST. LOUIS U. L.J. 973, 973-74 (2001) (noting the connection between these high-profile murders and the push to enact federal hate crime legislation).

¹⁷ PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 238 (2005).

¹⁸ *Id.* at 238-39.

¹⁹ *Id.*

²⁰ Tom Kenworthy, *Gay College Student Who Was Beaten Dies*, CHI. SUN-TIMES, Oct. 13, 1998, at 20.

²¹ James Brooke, *Gay Man Beaten and Left for Dead; 2 Are Charged*, N.Y. TIMES, Oct. 10, 1998, at A9.

²² *Id.*

These two brutal murders set off a firestorm of national attention as political leaders such as President Clinton and Attorney General Janet Reno joined with civil rights leaders to call for national hate crime legislation.²⁴ In the months that followed, Senator Edward Kennedy responded by proposing the Hate Crimes Prevention Act of 1999,²⁵ which would have made it a federal offense to commit a crime of violence motivated by the victim's race, religion, gender, sexual orientation, or disability.²⁶ Although this bill never became law, it has been reintroduced in each Congress since that time.²⁷

Recently, the debate over hate crime legislation has again heated up, spurred in part by the events surrounding the "Jena 6" and the subsequent wave of noose hangings throughout the country. In August 2006, white students at Jena High School in Jena, Louisiana, hung two nooses from a tree in the school's courtyard—apparently as a signal to black students not to gather near the tree.²⁸ The students

²³ *Gay Student Dies; 2 Face Murder Charges*, PITTSBURGH POST-GAZETTE, Oct. 13, 1998, at A1.

²⁴ See Carla Crowder, *Clinton Saddened by Wyo. 'Hate' Assault: President Says Beating of Shepard Shows Need to Pass Hate-Crimes Bill*, ROCKY MOUNTAIN NEWS (Denver), Oct. 11, 1998 (discussing President Clinton's call for national hate crime legislation that would cover crimes motivated by sexual-orientation bias in response to Matthew Shepard's murder); *House Expresses Dismay at Murder of Gay Student in Wyoming*, WASH. POST, Oct. 16, 1998, at A24 (noting how Matthew Shepard's murder motivated Congress to consider laws that would broaden hate crime punishments and make it easier for federal law enforcement to prosecute such crimes); Charles A. Radin, *Kennedy Vows Push for New Rights Laws*, BOSTON GLOBE, Nov. 14, 1998, at B2 (citing Senator Kennedy's opinion that the murders of Byrd and Shepard made federal hate crime laws particularly necessary); *Reno Urges Matthew Shepard Law*, ST. PAUL PIONEER PRESS, Oct. 19, 1998, at 2A ("Attorney General Janet Reno urged Congress to expand federal hate crime laws to include offenses based on sexual orientation, saying that the brutal slaying of gay Wyoming student Matthew Shepard shows that the government must take a stronger stand.").

²⁵ S. 622, 106th Cong. (1999).

²⁶ *Id.* § 4.

²⁷ See *infra* notes 54-62 and accompanying text.

²⁸ Mary Mitchell, *Did Civil Rights Movement Pass Louisiana By? Racist Incident Leads to Harsh Justice for Black Students*, CHI. SUN-TIMES, Aug. 30, 2007, at 12. The true story of what happened in Jena seems to be controversial. Craig Franklin, a local reporter in Jena whose wife taught for many years at Jena High School, claims that the commonly accepted story is largely a creation of the media. Among other disputes with the commonly accepted facts, Franklin claims that the nooses were not hung as a message to black students not to sit under the tree, but rather as a prank aimed at fellow white students who were members of the school's rodeo team. According to Franklin, the students who hung the nooses had no idea about the nooses' racial connotations and expressed sincere remorse when told. See Craig Franklin, *Media Myths About the Jena 6*, CHRISTIAN SCI. MONITOR, Oct. 24, 2007, at 9. Whatever the true version of these

responsible for the nooses were lightly punished by the school and were not charged with a crime because their conduct violated no state law.²⁹ Racial tensions began to build in the town after residents found the nooses, eventually leading to an incident in which six black students beat a white student unconscious. Police arrested the six students responsible for the beating, and initially charged them with attempted second-degree murder.³⁰ Spun as a racially motivated double standard, the story began to attract national attention. On September 20, 2007, more than ten thousand protesters gathered in Jena in what has been called one of the largest civil rights protests since the Civil Rights Era of the 1960s.³¹

After the Jena incident, nooses began to appear in public places around the country,³² leading civil rights leaders to call for—and many states to consider—statutes that would outlaw the hanging of nooses.³³ Spurred by these incidents, several thousand protesters gathered out-

events may have been, it is undeniable that the popularly reported version of events sparked a renewed interest in hate crime legislation.

²⁹ Mitchell, *supra* note 28. While it was commonly reported that the white students who hung the nooses received only a three-day suspension, Franklin contends that in fact their punishment involved nine days at an alternative facility, two weeks of in-school suspension, Saturday detentions, attendance at Discipline Court, and evaluation by mental health professionals. Franklin, *supra* note 28.

³⁰ Mitchell, *supra* note 28.

³¹ Theo Milonopoulos, *Sharpton Leads Call for Federal Investigation of Hate Crimes*, L.A. TIMES, Nov. 17, 2007, at A12; *see also* Susan Roesga et al., *Thousands 'March for Justice' in Jena, Court Orders Hearing on Teen*, CNN.COM, Sept. 20, 2007, <http://www.cnn.com/2007/US/law/09/20/jena.six/index.html> (last visited Nov. 15, 2008) (describing the protest and noting the involvement of people from across the country).

³² *See* Mark Potok et al., Op-Ed., *The Geography of Hate*, N.Y. TIMES, Nov. 25, 2007, at 11 (“In the past decade or so, only about a dozen noose incidents a year came to the attention of civil rights groups. But since the huge Sept. 20 rally in Jena, La., where tens of thousands protested what they saw as racism in the prosecution of six black youths known as the ‘Jena 6,’ this country has seen a rash of as many as 50 to 60 noose incidents.”); Jake Wagman, *Noose’s Revival is Raising the Issue of Intent*, ST. LOUIS POST-DISPATCH, Jan. 18, 2008, at A1 (“The Southern Poverty Law Center, which tracks hate crimes nationwide, finds fewer than a dozen noose reports in a typical year. But in the last four months, the center says, there have been between 60 and 70, including incidents at a Home Depot in New Jersey, a factory in Houston and at Columbia University in New York, where a noose was found hanging on the door of an African-American professor’s office.”).

³³ *See* Jaime Malarkey, *Lawmakers: Include Nooses as Hate-Crime Symbols*, EXAMINER (Balt.), Jan. 17, 2008, *available at* http://www.examiner.com/printa-1163272~Lawmakers:Include_nooses_as_hate_crime_symbols.html (last visited Nov. 15, 2008) (discussing two bills debated in a Maryland House of Delegates committee meeting that would make the hanging of nooses a hate crime); Wagman, *supra* note 32 (noting that Missouri and other states are considering legislation criminalizing nooses in response to the Jena incident).

side the Department of Justice in Washington, D.C., on November 16, 2007, to demand a stronger federal response to bias-motivated crimes.³⁴ Although current federal hate crime proposals³⁵ would only affect crimes committed because of bias that “caus[e] bodily injury,”³⁶ the renewed attention that the Jena incident has brought to these proposals has lent strength to the push for their enactment.

In 2007, federal legislators rode this momentum to the near-passage of the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007 (“Matthew Shepard Act” or “the bill”).³⁷ The Matthew Shepard Act would have expanded the classes protected by existing civil rights laws and made it easier to exercise federal jurisdiction over bias-motivated violent crimes by relying on the Commerce Clause as the source of congressional authority. Despite generating wide support in both houses of Congress, the Matthew Shepard Act ultimately failed to become law when President George W. Bush promised to veto it if it came before him. Calling the bill “unnecessary and constitutionally questionable,” the Bush Administration noted that Congress could only federalize this area of criminal law if it did so in implementation of a power granted to it, such as the power

³⁴ Milonopoulos, *supra* note 31.

³⁵ Among these proposals is the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. (2007), which is the statute that is the primary subject of this Comment.

³⁶ In fact, it is likely that if the Matthew Shepard Act were law, the six black students in the Jena case would face federal prosecution, but the white students would not, because the bill only criminalizes bias-motivated crimes “causing bodily injury.” S. 1105 § 7(a)(2)(A). This highlights a problem with lumping all bias-motivated crimes together as hate crimes. The drafters of the Matthew Shepard Act, facing criticism that the bill could implicate serious free speech concerns, specifically inserted language denying that any form of speech can amount to a crime under the bill. *See id.* § 7(d) (refusing to allow evidence of expression or associations of the defendant as substantive evidence unless it is used to establish bias relating to the defendant’s conduct); HUMAN RIGHTS CAMPAIGN, QUESTIONS AND ANSWERS: THE LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT 2 (2007), available at <http://www.matthewshepard.org/site/DocServer/HRC-LLEHCPA-FAQ1-17-07.pdf?docID=463> (asserting that the evidentiary rule of § 7(d) addresses concerns that the Matthew Shepard Act could be used to prosecute speech). The House version of the bill also contains a rule of construction that would prevent interpretations of the statute in any way that would “prohibit any expressive conduct protected from legal prohibition by, or any activities protected by the free speech or free exercise clauses of, the First Amendment to the Constitution.” Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 8. While the attention the Jena 6 case has brought to hate crimes has undoubtedly helped in the campaign to turn the Matthew Shepard Act into law, had it been law at the time of the Jena incident, the bill may have actually served to exacerbate the situation.

³⁷ S. 1105; *see also* H.R. 1592.

to regulate interstate commerce.³⁸ Without elaborating, the Administration indicated that the bill did not appear to be properly within Congress's authority under the Commerce Clause or any other granted power.³⁹

In response, a number of supporters of the Matthew Shepard Act have argued for the bill's constitutionality. In so doing, they have claimed that because the bill contains a jurisdictional element⁴⁰ it will survive analysis under the *Lopez* framework and will therefore be a valid exercise of Congress's power under the Commerce Clause.⁴¹ While the Supreme Court has made clear that the presence of a jurisdictional element that ensures that federal authorities can only prosecute cases having a substantial effect on interstate commerce would support the bill's constitutionality, none of the arguments in favor of the bill has provided a detailed analysis of its constitutionality under *Lopez*.⁴² Rather than analyzing the bill's jurisdictional element to de-

³⁸ OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 1592—LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT OF 2007 (2007), available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1592sap-h.pdf>.

³⁹ *Id.*

⁴⁰ A jurisdictional element is "a fact included in a statute that must be pled and proven by the plaintiff in each case, serving as a nexus between a particular piece of legislation and Congress's constitutional power to enact that legislation and to regulate the conduct at issue." Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 679 (2005). Jurisdictional elements in statutes enacted under the Commerce Clause therefore seek to limit the application of the statute to those cases that have a nexus to interstate commerce. See Tara M. Stuckey, Note, *Jurisdictional Hooks in the Wake of Raich: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101, 2105-06 (2006) ("In a Commerce Clause context, the jurisdictional hook requires that the regulated activity or object have a nexus to interstate commerce."). In the context of a federal criminal law, such as the Matthew Shepard Act, the jurisdictional element must be proven beyond a reasonable doubt before the federal government can claim to have jurisdiction over the defendant. *Id.*

⁴¹ See, e.g., CHARLES DOYLE, CONG. RESEARCH SERV., HATE CRIMES: SKETCH OF SELECTED PROPOSALS AND CONGRESSIONAL AUTHORITY 4 (2002), available at <http://www.firstamendmentcenter.org/CRS.hate1.pdf> (indicating optimism for the prospects of Court approval of an earlier version of the Matthew Shepard Act because it contained the jurisdictional element present in current versions); Anthony E. Varona & Kevin Layton, *Anchoring Justice: The Constitutionality of the Local Law Enforcement Enhancement Act in United States v. Morrison's Shifting Seas*, 12 STAN. L. & POL'Y REV. 9, 14 (2001) ("[The Local Law Enforcement Enhancement Act's] multiple jurisdictional elements ensure that the legislation allows Congress to address the national problem of hate-motivated crimes while still fitting into the Court's Commerce Clause jurisprudence, as well as the Court's increasingly conservative view of congressional authority.").

⁴² Generally, the debate surrounding the Matthew Shepard Act is limited to a claim by opponents that *Morrison* prevents Congress from criminalizing violent crime that does not cross state lines, and a response by supporters that the bill is constitu-

termine if it sufficiently limits the range of federal jurisdiction to ensure that each crime substantially affects interstate commerce, these commentators generally mention in passing that the bill would be constitutional simply because it contains a jurisdictional element.⁴³

This is not surprising, given that there is currently no Supreme Court case directly addressing the issues of whether the mere presence of a jurisdictional element will enable a statute to survive scrutiny under the Commerce Clause, and, if not, how limiting the element must be in order for the statute to survive. In fact, a comprehensive treatment of jurisdictional elements is the only piece of *Lopez*'s framework that the Supreme Court has not yet addressed. *Lopez* identified three factors to consider when determining whether a congressional statute regulating non-economic activity that is said to substantially affect interstate commerce is a valid exercise of Congress's power under the Commerce Clause: (1) whether the statute contains a jurisdictional element that would limit the class of cases to those substantially affecting interstate commerce; (2) whether the statute contains any findings showing the regulated activity's connection to interstate commerce; and (3) whether the regulated activity is a necessary piece of a larger regulation of economic activity.⁴⁴ Building on the foundation of *Lopez*, the Court addressed the sufficiency of congressional findings in *Morrison* and the effect of a greater regulation of economic activity in *Raich*. To this point, the Court has not taken the opportunity to address the characteristics of a valid jurisdictional element.

The Supreme Court may soon be presented with such an opportunity in the form of the Matthew Shepard Act. With the increasing attention drawn by hate crimes nationally, and the success of recent votes on proposed hate crime legislation, passage of a federal hate crime law within the next few years seems probable, particularly in light of the recent election of Barack Obama as President of the

tional because, unlike the Violence Against Women Act (VAWA) of *Morrison*, the Matthew Shepard Act contains a jurisdictional element. For a good example of this debate, see *Markup of H.R. 1592 Before the H. Comm. on the Judiciary*, 110th Cong. 57, 185-86 (2007).

⁴³ See, e.g., DOYLE, *supra* note 41 (predicting that the bill will survive a Commerce Clause challenge because its jurisdictional element precludes conviction unless the activity has the requisite nexus to interstate commerce); Varona & Layton, *supra* note 41, at 12-14 (asserting that the jurisdictional element and the case-by-case analysis it demands will "ensure" that the legislation falls within the commerce power).

⁴⁴ See *United States v. Morrison*, 529 U.S. 598, 610-13 (2000) (explaining the factors that the Court considered in its *Lopez* decision).

United States.⁴⁵ If this new federal criminal law passes, it will be on a direct collision course with the federalism principles announced in *Lopez*. Ultimately the United States Supreme Court must resolve this tension, and the constitutionality of the law that reaches the Court will turn on the effectiveness of its jurisdictional element. What is needed now is what no one has yet provided: a detailed analysis of the Matthew Shepard Act's jurisdictional element.

This Comment provides such an analysis of the Matthew Shepard Act and closely examines its jurisdictional element to determine whether, if passed, the bill would withstand a constitutional challenge under the Commerce Clause using *Lopez*'s framework. Part I offers a brief history of hate crime legislation and describes the relevant provisions of the Matthew Shepard Act. Part II details modern Commerce Clause doctrine as reflected in *Lopez* and the two major decisions since: *United States v. Morrison* and *Gonzales v. Raich*. Part III analyzes the Matthew Shepard Act under the *Lopez* framework and concludes that if the bill is to be a valid exercise of Congress's power under the Commerce Clause, it must be because the bill's jurisdictional element effectively limits the class of cases covered to those that substantially affect interstate commerce. Part IV engages in a detailed analysis of that jurisdictional element, determining that the element is too broad to allow the bill to withstand constitutional challenge. Part V argues that Congress should abandon its attempt to federalize hate crime laws because a version of the Matthew Shepard Act amended to ensure its constitutionality would add very little to the protections already available under state law. The Comment concludes by predicting that if Congress passes the current version of the bill, the effect of

⁴⁵ President-elect Obama has repeatedly expressed his support for the Matthew Shepard Act. See Barack Obama and Joe Biden: The Change We Need, Civil Rights, http://origin.barackobama.com/issues/civil_rights/ (last visited Nov. 15, 2008) ("Obama and Biden will strengthen federal hate crimes legislation, expand hate crimes protection by passing the Matthew Shepard Act, and reinvigorate enforcement at the Department of Justice's Criminal Section."); Open Letter from Barack Obama, United States Senator and Candidate for President of the United States, to the LGBT Community (Feb. 28, 2008), available at http://obama.3cdn.net/36ddd2f5daac41cb21_rym6bxaax.pdf ("[A]s President, I will place the weight of my administration behind the enactment of the Matthew Shepard Act to outlaw hate crimes . . ."). In fact, in 2007, while he was in the United States Senate, President-elect Obama voted to pass the Matthew Shepard Act. See 153 CONG. REC. S12,205 (daily ed. Sept. 27, 2007). As of now, the only thing preventing the Matthew Shepard Act from becoming law is President Bush's threatened veto, so, if President-elect Obama continues to support federal hate crime legislation and removes that veto threat, a new federal hate crimes law should soon follow.

its collision with *Lopez* will be a landmark case that rounds out the Court's modern Commerce Clause doctrine by clarifying the effect of jurisdictional elements in federal statutes.

I. FEDERAL HATE CRIME LEGISLATION IN THE UNITED STATES

The Civil Rights Act of 1968 created the existing federal criminal laws regulating bias crimes.⁴⁶ To maintain a prosecution under the current law, the government must prove two elements: First, the defendant must have committed the crime because of the victim's race, religion, national origin, or color.⁴⁷ Second, the defendant must have intended to prevent the victim from exercising a federally protected right such as voting or attending a public school.⁴⁸ Although this law provides for some federal involvement in the prosecution of hate crimes, the federally-protected-activity requirement seriously limits this potential.⁴⁹ For instance, the murder of neither James Byrd, Jr., nor Matthew Shepard could be prosecuted under federal law because neither victim was engaged in a federally protected activity.⁵⁰ The Matthew Shepard Act would expand the protected classes to include gender, gender identity, sexual orientation, and disability,⁵¹ and would eliminate the federally-protected-activity requirement.⁵²

⁴⁶ See 18 U.S.C. § 245(b)(2) (2006) (making it unlawful to injure, intimidate, or interfere with any person because he is engaging in a federally protected activity because of his "race, color, religion, or national origin").

⁴⁷ *Id.*

⁴⁸ The activities protected include (1) attending a public school, (2) receiving a benefit or using a facility administered by a State, (3) applying for employment, (4) serving as a juror, (5) using a common carrier for transportation, and (6) staying at a hotel or eating at a restaurant. *Id.*

⁴⁹ See Varona & Layton, *supra* note 41, at 10 (highlighting the substantial barrier to successful prosecution that is erected by the requirement that the perpetrator "must have *intended* to prevent the victim from exercising a federally protected right" (emphasis added)).

⁵⁰ Although federal charges could not be brought, both sets of defendants were convicted under state law for the murders. John King and Lawrence Brewer were both sentenced to death, and Shawn Berry was sentenced to life in prison, for the murder of James Byrd, Jr. In addition, Russell Henderson and Aaron McKinney were both given consecutive life sentences for the murder of Matthew Shepard. See *infra* note 82.

⁵¹ S. 1105, 110th Cong. § 7(a)(2)(4) (2007).

⁵² Compare *id.* § 7 with 18 U.S.C. § 245.

A. History of the Matthew Shepard Act

The Matthew Shepard Act is the most recent in a long line of proposals attempting to expand federal jurisdiction over bias-motivated crimes. In the 1990s, many of these proposals involved the collecting and reporting of hate crime statistics.⁵³ The first bill attempting to expand the classes covered by existing federal bias-crime statutes and remove the federally-protected-activity requirement was the Hate Crimes Prevention Act of 1997,⁵⁴ introduced by Senator Edward Kennedy in the 105th Congress.⁵⁵ Since that time, Senator Kennedy has introduced a bill in each Congress that is substantially similar to the Matthew Shepard Act and that would create federal jurisdiction over bias-motivated crimes.⁵⁶

As noted above, the highly publicized murders of James Byrd, Jr., and Matthew Shepard in 1998 generated considerable momentum for federal hate crime legislation. The bill came close to passing in the wake of the publicity generated by these crimes when the Senate approved it as an amendment to the 2001 defense appropriations bill.⁵⁷ The House version of the defense bill, however, did not contain the amendment, and eventually the House version prevailed in committee. After this near victory, federal hate crime legislation, although introduced by Senator Kennedy in each Congress, did not again come close to passing into law until 2007.

⁵³ Congress has sought to increase the awareness of bias-motivated crime since 1990. In that year, the Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 note (2006)), was passed, which requires the Attorney General to collect and publish data on crimes committed because of the victim's race, religion, disability, sexual orientation, or ethnicity. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994) (codified at 28 U.S.C. § 994 note), requiring the United States Sentencing Commission to increase the penalty for defendants who selected their victims based on the victim's race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation. In 1998, Congress passed the Campus Hate Crimes Right to Know Act, Pub. L. No. 105-244, § 486, 112 Stat. 1581, 1743 (1998) (codified at 20 U.S.C. § 1092(f)(1)(F)(ii) (2006)), requiring campus security officers to collect and report data on crimes committed based on the victim's race, gender, religion, sexual orientation, ethnicity, or disability.

⁵⁴ S. 1529, 105th Cong. (1997); *see also* H.R. 3081, 105th Cong. (1997).

⁵⁵ It was this bill that President Clinton urged Congress to pass the next year following the murders of James Byrd, Jr., and Matthew Shepard. *See* Crowder, *supra* note 24.

⁵⁶ HUMAN RIGHTS CAMPAIGN, QUESTIONS AND ANSWERS: THE LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT 1 (2007), *available at* <http://www.matthewshepard.org/site/DocServer/HRC-LLEHCPA-FAQ1-1707.pdf?docID=463>.

⁵⁷ S. 2550, 106th Cong. tit. XV (2000).

In 2007, with the election of a Democratic majority in Congress and the publicity generated by the Jena incident, federal hate crime legislation again came to national attention. On May 3, 2007, the House passed its own version of the Matthew Shepard Act—the Local Law Enforcement Hate Crimes Prevention Act of 2007.⁵⁸ On the same day, President Bush responded by threatening to veto the bill if it came to him, claiming that the bill was “unnecessary and constitutionally questionable.”⁵⁹ Fearing a presidential veto, the Senate approved the bill as an amendment to the National Defense Authorization Act for Fiscal Year 2008⁶⁰ on September 27, 2007.⁶¹ After being sent to committee for reconciliation of the House and Senate versions of the defense bill, the Matthew Shepard Act amendment was removed because of a sense that together the two controversial bills could not generate the necessary support.⁶² House Speaker Nancy Pelosi has said that she still is committed to passing a federal hate crime prohibition,⁶³ so the issue is likely to reappear in the near future. Given the results of the 2008 presidential and congressional elections, a federal hate crime statute could soon become a reality.

⁵⁸ H.R. 1592, 110th Cong. (2007).

⁵⁹ STATEMENT OF ADMINISTRATION POLICY, *supra* note 38.

⁶⁰ H.R. 1585, 110th Cong. (2007).

⁶¹ See 120 CONG. REC. S12071 (daily ed. Sept. 23, 2007). Although the bill could have passed the Senate on its own, the bill’s supporters thought that it would be more difficult for the President to veto the defense authorization bill, particularly because it contained politically popular pay increases for soldiers. See S.A. Miller, *Gay Protection Tacked onto Defense Bill; Bush’s Veto Would Be First in U.S. History*, WASH. TIMES, Sept. 28, 2007, at A1. If the bill had been passed and vetoed, it is unlikely that the bill’s supporters could have gathered enough votes to override the veto. See Rick Klein, *Gay-Rights Proposals Gain in Congress: Measures Would Add Protections*, BOSTON GLOBE, Apr. 25, 2007, at A1 (“Democratic leaders say that while they have enough votes to approve [hate crime legislation], they probably could not override a presidential veto.”).

⁶² See Editorial, *Caving in on Hate Crimes*, N.Y. TIMES, Dec. 10, 2007, at A22 (claiming that a majority supporting the combined bills could not be reached because “some liberals did not want to vote for the defense bill and some conservatives did not want to vote for the hate crimes bill”).

⁶³ See Press Release, House Speaker Nancy Pelosi, Pelosi Statement on Hate Crimes Legislation (Dec. 6, 2007), <http://speaker.gov/newsroom/pressreleases?id=0432> (last visited Nov. 15, 2008) (stating that Pelosi is “strongly committed to sending the hate crimes legislation, passed by the House [in 2007], to the President for his signature” and that “House Democratic leaders will work with [their] Senate colleagues to make certain that a hate crime bill passes the Senate and goes to the President’s desk”).

B. Structure of the Matthew Shepard Act

The Matthew Shepard Act is broken into two sections. Section 7(a)(1) includes the same classes as the Civil Rights Act (race, religion, and national origin), but does away with the federally-protected-activity requirement.⁶⁴ In removing this requirement, the bill cites the Thirteenth Amendment as the source of congressional authority over crimes motivated by bias against these classes.⁶⁵ The claim is that because the Supreme Court has interpreted the Thirteenth Amendment to authorize Congress to “[abolish] all the badges and incidents of slavery” even by restraining private actors, Congress may therefore use this authority to prohibit bias-motivated crimes based on race, religion, and national origin.⁶⁶ Some commentators have presented arguments suggesting problems with relying on the Thirteenth Amendment to authorize a federal hate crime law,⁶⁷ but the inquiry here is more concerned with the second section of the bill, which contains the jurisdictional element.

Along with removing the federally-protected-activity requirement, section 7(a)(2) adds gender identity, sexual orientation, and disability to the list of protected classes. Because these classifications never were a means for promoting slavery, the protection of these classes

⁶⁴ S. 1105, 110th Cong. § 7(a)(1) (2007).

⁶⁵ *Id.* § 2(7)–(8). The Supreme Court has held that the Thirteenth Amendment authorizes Congress to enact laws to eliminate the “badges and incidents of slavery,” even by restraining private actors. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968) (holding that the Thirteenth Amendment empowers the federal government to prohibit racially biased actions of private parties); *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (“[T]he power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . .”). As the argument goes, because slavery was racially based, the Thirteenth Amendment authorizes laws designed to remedy racial discrimination. In addition, because nationality and religion were often used as a proxy for race, one may argue that the Thirteenth Amendment can be used to prevent discrimination based on these classifications as well. See Hasenstab, *supra* note 16, at 1009–10 (discussing arguments for and against the use of the Thirteenth Amendment to support a federal hate crime law).

⁶⁶ *Jones*, 392 U.S. at 439–40.

⁶⁷ See, e.g., John S. Baker, Jr., *United States v. Morrison and Other Arguments Against Federal “Hate Crime” Legislation*, 80 B.U. L. REV. 1191, 1220–21 (2000) (arguing both that even if a hate crime law could be supported by the Thirteenth Amendment, it would still be constitutionally problematic under the Due Process Clause of the Fifth Amendment, and that the Supreme Court would avoid approving a bill that puts two constitutional amendments in conflict); Hasenstab, *supra* note 16, at 1009–10 (observing that the doctrine surrounding the Thirteenth Amendment is not well developed and noting the differences between race and religion as well as civil and criminal statutes).

cannot be based on “removing the badges and incidents of slavery,” and the Thirteenth Amendment cannot be used as the source of federal power to enact the bill. Because the Thirteenth Amendment cannot support the bill, its drafters have sought to legislate under the Commerce Clause as a way to eliminate the federally-protected-activity requirement.

To support the bill’s constitutionality under the Commerce Clause, its authors included findings attempting to show how bias-motivated crimes affect interstate commerce. The bill states the following:

Such violence substantially affects interstate commerce in many ways, including the following:

(A) The movement of members of targeted groups is impeded, and members of such groups are forced to move across State lines to escape the incidence and risk of such violence.

(B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity.

(C) Perpetrators cross State lines to commit such violence.

(D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence.

(E) Such violence is committed using articles that have traveled in interstate commerce.⁶⁸

In addition to findings that support the connection between bias-motivated crimes and interstate commerce, the bill also includes a jurisdictional element, which attempts to ensure that only situations where the crime substantially affects interstate commerce trigger federal jurisdiction. The bill’s jurisdictional element contains multiple prongs through which federal prosecutors can establish the necessary connection to interstate commerce. First, the text of the bill triggers federal jurisdiction when the victim or defendant commits the crime after traveling across state lines.⁶⁹ Second, jurisdiction is triggered whenever the defendant uses a “channel, facility, or instrumentality of interstate or foreign commerce” in connection with the crime.⁷⁰ Third, federal prosecutors may establish jurisdiction by proving that any weapon used by the defendant passed through interstate com-

⁶⁸ S. 1105 § 2(6).

⁶⁹ *Id.* § 7(a) (proposing to amend 18 U.S.C. § 249(a)(2)(B)(i)).

⁷⁰ *Id.* (proposing to amend 18 U.S.C. § 249(a)(2)(B)(ii)).

merce at some point.⁷¹ Next, federal jurisdiction will be appropriate when prosecutors can establish that a bias-motivated crime of violence interferes with economic activity in which the victim is engaged at the time of the offense.⁷² Finally, federal jurisdiction will be appropriate if the prosecutors can somehow establish that the crime “otherwise affects interstate . . . commerce.”⁷³

C. *Debate Surrounding the Matthew Shepard Act*

The Matthew Shepard Act has drawn criticism from an exceptionally wide range of sources. Even the basic question of whether hate crimes should be subject to enhanced penalties is extremely controversial and generates significant debate in state legislatures across the country.⁷⁴ The Matthew Shepard Act, however, is more controversial than standard state hate crime statutes for two reasons. First, because the Matthew Shepard Act would add sexual orientation and gender

⁷¹ *Id.* (proposing to amend 18 U.S.C. § 249(a)(2)(B)(iii)).

⁷² *Id.* (proposing to amend 18 U.S.C. § 249(a)(2)(B)(iv)(I)).

⁷³ *Id.* (proposing to amend 18 U.S.C. § 249(a)(2)(B)(iv)(II)). This language signifies Congress’s intent to exercise the full authority of the Commerce Clause. *See, e.g., Jones v. United States*, 529 U.S. 848, 854 (2000) (holding that the language “any activity affecting . . . commerce” demonstrates Congress’s intent to invoke its full authority under the Commerce Clause); *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (establishing that the words “affecting commerce” indicate Congress’s intention to exercise jurisdiction to the full limits of the Commerce Clause).

⁷⁴ *See* James B. Jacobs & Kimberly Potter, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 29, 29-44 (1998), *as reprinted in* ROBINSON, *supra* note 17, at 839-48 (describing the differences that exist among the states regarding the punishment of bias-motivated crimes). Supporters of heavier punishments for bias-motivated crimes claim that these crimes are more harmful to both the individual and society than an equivalent crime that is not motivated by bias. In fact, in upholding a state’s imposition of extra punishments for crimes motivated by bias, the Supreme Court identified three ways in which these crimes create greater harms than their non-bias-motivated counterparts: “[B]ias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.” *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993). Opponents of enhanced punishments for hate crimes note the imprecision in any measure of a defendant’s motivation for committing a crime and argue that in any given case it is extremely difficult to identify exactly what a defendant’s motivation may have been. *See Baker, supra* note 67, at 1209-11. Conditioning a defendant’s sentence on a factual question that is extremely difficult to conclusively determine contravenes the legality principle, which requires criminal laws to be both clear and determinate. *See id.* at 1213-14. In addition, opponents argue that it is the underlying offense that causes harm to the victim, not the mental state of the perpetrator. *See id.* at 1215 (“The concept of ‘hate’ as harm, however, actually has little, if anything, to do with the harm to particular victims.”). To condition punishment on the beliefs of the perpetrator may lead to different punishment for the same harmful conduct. *See id.* at 1211-12.

identity to the existing federal bias-crime laws as protected classes, many see this bill as an effort to give special protections to those classes.⁷⁵ Second, because the bill would eliminate the federally-protected-activity requirement and create federal jurisdiction over a much broader area of criminal conduct traditionally left to the states, many opponents see it as an intrusion into the residual state sovereignty guaranteed by the federal system established by the Constitution.⁷⁶

Noting that the protection of citizens through the police power is one of the core areas of traditional state concern,⁷⁷ those who object to the bill on federalism grounds make a number of arguments against federal hate crime laws. First, some have argued that federal criminal law introduces complexities into the administration of justice that otherwise do not exist under state law and therefore makes the criminal justice system less effective.⁷⁸ For example, because of the constitutionally mandated jurisdictional elements present in most federal criminal statutes, a prosecution under federal law is often much more complex than the same prosecution at the state level. In addition, fair prosecution is more difficult because federal officials are often far removed from local conditions, which may be particularly relevant in the context of a hate crime case because societal perceptions play such a key role in evaluating the existence of bias motivation. This complexity increases the costs of the prosecution and often makes it more difficult to convict a defendant of a federal offense.

In addition to the complexities introduced by a federal prosecution, many opponents of federal hate crime legislation assert that fed-

⁷⁵ See, e.g., Peter Sprigg, Op-Ed., *Reject the 'Hate Crimes' Bill; The Mythology Behind Matthew Shepard*, WASH. TIMES, Aug. 10, 2007, at A19 (drawing a parallel between the murder of Matthew Shepard and that of Cindy Dixon, the mother of one of Shepard's killers, and arguing that the Matthew Shepard Act would entitle Shepard to greater protection under federal law than it would Dixon).

⁷⁶ Cf., e.g., Baker, *supra* note 67, at 1215-21 (arguing that any federal hate crime statute passed by Congress will most likely face significant challenges in light of the Supreme Court's decision in *Morrison*).

⁷⁷ Cf. *United States v. Morrison*, 529 U.S. 598, 617-19 (2000) ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. . . . Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

⁷⁸ See, e.g., Baker, *supra* note 67, at 1194-99 (arguing that state prosecutions are preferable to federal prosecutions because of the increased complexity involved with federal cases).

eral prosecution is unnecessary because most states have laws that adequately cover the underlying offense and provide enhanced penalties for bias motivation.⁷⁹ In fact, the Statement of Administration Policy issued by the executive branch after passage of the House version of the Matthew Shepard Act in 2007 expresses the President's position that the Matthew Shepard Act is "unnecessary."⁸⁰ In so doing, the statement argues that

[t]here has been no persuasive demonstration of any need to federalize such a potentially large range of violent crime enforcement, and doing so is inconsistent with the proper allocation of criminal enforcement responsibilities between the different levels of government. In addition, almost every State in the country can actively prosecute hate crimes under the State's own hate crimes law.⁸¹

Importantly, despite the push to enact federal hate crime laws that grew out of the murders of Matthew Shepard and James Byrd, Jr., all of the defendants in these two cases were convicted in state court and sentenced to either life in prison or death without the assistance of a federal law.⁸²

Finally, many argue that congressional support for federal hate crime laws comes more from a desire by members to express disgust for bigoted attitudes than from any perceived problem in state criminal justice systems.⁸³ In making this argument, commentators note that many of the federal criminal laws passed in recent years have

⁷⁹ See, e.g., OFFICE OF MGMT. & BUDGET, *supra* note 38.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Russell Henderson and Aaron McKinney both pled guilty to kidnapping and murder charges and received two consecutive life sentences for the murder of Matthew Shepard. Tiffany Edwards, *Gay Man's Murderer Sentenced to Life*, TORONTO STAR, Nov. 5, 1999, at A24; *Man Gets 2 Life Terms in Gay Student's Death; Defendant Pleaded Guilty in Wyoming Case*, HOUSTON CHRON., Apr. 6, 1999, at A2. In giving him that sentence, the state judge told Henderson that he "deserv[ed] the fullest punishment [the] court can mete out." *Id.* John William King and Lawrence Russell Brewer both received death sentences for the murder of James Byrd, Jr. Lee Hancock, *Racist to Die For Killing; Victim's Kin Hail Sentence*, DALLAS MORNING NEWS, Feb. 26, 1999, at 1A. Shawn Allen Berry was given a life sentence for his part in the Byrd murder. Patty Reinert & Richard Stewart, *3rd Defendant Gets Life Sentence in Jasper Man's Dragging Death*, HOUSTON CHRON., Nov. 19, 1999, at 1A. The families and communities of the victims indicated that they were satisfied with the punishments in both of these cases. See Edwards, *supra* (quoting Matthew Shepard's father as praising the jury for its guilty verdicts in Aaron McKinney's case); Charisse Jones, *Sentence Sits Well With Texas Town*, USA TODAY, Feb. 26, 1999, at 3A (reporting that after learning of King's death sentence, "no one [in Jasper, Texas] disagreed that justice had been done").

⁸³ See Baker, *supra* note 67, at 1214.

gone largely unprosecuted.⁸⁴ In fact, because criminal prosecutions under the Federal Violence Against Women Act (VAWA)⁸⁵ were so rare, the case in which the Supreme Court ultimately declared the law unconstitutional came in the context of a civil action for damages.⁸⁶ Prosecutions under the Matthew Shepard Act will likely be similarly rare, leading some opponents to conclude that Congress is more concerned with winning the favor of voters or sending a symbolic message than with remedying a problem of state prosecutions.⁸⁷ Regardless of its source, the bipartisan support that the Matthew Shepard Act has received in Congress indicates that federal legislators will most likely pass the bill in the near future. The intense and widespread criticism generated by the Matthew Shepard Act ensures that once it is passed, those representing individuals prosecuted under it will be prepared to challenge the bill's constitutionality.

II. MODERN COMMERCE CLAUSE DOCTRINE

One of the major constitutional challenges to the Matthew Shepard Act will be that it exceeds Congress's authority under the Commerce Clause. Whether or not the bill is within Congress's power to regulate interstate commerce is a question that must be analyzed within the framework announced in the Supreme Court's 1995 decision in *United States v. Lopez*. *Lopez* set out a general framework for evaluating Commerce Clause cases, and reinterpreted the Court's past cases to fit within this framework. Because the Court's subsequent decisions in *United States v. Morrison* and *Gonzales v. Raich* indicate that future Commerce Clause cases will continue to be decided within *Lopez*'s framework, this Comment does not attempt to give a detailed presentation of the doctrine's historical development.⁸⁸ Instead, this

⁸⁴ See *id.* at 1215 (claiming that many recently enacted federal criminal laws go unprosecuted because the federal court system could not handle the consistent enforcement of these laws due to the volume of federal criminal laws passed since the 1970s).

⁸⁵ Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902 (1994) (codified in scattered sections of 28 U.S.C. and 42 U.S.C. (2000)).

⁸⁶ Baker, *supra* note 67, at 1215.

⁸⁷ See *id.*; see also William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2028 (2008) (describing the factors that lead to underprosecution of federal criminal laws and arguing that the "optional nature" of these laws makes them "useful vehicles for sending symbolic messages").

⁸⁸ For a good general description of the history of Commerce Clause doctrine, see Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since Lopez: A Survey*, 32 CAP. U. L. REV. 671, 673-89 (2004).

Part will discuss the modern doctrine as presented in *Lopez* and developed in *Morrison* and *Raich*.⁸⁹

A. *The Lopez Framework*

As explained in *Lopez*, Congress traditionally has had the power to regulate three broad areas under the Commerce Clause: first, Congress may regulate “the channels of interstate commerce”;⁹⁰ second, Congress may regulate “persons or things in interstate commerce”;⁹¹ and third, Congress may regulate activities that “substantially affect interstate commerce.”⁹² The modern debate over the limits of Congress’s power under the Commerce Clause has centered on this third category of regulation, and the primary contribution of *Lopez* has been to provide a framework for determining when an activity substantially affects interstate commerce.

Under *Lopez*, the Court must perform a two-step inquiry when evaluating a law under the substantial-effects test. First, the Court must determine whether the activity regulated is economic activity. If the activity regulated is economic, the Court will be highly deferential to Congress’s determination that it substantially affects interstate commerce and will most likely uphold the regulation.⁹³ If the Court determines that the activity regulated is not economic, the Court will be less deferential, considering three factors to determine whether the regulation is within congressional power: (1) whether the statute contains a jurisdictional element limiting its reach to activities affecting interstate commerce;⁹⁴ (2) whether Congress has offered any find-

⁸⁹ Most discussions of Commerce Clause doctrine treat the subject historically, detailing the original direct-effects test used prior to 1937, the development and refinement of the substantial-effects test from 1937 to *United States v. Lopez* in 1995, and assessing the changes resulting from *Lopez* and more recent Commerce Clause cases. See, e.g., Hasenstab, *supra* note 16, at 978-85. While this is a reasonable approach to take, it is not the most helpful in performing an analysis under the Commerce Clause. Because *Lopez* reinterpreted without overruling any particular case, the Court’s past cases have the meaning that *Lopez* ascribes to them rather than the meaning they originally may have carried.

⁹⁰ *United States v. Lopez*, 514 U.S. 549, 558 (1995).

⁹¹ *Id.*

⁹² *Id.* at 559.

⁹³ See *id.* at 560 (“These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”).

⁹⁴ See *id.* at 561 (concluding that the GFSZA contains no such jurisdictional element); see also *United States v. Morrison*, 529 U.S. 598, 613 (2000) (noting that the Violence Against Women Act contains no jurisdictional element).

ings showing the regulated activity's effect on interstate commerce;⁹⁵ and (3) whether the statute is a necessary part of a larger regulation of economic activity.⁹⁶

In two cases decided after *Lopez*—*United States v. Morrison* and *Gonzales v. Raich*—the Supreme Court expanded on its analysis of the second and third of these factors. In *Morrison* the Court discussed the impact that congressional findings have on a statute's constitutionality,⁹⁷ and in *Raich* the Court identified a situation where a law could be considered part of a larger regulation of economic activity.⁹⁸ The Court has not yet taken the opportunity to decide a case clarifying the impact that a jurisdictional element would have on a statute's constitutionality, but, as we will see below, the Matthew Shepard Act, if passed, could give the Court an excellent opportunity to expand on the doctrine in this area. For now, *Lopez*, *Morrison*, and *Raich* each add to, and build upon, the Supreme Court's new Commerce Clause doctrine and therefore deserve separate attention.

B. United States v. Lopez

Lopez involved the Gun-Free School Zones Act, which made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”⁹⁹ In striking down the regulation, Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, noted that “if § 922(q) [were] to be sustained, it must be under the third category as a regulation of an activity that substantially affects inter-

⁹⁵ See *Morrison*, 529 U.S. at 614-15 (observing that Congress, in support of VAWA, made “numerous findings regarding the serious impact that gender-motivated violence has on victims and their families”); *Lopez*, 514 U.S. at 562-63 (noting the absence of congressional findings regarding the effects of gun possession in a school zone on interstate commerce).

⁹⁶ See *Gonzales v. Raich*, 545 U.S. 1, 23-25 (2005) (distinguishing the Controlled Substances Act, part of a broad regulatory scheme, from the more narrow statutes at issue in *Lopez* and *Morrison*); *Lopez*, 514 U.S. at 561 (designating the GFSZA as a criminal statute not part of a comprehensive regulation of economic activity); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (explaining that the Agricultural Adjustment Act of 1938 serves a wide and important regulatory function).

⁹⁷ 529 U.S. at 614-15; see also *infra* notes 117-123 and accompanying text.

⁹⁸ 545 U.S. at 23-25; see also *infra* notes 132-133 and accompanying text.

⁹⁹ 18 U.S.C. § 922(q)(1)(A) (1994), *invalidated by Lopez*, 514 U.S. 549, *amended by* Treasury Department Appropriations Act, 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009-314, 3009-369 to -370 (codified at 18 U.S.C. § 922(q)(2)(A) (2006)).

state commerce.”¹⁰⁰ After introducing its new framework for analyzing substantial-effects-test cases,¹⁰¹ the Court found that the statute contained no jurisdictional element that would limit its scope, included no congressional findings showing its connection to interstate commerce, and was not an essential part of a larger regulation of economic activity.¹⁰² Also significant to the Court was the fact that the GFSZA tended to create a federal police power over areas traditionally subject only to state control.¹⁰³ Because § 922(q) regulated non-economic activity, the Court declared it to be outside of Congress’s power under the Commerce Clause when examined in light of the three factors.¹⁰⁴

Justice Kennedy wrote a concurring opinion, joined by Justice O’Connor. Although he counseled that the Court must show “great restraint” before declaring an act of Congress invalid under the Commerce Clause,¹⁰⁵ Justice Kennedy indicated that he voted to overturn the law because Congress had intruded into an area of regulation traditionally controlled by the states.¹⁰⁶ He argued that when Congress attempts to regulate conduct that has only an attenuated effect on interstate commerce, the Court should “inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.”¹⁰⁷ Allowing the federal government to control public-school grounds would prevent states from acting as “laboratories for experimentation” in order to test new policy choices.¹⁰⁸ Even so, Justice Kennedy’s concurrence indicated that he was willing to allow significant intrusions on state sovereignty, but not without a closer link to commerce.¹⁰⁹ Also concurring, Justice Thomas expressed his opinion that the substantial-effects test has no basis in the Constitution and could lead to a federal police power over all areas of life.¹¹⁰

Justices Stevens, Souter, and Breyer all authored dissenting opinions, expressing their belief that the majority opinion significantly de-

¹⁰⁰ *Lopez*, 514 U.S. at 559.

¹⁰¹ *See supra* text accompanying notes 93-96.

¹⁰² *Lopez*, 514 U.S. at 561-63.

¹⁰³ *See id.* at 561 n.3 (emphasizing that the states hold primary authority over criminal law enforcement).

¹⁰⁴ *Id.* at 559-63.

¹⁰⁵ *Id.* at 568 (Kennedy, J., concurring).

¹⁰⁶ *Id.* at 580.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 581.

¹⁰⁹ *Id.* at 583.

¹¹⁰ *Id.* at 584 (Thomas, J., concurring).

parted from the Court's prior Commerce Clause doctrine. Justice Souter argued that, under the Court's prior holdings, Congress should receive great deference, and that the Court should uphold laws enacted under the Commerce Clause as long as Congress had a rational basis for finding that the regulated activity affected interstate commerce.¹¹¹ Justice Breyer's dissent, joined by Justices Stevens, Souter, and Ginsburg, agreed, and attempted to show that the GFSZA passed rational basis review because guns affect education, and the quality of the education that children receive will determine future American economic success.¹¹² Justice Stevens wrote separately to express his agreement with Justices Souter and Breyer, and to argue that because Congress has the power to eliminate the market for guns generally, it also has the power to eliminate that market among school-age children.¹¹³

Dissenting opinions notwithstanding, the Court in *Lopez* voted, five to four, to strike down a law enacted under the Commerce Clause for the first time in nearly sixty years. In so doing, it set out a new framework for analyzing substantial-effects-test cases and identified three factors to consider when determining whether a law actually regulates an activity that substantially affects interstate commerce. Although it developed this framework, *Lopez* did not provide much guidance as to how the factors should be weighed in any given situation because the GFSZA satisfied none of the three factors. The Court left to future cases the task of defining the extent to which each of the three factors would weigh in favor of, or against, upholding a challenged law.

C. *United States v. Morrison*

The next major development in the Supreme Court's Commerce Clause jurisprudence came in 2000, with *United States v. Morrison*. *Morrison* involved a challenge to the constitutionality of a provision of VAWA, which provided a federal civil remedy for victims of gender-motivated violence.¹¹⁴ As in *Lopez*, Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. In order to satisfy the threshold inquiry of

¹¹¹ *Id.* at 603 (Souter, J., dissenting).

¹¹² *Id.* at 619-23 (Breyer, J., dissenting).

¹¹³ *Id.* at 602-03 (Stevens, J., dissenting).

¹¹⁴ Pub. L. No. 103-322, § 40302, 108 Stat. 1796, 1914 (codified as amended at 42 U.S.C. § 13981 (Supp. V 2005)).

Lopez, the Court first established that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”¹¹⁵ Because VAWA did not involve economic activity, the Court turned to *Lopez*’s three factors to determine whether the law actually regulated activity that substantially affects interstate commerce.

Like the GFSZA, VAWA contained no jurisdictional element limiting its reach and was clearly not a necessary piece of any larger regulation of economic activity.¹¹⁶ The statute, however, did contain extensive findings about the impact of gender-motivated violence on interstate commerce.¹¹⁷ Congress found that gender-motivated violence affects interstate commerce “by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce . . . [as well as] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.”¹¹⁸

The first question raised by these findings was whether their mere presence—the simple fact that Congress listed findings showing a connection to interstate commerce—would be enough to satisfy *Lopez*. In answering this question, the Supreme Court first established that whether an activity affects interstate commerce substantially enough to give Congress the power to regulate it is a judicial, rather than a legislative, question.¹¹⁹ Consequently, Congress’s findings that an activity substantially affects interstate commerce are not sufficient, by themselves, to sustain a law enacted under the Commerce Clause.¹²⁰ The first lesson of *Morrison* is, therefore, that the *Lopez* factors are not a “drafting guide” for laws enacted under the Commerce Clause.¹²¹ In other words, it is not the fact that Congress has included findings that

¹¹⁵ United States v. Morrison, 529 U.S. 598, 613 (2000).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 614.

¹¹⁸ *Id.* at 615 (quoting H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.), reprinted in 1994 U.S.C.C.A.N. 1803, 1853); accord S. REP. NO. 103-138, at 54 (1993) (“Gender-based crime[] . . . restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy.”).

¹¹⁹ See *Morrison*, 529 U.S. at 614 (“[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.” (internal quotation marks omitted) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964))).

¹²⁰ *Id.*

¹²¹ Cf. *Gonzales v. Raich*, 545 U.S. 1, 46 (2005) (O’Connor, J., dissenting).

will weigh in favor of upholding the law, but rather the extent to which, in the Court's judgment, the activity actually affects interstate commerce.

Having established that the mere presence of congressional findings would not support VAWA, the Court next moved on to analyze the extent to which gender-motivated violence affects interstate commerce. The Court ultimately rejected Congress's findings, holding that the link they established between gender-motivated violent crime and interstate commerce was too attenuated to conclude that this type of violence substantially affects interstate commerce.¹²² In so doing, the Court expressed its concern that the type of reasoning employed by Congress—"follow[ing] the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce"¹²³—would allow Congress to use the Commerce Clause to destroy "the Constitution's distinction between national and local authority."¹²⁴

Thus, the second lesson of *Morrison* is that the Court will look skeptically at regulations that tend to destroy all distinction between national and local authority, and thereby give Congress a type of plenary power to legislate. This is what has been called the "non-infinity principle," which is "the principle that any accepted theory of the Commerce Clause resulting in a virtually unlimited source of governmental power must be invalid" because it would "undermine the very notion of enumerated powers."¹²⁵ The Court seemed to emphasize the importance of this principle in *Morrison* when it rejected Congress's findings, concluding that if it were to accept Congress's reasoning that an activity's distant and indirect impact on the economy could be a basis for legislation, there would be no reason that Congress could not regulate other types of violent crime, family law, or even murder.¹²⁶ *Morrison* therefore seems to indicate that whenever Congress tries to claim an unlimited power to legislate, particularly in

¹²² *Morrison*, 529 U.S. at 615-17.

¹²³ *Id.* at 615.

¹²⁴ *Id.*

¹²⁵ Reynolds & Denning, *supra* note 15, at 376-78; *see also* David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 69 (1997) (developing the concept of the "non-infinity principle" and defining it as the principle that "for a Commerce Clause rationale to be acceptable under *Lopez*, it must not be a rationale that would allow Congress to legislate on everything").

¹²⁶ 529 U.S. at 615-16.

areas traditionally regulated by the states, the Court will be extremely hesitant to uphold the legislation.

D. *Gonzales v. Raich*

The most recent case involving Congress's power under the Commerce Clause was the Supreme Court's 2005 decision in *Gonzales v. Raich*. In *Raich* the Court upheld the portion of the Controlled Substances Act (CSA)¹²⁷ that prohibited the possession or cultivation of marijuana. The plaintiffs sought to prevent enforcement of the CSA's restrictions against their use of marijuana for medicinal purposes, which California law permitted.¹²⁸ While the CSA contained no jurisdictional restriction or congressional findings dealing with marijuana use for medicinal purposes, the Court upheld its ban because allowing medicinal marijuana use could undercut the CSA's effectiveness.¹²⁹ The Court applied the aggregation principle of *Wickard v. Filburn*,¹³⁰ finding that Congress could have rationally believed that the prohibition against medical marijuana was an essential part of a larger regulation of economic activity.¹³¹ In so doing, the Court expanded on *Lopez*'s third factor, and provided some explanation about when a regulation will be upheld as being necessary to a larger economic regulation.

Justice Stevens delivered the opinion of the Court in which Justices Kennedy, Souter, Ginsburg, and Breyer joined. For Justice Stevens, the central question was whether Congress had a rational basis for concluding that this regulation was an essential part of a larger regulatory scheme.¹³² Because Congress could have rationally concluded that the allowance of intrastate drug use would hinder its ability to eliminate the interstate drug market, the Court upheld Congress's action.¹³³

¹²⁷ Pub. L. No. 91-513, § 202, 84 Stat. 1242, 1249 (1970) (codified as amended at 21 U.S.C. § 812 (2006)).

¹²⁸ *Gonzales v. Raich*, 545 U.S. 1, 5 (2005).

¹²⁹ *Id.* at 26-27.

¹³⁰ *See* 317 U.S. 111, 127-29 (1942) ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

¹³¹ *Raich*, 545 U.S. at 18-19.

¹³² *Id.* at 26.

¹³³ *Id.*

It is important to note the subtle difference between the rational basis review of *Raich* and the rational basis review applied in past Commerce Clause cases such as *Katzenbach v. McClung*¹³⁴ and *Heart of Atlanta Motel, Inc. v. United States*.¹³⁵ *Morrison* rejected the claim that for a statute to be constitutional under the Commerce Clause the Court simply had to determine that Congress had a rational basis for believing that the regulated conduct substantially affects interstate commerce.¹³⁶ Although seen by some as a return to pre-*Lopez* rational basis review of Commerce Clause cases,¹³⁷ the Court in *Raich* applied rational basis review to Congress's determination that control of intrastate activity was necessary to make its larger regulatory scheme effective. Rather than giving Congress carte blanche in the Commerce Clause, this distinction serves to reinforce *Lopez's* claim that the Commerce Clause will in fact be a limited grant of authority to Congress because the Court will only reach rational basis review after it is satisfied that the larger regulatory scheme is valid under the Commerce Clause. Following *Raich*, therefore, the Court must first apply the *Lopez* framework to the larger regulation to determine if it is a valid exercise of Congress's power under the Commerce Clause. If the regulatory scheme covers economic activity, it will be valid under *Lopez* and the Court can move on to decide whether the narrower regulation of intrastate activity is necessary. In making this subsequent determination, the Court will apply rational basis review, and will be deferential to Congress's decision to

¹³⁴ 379 U.S. 294 (1964).

¹³⁵ 379 U.S. 241 (1964).

¹³⁶ Although *McClung*, 379 U.S. at 304, and *Heart of Atlanta Motel*, 379 U.S. at 261-62, employ this type of rational basis review, it has been rejected by the Court's modern cases. But, in order to maintain the outcomes of these cases, *Lopez* cites to them as representative of decisions upholding statutes regulating economic activity. *United States v. Lopez*, 514 U.S. 549, 559-60 (1995).

¹³⁷ See, e.g., Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751 (2005) (regarding *Raich* as a repudiation of the doctrines espoused in *Lopez* and *Morrison*); Michael C. Blumm & George A. Kimbrell, Letter to the Editors, *Gonzales v. Raich, the "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491, 497 (2005) (suggesting that *Lopez* and *Morrison* were deviations in the Court's Commerce Clause jurisprudence rather than indications of a federalism revolution); Mollie Lee, Note, *Environmental Economics: A Market Failure Approach to the Commerce Clause*, 116 YALE L.J. 456, 468 (2006) ("One way to understand *Raich* is as a retreat from the Court's new Commerce Clause jurisprudence, and thus reading *Lopez* and *Morrison* as mere aberrations."). But cf. Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 884 (2005) ("[I]t is impossible to determine whether the majority or the dissent correctly applied the *Lopez* and *Morrison* standards, because they are so malleable as to justify either result.").

include even intrastate, non-economic activity as long as there is a rational basis for doing so. Because the Court will not engage in rational basis review until after it has applied the *Lopez* framework to the parent regulation, *Raich* clearly does not signal a return to the pre-*Lopez* framework.

Justice Scalia's concurrence makes this point clear. Justice Scalia concurred in the judgment, but, unlike the majority, he believed that the power to regulate purely intrastate activities that are essential pieces of a larger regulation of economic activity derived from the Necessary and Proper Clause.¹³⁸ For Justice Scalia, Congress can regulate intrastate non-economic activity when it is necessary or proper to regulate in order to make effective a larger regulation of interstate economic activity.¹³⁹ The Court must determine "whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."¹⁴⁰ Thus, while Congress could not regulate these activities under the Commerce Clause alone, the Necessary and Proper Clause allowed Congress to regulate them in order to make the CSA effective. For Justice Scalia, the key question is whether the larger statutory scheme is a valid exercise of the Commerce Clause power to regulate economic activity, and *Lopez* provides the test for this.

E. *Themes of Lopez, Morrison, and Raich*

It seems that the central message of *Lopez*, reinforced by *Morrison*, is that the Court will once again enforce the outer limits of Congress's authority under the Commerce Clause rather than allowing the Clause to serve as the grant of general legislative power that it had become in the previous decades. As then-Judge Alito noted in a dissenting opinion issued soon after *Lopez* was decided, "if *Lopez* means anything, it is that Congress's power under the Commerce Clause must have some limits."¹⁴¹ Consistent with this interpretation, the Court in *Morrison* resisted Congress's attempt to circumvent the limited grant of power that is the Commerce Clause by issuing findings that showed only an attenuated connection between gender-motivated violent crime and interstate commerce. *Morrison* makes clear that Congress

¹³⁸ U.S. CONST. art. I, § 8, cl. 18; *see also Raich*, 545 U.S. at 34 (Scalia, J., concurring) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce . . . derives from the Necessary and Proper Clause.")

¹³⁹ *Raich*, 545 U.S. at 37.

¹⁴⁰ *Id.*

¹⁴¹ *United States v. Rybar*, 103 F.3d 273, 291 (3d Cir. 1996) (Alito, J., dissenting).

may not claim the power to regulate everything simply by its use of “magic words” that will insulate the statute from constitutional attack. It also indicated that the Court will approach with skepticism congressional regulations that have the effect of eliminating any distinction between the powers of the federal government and those reserved to the states.

Another recurring theme is the Court’s resistance to allowing Congress to regulate areas traditionally controlled by the states. In *Lopez* the Court expressed concern that the GFSZA encroached on both the states’ traditional police powers and their authority to regulate education.¹⁴² Similarly, in *Morrison* the Court discussed extensively its concern that upholding VAWA could give Congress the power to regulate traditional areas of state regulation, such as marriage, divorce, child custody, and every type of violent crime—including murder.¹⁴³ In fact, one important distinguishing characteristic of the CSA in *Raich* is that because Congress has always had the power to regulate controlled substances, upholding the intrastate ban on marijuana, at least to the majority, posed no threat to any traditional area of state control.¹⁴⁴ So, while not specifically presented by *Lopez* as a factor, all three cases make clear that the Court will seek to protect the areas of regulation traditionally associated with state control from overreaching by Congress.

Even after *Lopez*, *Morrison*, and *Raich*, the Court still has not addressed the first of the *Lopez* factors: a situation in which a statute must survive or fail on the strength of its jurisdictional element. Jurisdictional elements, however, have been a primary tool in Congress’s arsenal as it attempts to design statutes that regulate broad areas not directly associated with economic activity. These elements have therefore been the subject of some confusion among courts and interest among scholars.¹⁴⁵ The final piece in the *Lopez* line of modern Com-

¹⁴² United States v. Lopez, 514 U.S. 549, 564-65 (1995).

¹⁴³ United States v. Morrison, 529 U.S. 598, 615-16 (2000).

¹⁴⁴ See *Raich*, 545 U.S. at 10-15 (discussing the history of the CSA and noting that Congress regulated controlled substances as early as 1906).

¹⁴⁵ See Susanna Frederick Fischer, *Between Scylla and Charybdis: The Disagreement Among the Federal Circuits over Whether Federal Law Criminalizing the Intrastate Possession of Child Pornography Violates the Commerce Clause*, 10 NEXUS 99, 101-02 (2005) (noting that “[r]ecent Supreme Court decisions have placed federal courts of appeals in an impossible situation when ruling on Commerce Clause challenges to [certain types of jurisdictional elements,]” but that the Supreme Court “has not yet provided clear guidance as to the meaning of economic or commercial, nor has it overruled prior precedent that seems clearly inconsistent with this limitation”); Stuckey, *supra* note 40, at 2104-05

merce Clause cases would therefore appear to be a case addressing the impact and sufficiency of jurisdictional elements. Once the Court addresses this last *Lopez* factor, the basic contours of the modern Commerce Clause framework will be complete. As will be seen below, because of its similarity to VAWA, which was at issue in *Morrison*, the Matthew Shepard Act may provide the Court with the best possible opportunity to isolate the effect of a jurisdictional element and bring clarity to this area of the law. An analysis of the Matthew Shepard Act under *Lopez*, then, becomes important not only for the fate of the bill itself, but also as a predictor of the Supreme Court's potential treatment of jurisdictional-element questions more generally.

III. ANALYSIS UNDER THE *LOPEZ* FRAMEWORK

At the outset, *Morrison* indicates that a prohibition against violent crime motivated by gender or other characteristics regulates neither the channels of interstate commerce nor persons or things in interstate commerce. Therefore, if the Matthew Shepard Act is a valid exercise of Congress's power under the Commerce Clause it must be because bias-motivated crimes have a substantial effect on interstate commerce.¹⁴⁶ Because the bill does not regulate economic activity,¹⁴⁷ the Court must consider the three *Lopez* factors: (1) whether the bill contains congressional findings attempting to show the regulated activity's effect on interstate commerce; (2) whether the regulation provided by the bill is a necessary part of a larger regulation of economic activity; and (3) whether the bill contains a jurisdictional element that would limit its reach to activities that substantially affect interstate commerce.¹⁴⁸

According to *Morrison*, congressional findings will only support the constitutionality of a statute if the connection between the regu-

(describing the confusion courts have faced when analyzing jurisdictional elements after *Raich* and suggesting possible ways in which the courts should deal with these elements).

¹⁴⁶ Cf. *Morrison*, 529 U.S. at 609 (recounting *Lopez*'s three-factor analysis and finding that the issue of gender-motivated violence must fall under the substantial-effect prong); *Lopez*, 514 U.S. at 559 (finding that legislation regulating the possession of a handgun near schools is neither a regulation of the use of the channels of interstate commerce nor an attempt to regulate the transport of an item through the channels of commerce, and that it therefore can only be justified if it has a substantial effect on commerce).

¹⁴⁷ See *Morrison*, 529 U.S. at 613 (holding that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity").

¹⁴⁸ *Lopez*, 514 U.S. at 561-63.

lated activity and interstate commerce is not too attenuated.¹⁴⁹ In *Morrison*, the Court noted the presence of congressional findings attempting to show the connection between gender-motivated violence and interstate commerce:

Congress found that gender-motivated violence affects interstate commerce “by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.”¹⁵⁰

The Court ultimately rejected Congress’s findings because the reasoning it advanced, following “the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce,” would give Congress unlimited authority.¹⁵¹ As noted above, *Morrison* reinforced the Court’s resistance to any type of “magic words” that could give Congress unlimited authority simply by their inclusion.

The findings contained within section 2 of the Matthew Shepard Act are very similar to those present in VAWA. Central to Congress’s findings in the bill is the claim that hate crimes impede the movement of targeted groups and prevent members of such groups from engaging in interstate commerce.¹⁵² Because in *Morrison* the Court held that a similar connection between gender-motivated violent crime and interstate commerce was too attenuated to support VAWA, the findings present in the Matthew Shepard Act will also likely be insufficient to sustain it.

It is also clear that the Matthew Shepard Act is not a necessary part of a larger regulation of economic activity. Of the three recent Commerce Clause cases, only *Raich* involved a prohibition that was part of a larger regulatory framework. In that case, the prohibition on intrastate, noncommercial possession of marijuana was necessary because the absence of such regulation would undercut the CSA’s attempt to eliminate the interstate market in illegal drugs. However, the Court in *Morrison* held that VAWA was not a necessary part of a larger regu-

¹⁴⁹ *Morrison*, 529 U.S. at 614-15.

¹⁵⁰ *Id.* at 615 (quoting H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.), reprinted in 1994 U.S.C.C.A.N. 1803, 1853).

¹⁵¹ *Id.*

¹⁵² S. 1105, 110th Cong. § 2(6) (2007).

lation of economic activity, presumably because there is no interstate market for gender-motivated violence.¹⁵³ Like VAWA, the Matthew Shepard Act seeks to claim federal jurisdiction over crimes motivated by gender, among other classifications. Because it held that VAWA was not part of a larger regulation of economic activity, the Court will likely hold that the Matthew Shepard Act is similarly not part of a larger regulatory scheme.¹⁵⁴

The primary difference between the laws at issue in the three modern Commerce Clause cases and the Matthew Shepard Act is the presence of a jurisdictional element attempting to limit the reach of the bill to conduct that substantially affects interstate commerce. In fact, without this jurisdictional element the bill is remarkably similar to VAWA, and the Court would most likely declare the law unconstitutional on similar grounds. The effectiveness of this jurisdictional element will therefore likely determine the constitutionality of the bill.

In fact, because the Matthew Shepard Act is so similar to VAWA—from its congressional findings to the type of conduct regulated—a case challenging the constitutionality of the Matthew Shepard Act would present the Court with an excellent opportunity to clarify the *Lopez* framework with regard to jurisdictional elements. Since the bill is clearly unconstitutional without the jurisdictional element, such a case would allow the Court to isolate the effect of the jurisdictional element and speak directly to this issue. Also, because the particular jurisdictional element of the Matthew Shepard Act contains every type of jurisdictional-element prong used by Congress,¹⁵⁵ the Court would have the opportunity to assess thoroughly the impact of each. The

¹⁵³ See *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (distinguishing *Raich* and *Morrison* on the ground that the CSA regulated quintessentially economic activity such as “production, distribution, and consumption,” while VAWA regulated activity that was more criminal than economic).

¹⁵⁴ Interestingly, Justice O’Connor’s dissenting opinion in *Raich* expressed concern that the Court’s decision in that case would allow Congress to claim unlimited authority by regulating broadly. *Id.* at 46-47 (O’Connor, J., dissenting). But, the analysis above shows that, at least in the case of intrastate, non-economic, criminal law, *Raich* is not the *carte blanche* that Justice O’Connor feared. It is true that Congress could insert findings stating that jurisdiction over intrastate bias-motivated crimes is necessary for some larger regulatory purpose. In that case, it becomes especially important for the Court to remember the lesson of *Lopez* and *Morrison* and continue to enforce the limits of the Commerce Clause. For now, however, the Matthew Shepard Act contains no such findings and is clearly not part of a larger economic regulation.

¹⁵⁵ The particular jurisdictional element of the Matthew Shepard Act contains at least five independent bases for federal prosecutors to claim jurisdiction. See S. 1105, 110th Cong. § 7(a)(2)(B) (2007). For a discussion of these provisions, see *supra* notes 67-73 and accompanying text.

remainder of this Comment will conduct this analysis based on the decisions of many of the courts of appeals applying *Lopez*, *Morrison*, and *Raich*.

IV. JURISDICTIONAL-ELEMENT ANALYSIS

A jurisdictional element exists to limit the reach of a statute to a discrete set of activities that “have an explicit connection with or effect on interstate commerce.”¹⁵⁶ It may do this either by bringing the activity out of the realm of the substantial-effects test—by ensuring that the statute regulates only the channels of interstate commerce or persons or things in interstate commerce—or by guaranteeing, through case-by-case inquiry, that the activity in question substantially affects interstate commerce.¹⁵⁷ For a jurisdictional element to ensure that a regulated activity substantially affects interstate commerce, the key question is whether proof of the jurisdictional element also proves that the regulated activity has a connection to interstate commerce. When analyzing the jurisdictional element of the Matthew Shepard Act, the Supreme Court would have to address two questions for the first time: (1) whether the mere presence of a jurisdictional element is sufficient to sustain a statute’s constitutionality; and (2) if not, how significant a restriction must a statute place on the class of activities reached in order to be sufficient.

A. *Mere Presence of a Jurisdictional Element*

Nearly every federal court of appeals that has considered the question has held that the mere presence of a jurisdictional element is not sufficient to ensure a statute’s constitutionality.¹⁵⁸ Only the Eighth Circuit has held that an element’s mere presence is sufficient for a statute to survive a facial challenge under the Commerce Clause.¹⁵⁹

¹⁵⁶ *United States v. Lopez*, 514 U.S. 549, 562 (1995).

¹⁵⁷ *See id.* at 561-62 (finding that the GFSZA was solely a criminal statute with no jurisdictional element to confine its reach to activity that affects interstate commerce); *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999) (applying the *Lopez* framework and finding that a federal statute regulating the possession of child pornography qualifies as an activity that has a substantial relation to interstate commerce).

¹⁵⁸ *See Fischer*, *supra* note 145, at 118-19 (describing holdings of the courts of appeals that have considered this question).

¹⁵⁹ *United States v. Hoggard*, 254 F.3d 744, 746 (8th Cir. 2001); *United States v. Bausch*, 140 F.3d 739, 741 (8th Cir. 1998). The Eighth Circuit, however, seems to have backed away from this bright-line rule in subsequent cases. In its most recent Commerce Clause cases the court describes its holding in *Bausch* as standing for the propo-

Meanwhile, the First, Second, Third, Fifth, Sixth, Ninth, and Eleventh Circuits have all held that the mere presence of a jurisdictional element is insufficient to guarantee the constitutionality of a statute under the Commerce Clause.¹⁶⁰

The cases dealing with the constitutionality of federal statutes criminalizing the possession of child pornography¹⁶¹ illustrate how the courts of appeals have ruled on this question. Although most circuits have upheld these statutes, they have done so on grounds similar to *Raich*, reasoning that prohibiting the intrastate possession of child pornography is necessary to eliminate the interstate commercial market for it.¹⁶² In the course of their analyses, however, these courts have often assessed the impact of these statutes' jurisdictional elements, helping to illuminate the ways in which the Supreme Court might assess the issues presented by these elements.

The federal child pornography statutes make it a crime to possess or manufacture child pornography that "has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced by using materials which have been mailed or so shipped or transported."¹⁶³ When analyzing these statutes for their constitutionality under the Commerce Clause, courts are faced with the initial question of whether the mere presence of these jurisdictional elements is sufficient to sustain the laws.

sition that the particular jurisdictional element at issue sufficiently limited the reach of federal jurisdiction, rather than that every jurisdictional element does so. *See, e.g.*, *United States v. Muga*, 394 F.3d 1016, 1020-22 (8th Cir. 2005) (describing *Bausch* as holding that "the statute's express jurisdictional element, which limits prosecution to cases in which the depictions or the underlying materials had been transported in interstate commerce, ensured that each defendant's pornography possession affected interstate commerce" (internal quotation marks omitted)).

¹⁶⁰ Fischer, *supra* note 145, at 118.

¹⁶¹ These laws include two statutes prohibiting the possession of pornographic images of children, 18 U.S.C. §§ 2252, 2252A (2006), as well as one prohibiting its manufacture, *id.* § 2251.

¹⁶² *See, e.g.*, *United States v. Maxwell*, 446 F.3d 1210, 1217-18 (11th Cir. 2006) ("It is well within Congress's authority to regulate directly the commercial activities constituting the interstate market for child pornography, and [p]rohibiting the intrastate possession . . . of an article of commerce is a rational . . . means of regulating commerce in that product." (alterations in original) (internal quotation marks omitted)), *cert. denied*, 127 S. Ct. 705 (2006); *United States v. Morales-De Jesús*, 372 F.3d 6, 10 (1st Cir. 2004); *United States v. Holston*, 343 F.3d 83, 88-91 (2d Cir. 2003); *United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000).

¹⁶³ 18 U.S.C. § 2252(a)(4)(B); *id.* § 2252A(a)(5)(B); *see also id.* § 2251(b) (prohibiting the manufacture of child pornography "if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means").

Of the courts of appeals that have considered these laws, only the Eighth Circuit, in *United States v. Bausch*, has apparently held that the mere presence of this jurisdictional element establishes the constitutionality of these laws.¹⁶⁴ In that case, the court stated that the presence of *any* jurisdictional element guarantees the constitutionality of a statute because a jurisdictional element forces courts to conduct a case-by-case inquiry into the defendant's conduct to establish that it substantially affects interstate commerce.¹⁶⁵ But when examining the law in that case, the court stopped short of analyzing whether the particular element in the statute did in fact ensure that the defendant's conduct substantially affected interstate commerce, apparently resting its holding on the belief that all jurisdictional elements guarantee such a connection.

When considering the same statute in *United States v. Rodia*, however, the Third Circuit refused to allow the mere presence of the jurisdictional element in the child pornography statutes to establish their constitutionality and therefore took the further step of inquiring whether the particular element sufficiently fulfilled its task.¹⁶⁶ The court relied on its earlier decision in *United States v. Bishop*, in which it expressly held that “[t]he mere presence of a jurisdictional element . . . does not in and of itself insulate a statute from judicial scrutiny under the Commerce Clause, or render it *per se* constitutional.”¹⁶⁷ In *Bishop* the Third Circuit had rejected the government's argument that the presence of a jurisdictional element automatically rendered the statute constitutional because it required the government to prove in every case beyond a reasonable doubt that a carjacking victim's car had been “transported, shipped, or received in interstate or foreign commerce.”¹⁶⁸ Although the court ultimately determined that the element did indeed guarantee a sufficient connection to interstate commerce, it expressly held that the courts must test the sufficiency of a jurisdictional element.¹⁶⁹

Adopting the reasoning of *Bishop*, the Third Circuit similarly held that a court must test a jurisdictional element to determine whether it

¹⁶⁴ *Bausch*, 140 F.3d at 741.

¹⁶⁵ *Id.*

¹⁶⁶ 194 F.3d 465, 472-73 (3d Cir. 1999).

¹⁶⁷ 66 F.3d 569, 585 (3d Cir. 1995).

¹⁶⁸ *Id.* (quoting 18 U.S.C. § 2119 (1994)).

¹⁶⁹ *See id.*

“has the requisite nexus with interstate commerce.”¹⁷⁰ The court stated that

[a] hard and fast rule that the presence of a jurisdictional element automatically ensures the constitutionality of a statute ignores the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated as to fail to guarantee that the activity regulated has a substantial effect on interstate commerce.¹⁷¹

Although it preceded *Morrison*, this language is reminiscent of that case’s holding that congressional findings showing a link between an activity and interstate commerce will not support a challenged law if, in the court’s judgment, the connection is too attenuated.¹⁷² In *Morrison*, rather than allow the mere presence of congressional findings to guarantee a statute’s constitutionality, the Court held that judges must examine the actual connection between the activity and interstate commerce to determine if there is a substantial connection.¹⁷³ The Court expressed concern that congressional power to reason from an activity to its most attenuated and indirect effect on interstate commerce could “obliterate the Constitution’s distinction between national and local authority.”¹⁷⁴

The *Rodia* court saw a similar risk in allowing Congress to reach activities outside its power by including a jurisdictional element that did not sufficiently guarantee a connection to interstate commerce.¹⁷⁵ To avoid this risk, the court held that the sufficiency of a jurisdictional element is likewise a question to be decided by the courts.¹⁷⁶ In fact, unlike *Bishop*, the court in *Rodia* indicated its belief that the jurisdictional element of the child pornography statutes was unconstitutionally broad because it did not limit the class of cases available to federal jurisdiction to those that substantially affect interstate commerce.¹⁷⁷ In declaring the jurisdictional element to be insufficiently limiting, the court expressed concern that the element did not actually limit federal jurisdiction at all because nearly all child pornographers will

¹⁷⁰ *Rodia*, 194 F.3d at 472 (quoting *Bishop*, 66 F.3d at 585).

¹⁷¹ *Id.*

¹⁷² See *United States v. Morrison*, 529 U.S. 598, 615 (2000).

¹⁷³ *Id.* at 614-15.

¹⁷⁴ *Id.* at 615.

¹⁷⁵ See *Rodia*, 194 F.3d at 473.

¹⁷⁶ *Id.* at 472.

¹⁷⁷ See *id.* at 473. Although the court expressed its opinion that the jurisdictional element was unconstitutionally broad, it did not so hold because it upheld the statute on other grounds.

use some materials—like floppy disks, film, or cameras—that have traveled in interstate commerce.¹⁷⁸ In the court's opinion, such broad coverage opened up the risk that Congress could use this type of jurisdictional element to reach cases with only an attenuated connection to interstate commerce.

In the cases decided since, the Third Circuit's reasoning has uniformly prevailed.¹⁷⁹ In fact, although the Eighth Circuit has repeatedly reaffirmed *Bausch* after *Morrison*,¹⁸⁰ it seems to have backed away from *Bausch*'s bright-line rule that every jurisdictional element will guarantee a connection to interstate commerce. In the most recent cases, the court has indicated that *Bausch* instead rested on the conclusion that the particular jurisdictional element of the child pornography statutes guaranteed the requisite nexus to interstate commerce.¹⁸¹ Rather than concluding simply that the presence of any jurisdictional element must guarantee such a connection, even the

¹⁷⁸ *Id.*

¹⁷⁹ See Fischer, *supra* note 145, at 118-19 (noting that the Second, Third, Fifth, Sixth, Ninth, and Eleventh Circuits have preferred the approach taken in *Rodia*). Fischer notes that an unreported Fourth Circuit case seems to have adopted the Eighth Circuit's reasoning and that the First Circuit also seems to have done so before *Morrison*. *Id.* The Fourth Circuit's opinion, however, simply refers to the fact that other courts have held the jurisdictional element to be sufficient, without providing much analysis with regard to the question of the reasons for those courts' holdings. See *United States v. Harden*, No. 01-7869, 2002 WL 2004854, at *3 (4th Cir. Sept. 3, 2002) (per curiam) ("The circuits that have addressed [the constitutionality of § 2252(a)(4)(B)] are in agreement that the statute is constitutional on its face."). While the First Circuit held before *Morrison* that an element's mere presence could support the statute, it did not consider the jurisdictional element's mere presence to be sufficient to uphold the statutes in a later case. Compare *United States v. Robinson*, 137 F.3d 652, 656 (1st Cir. 1998) (rejecting a Commerce Clause challenge on the grounds that § 2252(a)(4)(B) "contains an explicit jurisdictional element"), with *United States v. Morales-De Jesús*, 372 F.3d 6, 12-15 (1st Cir. 2004) (agreeing with *Rodia*'s assessment that the jurisdictional element of § 2251(a) could not support the law on its own). The First Circuit still upheld the statute, but it did so on grounds analogous to those in *Raich*. See *id.* at 20-21.

¹⁸⁰ See *United States v. Betcher*, No. 07-2173, 2008 U.S. App. LEXIS 15570, at *5-6 (8th Cir. July 22, 2008) (rejecting the argument that the child pornography statutes are unconstitutional under the Commerce Clause, relying on post-*Morrison* Eighth Circuit decisions); *United States v. Muga*, 394 F.3d 1016, 1020-24 (8th Cir. 2005) (finding the "express" jurisdictional nexus and the required proof thereof sufficient to place the statute beyond constitutional attack); *United States v. Hampton*, 260 F.3d 832, 834-35 (8th Cir. 2001); *United States v. Hoggard*, 254 F.3d 744, 746 (8th Cir. 2001).

¹⁸¹ In *Muga*, for instance, the court described *Bausch* as holding that "the statute's 'express jurisdictional element,' which limits prosecution to cases in which the depictions or the underlying materials had been transported in interstate commerce, ensured that 'each defendant's pornography possession affected interstate commerce.'" *Muga*, 394 F.3d at 1021.

Eighth Circuit has indicated a willingness to assess the individual functioning of each.

The Eighth Circuit's move away from its bright-line rule and to the individual consideration of each jurisdictional element makes sense because it is likely that the Third Circuit's reasoning is most in line with *Morrison*. As Professor Fischer explains,

[t]he *Rodia* approach is more consistent with *Morrison* than the Eighth Circuit's approach, since *Morrison* did not state that the mere presence of a jurisdictional element in a statute will automatically render that statute constitutional under the Commerce Clause (nor would the absence of a jurisdictional hook render the statute automatically unconstitutional). Rather *Morrison*, citing *Lopez*, held that the presence of a jurisdictional hook *may* (as opposed to *must*) render a statute constitutional under the Commerce Clause where that jurisdictional element "might limit [the statute's] reach to a discrete set . . . of [intra-state] possessions that additionally have an explicit connection with or effect on interstate commerce."¹⁸²

Furthermore, a clear lesson of *Morrison* was that the Supreme Court will resist any attempt by Congress to circumvent the limits of the Commerce Clause simply by the inclusion of "magic words" or "pretextual incantations."¹⁸³ Instead, the Court strongly insisted that an activity's connection to interstate commerce must be evaluated by courts and must not be too attenuated. It is likely that in the case of jurisdictional elements as well, the Court will require that the connection they establish to interstate commerce be tested by courts and be similarly substantial. The Third Circuit's reasoning that the mere presence of a jurisdictional element does not render a statute per se constitutional therefore seems most in line with the Supreme Court's precedent.

B. *Sufficiency of the Jurisdictional Element in the Matthew Shepard Act*

If the Supreme Court were to hold that the mere presence of a jurisdictional element is insufficient, it would next consider whether the particular jurisdictional element of the Matthew Shepard Act sufficiently guarantees a connection to interstate commerce. As the Third Circuit made clear in *Rodia*, "[a] jurisdictional element is only suffi-

¹⁸² Fischer, *supra* note 145, at 119 (alterations in original) (citation omitted) (quoting *United States v. Morrison*, 529 U.S. 598, 611-12 (2000)).

¹⁸³ See *United States v. Maxwell*, 386 F.3d 1042, 1062 (11th Cir. 2004), *vacated*, 546 U.S. 801 (2005), *rev'd*, 446 F.3d 1210 (11th Cir. 2006).

cient to ensure a statute's constitutionality when the element either limits the regulation to interstate activity or ensures that the intrastate activity to be regulated falls within one of the three categories of congressional power."¹⁸⁴ These "three categories of congressional power" refer to the three areas in which *Lopez* indicated that Congress may legislate under the Commerce Clause: (1) the channels of interstate commerce; (2) persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce.¹⁸⁵ When analyzing a jurisdictional element for its sufficiency, a court will look at the most extensive reach of the statute as limited by the jurisdictional element. If any prong of the jurisdictional element present in a particular statute allows for federal jurisdiction over activities that are not guaranteed to have a sufficient connection to interstate commerce, the jurisdictional element will not be sufficient to sustain the statute's constitutionality.¹⁸⁶

When Congress seeks to regulate activities that are said to substantially affect interstate commerce, there are at least three main types of jurisdictional elements that it may use: "affecting commerce" prongs; "persons, things, or channels" prongs; and "materials in commerce" prongs. Affecting-commerce prongs are the most straightforward in that they simply require the government to prove that the activity substantially affects interstate commerce every time it seeks to exert jurisdiction. Persons-things-or-channels prongs, in contrast, seek to ensure that the regulation is of the person, thing, or channel of interstate commerce—rather than of a separate activity—thus bringing the regulation out of the realm of the substantial-effects test. Materials-in-commerce prongs trigger jurisdiction over intrastate activities when the government can show that the defendant used some object that had previously traveled in interstate commerce in connection with his offense. The ways in which courts have dealt with each of these prongs is helpful in understanding the contours of a properly limiting jurisdictional element and therefore deserve separate attention.

1. Affecting-Commerce Prongs

In *Jones v. United States*, the Supreme Court noted that the words "affecting commerce" "signal Congress' intent to invoke its full au-

¹⁸⁴ *Rodia*, 194 F.3d at 473.

¹⁸⁵ *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

¹⁸⁶ *Cf. Maxwell*, 386 F.3d at 1062 (declaring a jurisdictional element insufficient because one of its prongs allowed impermissible applications).

thority under the Commerce Clause.”¹⁸⁷ As stated in *Lopez*, the “outer limit” of Congress’s authority under the Commerce Clause is the power to regulate the channels of interstate commerce, persons or things in interstate commerce, and activities that substantially affect interstate commerce.¹⁸⁸ When used as part of a regulation aimed at an intrastate activity that is said to substantially affect interstate commerce, this type of jurisdictional element requires that the government prove in each case that the defendant’s conduct actually substantially affects interstate commerce.¹⁸⁹ In this way, these types of catchall jurisdictional elements do ensure, on a case-by-case basis, a sufficient connection to interstate commerce.

Section 7(a)(2)(B)(iv) of the Matthew Shepard Act triggers federal jurisdiction when the violent crime “interferes with commercial or other economic activity in which the victim is engaged,” or “otherwise affects interstate commerce.”¹⁹⁰ This catchall provision would require the government to prove either that the defendant was engaged in economic activity or that his activity otherwise substantially affects interstate commerce in each case in which the federal government claims jurisdiction. As the Court noted in *Lopez*, this type of jurisdictional element requires proof of a substantial connection to interstate commerce each time, and would therefore guarantee that the exercise of federal jurisdiction is appropriate.¹⁹¹

2. Persons-Things-or-Channels Prongs

Jurisdictional elements that ensure that a statute only regulates persons or things in, or channels of, interstate commerce have generally been sufficient to uphold a statute under a facial challenge.¹⁹² In *Morrison*, the Court cited with approval a statute similar to VAWA prohibiting persons who cross state lines from committing a crime of vio-

¹⁸⁷ 529 U.S. 848, 854 (2000); *see also, e.g.*, *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (establishing that the words “affecting commerce” indicate Congress’s intention to exercise jurisdiction to the full limits of the Commerce Clause).

¹⁸⁸ *Lopez*, 514 U.S. at 556-59.

¹⁸⁹ *See United States v. Morrison*, 529 U.S. 598, 613 (2000); *Maxwell*, 386 F.3d at 1061 (analyzing the defendant’s conduct and finding fatal the fact that its “link to a substantial effect on interstate commerce . . . is exceedingly attenuated”); Fischer, *supra* note 145, at 119 (noting that a jurisdictional element needs to ensure that the conduct at issue affects interstate commerce).

¹⁹⁰ S. 1105, 110th Cong. (2007).

¹⁹¹ *Lopez*, 514 U.S. at 561-62.

¹⁹² *Morrison*, 529 U.S. at 613 n.5.

lence against a spouse.¹⁹³ The Court noted that “[t]he Courts of Appeals have uniformly upheld this criminal sanction . . . , reasoning that ‘[t]he provision properly falls within the first of *Lopez*’s categories as it regulates the use of channels of interstate commerce—i.e., the use of the interstate transportation routes through which persons and goods move.’”¹⁹⁴ Similarly, in *United States v. Dorsey*, the Ninth Circuit upheld an amended version of the Gun-Free School Zones Act at issue in *Lopez*.¹⁹⁵ The amended GFSZA made it a federal crime to “knowingly . . . possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place the individual knows, or has reasonable cause to believe, is a school zone.”¹⁹⁶ Because the jurisdictional element ensures that the statute regulates the gun itself, and requires that the government prove that the gun has moved in interstate commerce, it guarantees that the activity will be within the power of Congress to regulate a thing in interstate commerce.

Section 7(a)(2)(B)(i) of the Matthew Shepard Act regulates persons or things in interstate commerce and the channels of interstate commerce by prohibiting persons who cross state lines from committing crimes of violence based on the victim’s membership in a named class.¹⁹⁷ As the Court noted in *Morrison*, this type of jurisdictional element has been “uniformly upheld” by the courts of appeals as a valid regulation of the interstate transportation system.¹⁹⁸ Similarly, section 7(a)(2)(B)(ii) regulates the channels of interstate commerce by prohibiting their use to commit a crime of violence.¹⁹⁹ Based on the Ninth Circuit’s holding in *Dorsey*, and the *Morrison* Court’s apparent approval of these prongs, it is likely that the Court will find this prong sufficiently limiting.

3. Materials-in-Commerce Prongs

In contrast to affecting-commerce prongs and persons-things-or-channels prongs, courts have generally held that materials-in-commerce prongs are too broad to support a statute. This type of ju-

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 614 n.5 (quoting *United States v. Lankford*, 196 F.3d 563, 571-72 (5th Cir. 1999)).

¹⁹⁵ *United States v. Dorsey*, 418 F.3d 1038, 1045-46 (9th Cir. 2005).

¹⁹⁶ *Id.* at 1045 (citing 18 U.S.C. § 922(q)(2)(A) (2000)).

¹⁹⁷ S. 1105, 110th Cong. (2007).

¹⁹⁸ *Morrison*, 529 U.S. at 614 n.5 (citing *Lankford*, 196 F.3d at 571-72).

¹⁹⁹ S. 1105, 110th Cong. (2007).

isdictional element triggers federal jurisdiction over a defendant who is not otherwise involved with interstate commerce simply because she used a material that had been in interstate commerce for some aspect of her crime. The child pornography statutes discussed above contain this type of prong, and it is the presence of this materials-in-commerce prong that has led all but the Eighth Circuit to declare the jurisdictional element of these statutes insufficient to support the law on its own.²⁰⁰ The child pornography statutes make it a crime to possess or manufacture child pornography that “has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced by using materials which have been mailed or so shipped or transported.”²⁰¹ The emphasized portion of this statute’s jurisdictional element is its materials-in-commerce prong, which seeks to claim jurisdiction over the purely intrastate possession of child pornography because it was produced using materials that had previously traveled in interstate commerce.

Courts that have moved beyond the mere presence of these statutes’ jurisdictional elements to determine if they are sufficiently limiting to ensure the laws’ constitutionality have consistently held them to be insufficient.²⁰² The basic problem identified in these courts’ opinions is that a prosecutor’s proof that some material has traveled in interstate commerce tells the court very little about whether the defendant’s possession of child pornography substantially affected interstate commerce. In this way it fails to ensure a sufficient connection between the source of federal jurisdiction (i.e., the materials) and the activity being regulated (i.e., the possession of child pornography).

This failure is a source of concern for two reasons. First, the statute’s failure to ensure more of a connection to interstate commerce means that the law does not do what *Lopez* requires a jurisdictional element to do: guarantee that the regulated activity has a substantial effect on interstate commerce every time jurisdiction can be established. For example, courts have noted that proof that a defendant used some materials (e.g., film, cameras, or disks) that have traveled in interstate commerce does not necessarily mean that that defendant’s possession of child pornography has a substantial effect on in-

²⁰⁰ See, e.g., Fischer, *supra* note 145, at 118-21 (discussing this circuit split).

²⁰¹ 18 U.S.C. § 2252(a)(4)(B) (2006) (emphasis added); see also *id.* § 2251(a)-(b) (prohibiting the manufacture of child pornography); *id.* § 2252A(a)(5)(B) (prohibiting the possession of child pornography).

²⁰² See Fischer, *supra* note 145, at 109-21 (surveying the cases addressing the sufficiency of the jurisdictional element in the child pornography statutes).

terstate commerce.²⁰³ These courts note the attenuated connection between the activity being regulated—the possession of child pornography—and the objects through which federal prosecutors claim jurisdiction—the film, cameras, or disks.²⁰⁴ Rather than guaranteeing that the possession of child pornography substantially affects interstate commerce, these courts see the materials-in-commerce prong as an effort by Congress to claim jurisdiction over purely intrastate activities by using a jurisdictional hook that rests on an attenuated connection to interstate commerce—much as it attempted to gain control over intrastate violent crime by including attenuated findings in VAWA.²⁰⁵

The second cause for concern in these courts is that a materials-in-commerce prong has no conceivable limit. Through a materials-in-commerce prong Congress could potentially claim jurisdiction over any type of criminal activity, including theft, murder, or even violent crime in general. For instance, if a materials-in-commerce prong could support a statute, Congress would have the power to pass a law making it a federal offense to commit a violent crime, including murder, if the defendant uses a weapon that has traveled in interstate commerce. This statute would suddenly give federal authorities the power to prosecute nearly every violent crime committed in the United States because almost all violent crimes are committed with a weapon that at some point has traveled in interstate commerce.²⁰⁶ There are, however, few areas of control more traditionally left to the states than the regulation of violent crime.²⁰⁷ A jurisdictional element

²⁰³ As the First Circuit noted in *United States v. Morales-De Jesús*,

[t]he jurisdictional element focuses on things such as film, cameras, videotapes, and recorders moving in interstate commerce, which are then used to produce child pornography. As a matter of logic, this Commerce Clause premise has the kind of flaw so worrisome to the Supreme Court in *Lopez* and *Morrison*—it could justify federalizing a vast array of crimes now prosecuted by the states, solely because the criminal used “materials that have been mailed, shipped, or transported in interstate [or] foreign commerce by any means.”

372 F.3d 6, 14 (1st Cir. 2004).

²⁰⁴ *Id.* at 14-15.

²⁰⁵ See Fischer, *supra* note 145, at 119-20; see also *supra* notes 170-179 and accompanying text.

²⁰⁶ See *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999) (citing Andrew St. Laurent, *Reconstituting United States v. Lopez: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 113 (1998)).

²⁰⁷ See *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“[W]e can think of no better example of the police power, which the Founders denied the National Govern-

that allows Congress to regulate nearly every violent crime committed within the United States cannot be sufficiently limiting to ensure a law's constitutionality.

Materials-in-commerce prongs therefore attempt to use an attenuated connection to interstate commerce to reach a potentially limitless class of activities. In this respect, they present courts with the same problems that the Supreme Court identified in *Morrison*. As the First Circuit stated, the materials-in-commerce prong suffers from "the kind of flaw so worrisome to the Supreme Court in *Lopez* and *Morrison*—it could justify federalizing a vast array of crimes now prosecuted by the states, solely because the criminal used 'materials that have been mailed, shipped, or transported in interstate [or] foreign commerce by any means.'"²⁰⁸ *Morrison* makes clear that the Court will be highly skeptical of anything that allows Congress to claim a general legislative power over areas traditionally regulated by the states, particularly when its method depends on the use of an attenuated and indirect connection to interstate commerce.²⁰⁹

It is important to note that the jurisdictional element held insufficient by these courts contains a persons-things-or-channels prong as well as a materials-in-commerce prong. But in these cases the presence of the materials-in-commerce prong prevented the jurisdictional element from sustaining the statutes under constitutional challenge because a jurisdictional element will only be as limiting as its broadest prong.²¹⁰ In fact, the presence of both types of prongs helps to illustrate the important difference between a persons-things-or-channels prong and a materials-in-commerce prong. As noted above, a persons-things-or-channels prong brings the activity being regulated out of the realm of the substantial-effects test, where it must contend with the requirements of *Lopez*, and ensures that the law is a regulation of a

ment and reposed in the States, than the suppression of violent crime and vindication of its victims.").

²⁰⁸ *Morales-De Jesús*, 372 F.3d at 14.

²⁰⁹ See *Morrison*, 529 U.S. at 617 ("We accordingly reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

²¹⁰ See, e.g., *United States v. Maxwell*, 386 F.3d 1042, 1062 (11th Cir. 2004) (rejecting § 2252(a)(5)(B) because the statute's utilization of the materials-in-commerce prong did not sufficiently cabin the statute's reach to guarantee a substantial effect on interstate commerce), *vacated*, 546 U.S. 801 (2005), *rev'd*, 446 F.3d 1210 (11th Cir. 2006); *Rodia*, 194 F.3d at 473 (holding the materials-in-commerce prong to be "almost useless" in limiting regulation to activity that substantially affects interstate commerce, but nonetheless finding that the statute survived because the activity being regulated was substantially related to interstate commerce).

person or thing in interstate commerce or the channels of interstate commerce, rather than of some other activity.

For example, the persons-things-or-channels prong of the child pornography statutes makes it a federal crime to possess child pornography that has itself been transported or shipped across state lines.²¹¹ In contrast, the materials-in-commerce prong makes it a federal crime to possess child pornography that has never moved beyond one state, so long as it was produced using materials that have been transported or shipped across state lines.²¹² The activity being regulated in both of these situations is the possession of child pornography, and it is this activity that must be shown to be within one of the three categories of congressional authority under the Commerce Clause. Under the persons-things-or-channels prong, if federal prosecutors can show that the child pornography was shipped or moved across state lines, they have shown that the pornography itself is a “thing” in interstate commerce over which Congress clearly has regulatory power.

If, however, the pornography itself never moved across state lines, it cannot be said to be an object in interstate commerce. In that situation the prosecutors must use the materials-in-commerce prong to claim jurisdiction, and they must establish that the intrastate possession of child pornography substantially affects interstate commerce. Because this activity falls under the substantial-effects test, all the requirements of *Lopez* become applicable, and the connection between the grounds for federal authority and the activity being regulated must not be too attenuated. Importantly, it is not the use of the interstate materials that is being regulated, but rather, as noted above, the possession of child pornography. Had it chosen to, Congress could have regulated the interstate materials because they are things in in-

²¹¹ See 18 U.S.C. § 2252(a)(4)(B) (2006) (prohibiting the possession or manufacture of child pornography that “has been mailed, or shipped or transported in interstate or foreign commerce”); see also *id.* § 2251(b) (allowing for the punishment of parents who allow their children to be the subject of child pornography, if the parent knows that the depiction will be transported in interstate commerce, or that the materials used to make the depiction have been transported in interstate commerce); *id.* § 2252A(a)(5)(B) (criminalizing the knowing possession of any “material that contains an image of child pornography that has been . . . transported in interstate or foreign commerce by any means”).

²¹² See *id.* § 2252(a)(4)(B) (prohibiting the possession or manufacture of child pornography that has not been shipped or transported across state lines but that “was produced using materials that have been mailed, or so shipped or transported in interstate or foreign commerce by any means”).

terstate commerce. But, in the case of a materials-in-commerce prong, Congress is seeking not to regulate the materials themselves but some other activity that is claimed to have a substantial effect on interstate commerce. As noted above, however, the *use of materials* that have traveled in interstate commerce cannot be said to “guarantee” that the *possession of child pornography* substantially affects interstate commerce. The relationship is too attenuated and indirect, and because a materials-in-commerce prong leaves the activity being regulated inside the realm of the substantial-effects test, such a connection is not sufficient to support the law.

This is also the basis for the distinction courts have drawn between the materials-in-commerce prong of the child pornography statutes and the persons-things-or-channels prong of the firearm regulations in 18 U.S.C. § 922. These laws prohibit the possession of guns by various individuals, and in various situations, including the familiar prohibition on the possession of a gun in a school zone.²¹³ In fact, after the Supreme Court struck down the GFSZA in *Lopez*, Congress amended the statute to include a jurisdictional element. After its amendment, that law now says that it is illegal to possess, in a school zone, a gun “that has moved in . . . interstate or foreign commerce.”²¹⁴ As mentioned above,²¹⁵ courts have upheld this statute as a valid exercise of Congress’s authority under the Commerce Clause because of the proper functioning of its jurisdictional element.²¹⁶ Courts that have considered the child pornography statutes have distinguished the laws in § 922, and their jurisdictional element, from the child pornography laws with their materials-in-commerce prong. These courts have reasoned that a prohibition on the possession of an object of interstate commerce is different from a prohibition on the possession of an intrastate object produced using some interstate materials.²¹⁷ A prohibition on the possession of an object of interstate commerce is seemingly valid as a regulation of persons or things in

²¹³ *Id.* § 922(q).

²¹⁴ *Id.* § 922(q)(2)(A).

²¹⁵ See *supra* notes 195-196 and accompanying text.

²¹⁶ See, e.g., *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005) (“This jurisdictional element saves § 922(q) from the infirmity that defeated it in *Lopez*.”); *United States v. Danks*, 221 F.3d 1037, 1038-39 (8th Cir. 1999) (upholding the constitutionality of the amended statute against a Commerce Clause challenge because the statute “contains an interstate-commerce requirement” in its jurisdictional element).

²¹⁷ See, e.g., *United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000) (reasoning that a prohibition of possession of a weapon that has moved across state lines is not equivalent to a prohibition of homicides using such weapons).

interstate commerce. But a prohibition on the use of that object for some other illegal activity is no longer a regulation of the object itself, but of the activity. For the regulation of the activity to be a valid exercise of Congress's power under the Commerce Clause, that activity must substantially affect interstate commerce. If a jurisdictional element does not ensure this substantial effect, the element cannot support the law. As the Fifth Circuit succinctly stated, "[i]t is one thing for Congress to prohibit possession of a weapon that has itself moved in interstate commerce, but it is quite another thing for Congress to prohibit homicides using such weapons."²¹⁸

In this sense, it is clear that a persons-things-or-channels element and a materials-in-commerce element must do different things to support their respective laws. For a persons-things-or-channels element to ensure that the possession of an object is prohibitable by Congress, it only has to ensure that the object is, in fact, one of interstate commerce—i.e., that it indeed has traveled across state lines. But in order to support a law relying on a materials-in-commerce element, that element must ensure that the regulated activity substantially affects interstate commerce—a much more difficult standard to meet. It may be that there are some activities so intricately connected to the materials used in their commission that the connection between the interstate travel of the materials and the interstate impact of the activity may guarantee the requisite nexus in each case. Under *Morrison*, this is a judicial question.²¹⁹ But in the case of the child pornography statutes, it has been the near universal opinion of the courts of appeals that the connection between the materials used to create child pornography and the interstate impact of the possession of child pornography is too attenuated to guarantee this connection.²²⁰

The materials-in-commerce prong of the Matthew Shepard Act's jurisdictional element prohibits the use of a "firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce."²²¹ This prong, similar to the materials-in-commerce

²¹⁸ *Id.*

²¹⁹ See *United States v. Morrison*, 529 U.S. 598, 614 (2000) ("[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995))).

²²⁰ See Fischer, *supra* note 145, at 109-18 (describing the holdings and reasoning of the cases addressing the sufficiency of the materials-in-commerce prong in the child pornography statutes).

²²¹ S. 1105, 110th Cong. § 7(a)(2)(B)(iii) (2007).

prong of the child pornography statutes, suffers from both dangers that courts have identified with respect to these elements. First, it is unclear how the fact that a weapon has traveled in interstate commerce “guarantees” that a bias-motivated violent crime substantially affects interstate commerce. In that sense, the connection between the trigger for federal jurisdiction and the activity being regulated is just as attenuated as that of the child pornography statutes. Because it does not fulfill the task assigned by *Lopez*—to guarantee that each time jurisdiction can be established the activity regulated substantially affects interstate commerce—the Matthew Shepard Act’s jurisdictional element is not sufficient to support the bill.

Similarly, the materials-in-commerce prong of the Matthew Shepard Act opens up an area of criminal law even more traditionally regulated by the states than do the child pornography statutes. States have always had the primary authority to regulate violent crime, and courts will likely look with suspicion upon a materials-in-commerce prong that would give federal authorities greater control over this area. As one commentator has noted, a purely nominal jurisdictional element, such as one containing a materials-in-commerce prong, gives the federal government power over a nearly limitless class of criminal activity because “virtually all criminal actions in the United States involve the use of some object that has passed through interstate commerce.”²²² The materials-in-commerce element of the Matthew Shepard Act would, therefore, likely make nearly every bias-motivated violent crime committed in the United States a federal offense. Without a very clear connection to interstate commerce, courts will be extremely hesitant to approve a jurisdictional element that so significantly upsets the federal/state balance. Because the connection between the fact that the weapon has traveled in interstate commerce and the effect of the bias-motivated crime on interstate commerce is indirect and attenuated, it seems very unlikely that courts will allow the Matthew Shepard Act’s materials-in-commerce prong to support the bill.

²²² St. Laurent, *supra* note 206, at 113. The Third Circuit quoted St. Laurent in its decision in *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999). After quoting the statement above, the court went on to say that, in the case of the child pornography statutes before it, “[a]s a practical matter, the limiting jurisdictional factor is almost useless here, since all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce and will therefore fall within the sweep of the statute.” *Id.*

4. The Matthew Shepard Act's Jurisdictional Element at Work

To illustrate the problems caused by the breadth of a materials-in-commerce prong, imagine a scenario in which the federal government seeks to claim jurisdiction over a purely local bias-motivated crime. Suppose that while walking through a public park, the defendant sees a man whom he believes to be homosexual playing a guitar for recreation.²²³ Because of the man's perceived homosexuality, the defendant shouts derogatory statements to which the musician does not respond. Because his insults failed to disturb the musician, the defendant grows angry, grabs the musician's guitar, and begins to beat him with it. The local police are called, arrest the defendant, and charge him with a hate crime.²²⁴

So far, this is a relatively straightforward case over which the local authorities have clear power to prosecute. The defendant certainly committed a crime of violence that seems to have been motivated by his animus toward homosexuals. Assuming that state bias-crime laws include sexual orientation as a protected class, the defendant will probably be convicted of a bias-motivated violent crime.

Suppose, however, that federal prosecutors want to become involved in this case because, for instance, the state's bias-crime law does not cover crimes motivated by animus toward sexual orientation. Leaving aside the other elements of the case, the federal prosecutors would have to prove that the defendant's crime substantially affects interstate commerce for jurisdiction to be proper under the Matthew

²²³ Whether or not the victim is *actually* a member of the protected class is irrelevant because the Matthew Shepard Act brings under its scope crimes committed based on the defendant's belief that the victim is a member of a particular class. See S. 1105, 110th Cong. § 7(a)(2)(A) (2007) (prohibiting crimes of violence committed because of the victim's "actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability").

²²⁴ This fact pattern is adapted from the case of Angel Santaurio. Santaurio was carrying his guitar while walking to a local motel to see a band perform. As he passed a bar frequented by homosexuals—at which he had been a janitor—a truck pulled up and one of its passengers yelled homophobic insults at him. When Santaurio did not respond, the truck's passengers got out of the truck and began to beat Santaurio with his own guitar. The passengers pled no contest to local assault and hate crime charges and were ordered to pay more than \$14,000 in restitution to Santaurio, in addition to serving three-year prison terms. See Jon Wiener, *Defendant in Hate Crime Case to Be Tried*, MOUNTAIN VIEW VOICE (Mountain View, Cal.), July 23, 2004, at 1, available at http://www.mv-voice.com/morgue/2004/2004_07_23.trial.shtml (last visited Nov. 15, 2008). Because Santaurio's assault interfered with his ability to watch the band, and because this is arguably commercial activity, section 7(a)(2)(B)(iv)(I) of the Matthew Shepard Act may have triggered federal jurisdiction in this case.

Shepard Act. To do this, they would have to prove one of the jurisdictional elements in section 7(a)(2)(B).

At first glance, it seems that the federal prosecutors would have difficulty showing how the defendant's crime substantially affects interstate commerce. Neither the defendant nor the victim crossed state lines or was engaged in any commercial activity. In fact, as a purely local, non-economic, violent crime, this seems like the paradigmatic case in which a federal government of limited powers should not be able to exert authority. Thus, if the jurisdictional element of the Matthew Shepard Act does in fact limit the class of cases covered by the bill to those that substantially affect interstate commerce, one would expect that federal prosecutors would be unable to prove any aspect of the element in this case.

The outcome of this analysis is as predicted for all but the materials-in-commerce prong of the Matthew Shepard Act. First, because no one crossed state lines, section 7(a)(2)(B)(i) does not apply. Second, the defendant used no channel or facility of interstate commerce to commit the crime, so section 7(a)(2)(B)(ii) also fails to trigger federal jurisdiction. Third, because the assault did not interfere with any commercial activity of the victim, section 7(a)(2)(B)(iv)(I) cannot be the source of jurisdiction either. Of course, the federal prosecutors are free to prove that the assault "otherwise substantially affects interstate commerce" under section 7(a)(2)(B)(iv)(II), but because of the local and non-economic nature of the case, they will have difficulty doing so.

So far the result is consistent with the initial assessment that the assault does not substantially affect interstate commerce. Were these four prongs the only means of triggering federal jurisdiction, the bill would most likely be constitutional because the jurisdictional element seems to limit the class of cases to which the bill will apply to those having a substantial connection with interstate commerce. Problems arise, however, when federal prosecutors attempt to assert jurisdiction under the materials-in-commerce prong of section 7(a)(2)(B)(iii). Here the prosecutors would have to prove that a weapon—the guitar, in this case—has traveled in interstate commerce. To do this, they would simply have to show that the victim's guitar had been manufactured in any state other than the one in which the crime occurred. Most likely the prosecutors would be able to prove this, and the materials-in-commerce prong would therefore trigger federal jurisdiction.

But is this the correct result? Does the fact that the prosecutors can prove that the guitar was manufactured somewhere other than

the state in which the crime took place guarantee that *this particular crime* substantially affects interstate commerce? Did the fact that the guitar could someday be used as a weapon with which the victim could be beaten enter into the victim's mind when he purchased it in such a way that it would affect his decision whether or not to buy the guitar? Does the location in which the guitar was manufactured tell us anything about the assault's effect on interstate commerce?

It is likely that the answer to all of these questions is no, and that the materials-in-commerce prong does a poor job of fulfilling the purpose of a jurisdictional element: to limit the class of cases brought under the scope of the statute to those that substantially affect interstate commerce. In fact, extending the analysis to more traditional weapons, it is likely that the materials-in-commerce prong will bring nearly every case within the scope of the Matthew Shepard Act simply because the defendant used a weapon that at some point had been shipped across state lines.²²⁵ This is exactly the problem that has led all circuits but the Eighth to find the jurisdictional element of the child pornography statutes unsatisfactorily broad.²²⁶

Although the jurisdictional limitations of section 7(a)(2)(B)(i)–(ii) restrict the class of activities regulated to those that have a sufficient connection with interstate commerce, the Matthew Shepard

²²⁵ It is conceivable that Congress could prohibit the *possession* of guitars that have moved interstate because these guitars themselves are the “things in interstate commerce.” But this does not mean that Congress could prohibit, for instance, the playing of guitars. That is, Congress could not prohibit the playing of guitars generally. Congress could, most likely, prohibit the playing of guitars for money because this would probably qualify as “economic” behavior that is entitled to deference under *Lopez*. See *United States v. Lopez*, 514 U.S. 549, 559-60 (1995). Congress could also potentially argue that, because of its desire to eliminate the market for guitars, a prohibition on playing guitars is necessary to prevent the appearance of homemade guitar-like instruments that would circumvent the statute, but this would be decided on *Raich* grounds rather than based on any type of jurisdictional-element analysis. Similarly, Congress cannot prohibit the use of guitars (or any other weapon) to commit violent crimes without the crime itself having some connection to interstate commerce.

²²⁶ See *United States v. Morales-De Jesús*, 372 F.3d 6, 14 (1st Cir. 2004) (noting that the materials-in-commerce prong of the child pornography statutes can be used as a justification for “federalizing a vast array of crimes now prosecuted by the states, solely because the criminal used ‘materials that have been mailed, shipped, or transported in interstate [or] foreign commerce by any means’”); *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999) (“A purely nominal jurisdictional requirement, that some entity or object involved in the crime be drawn from interstate commerce, does nothing to prevent the shifting of [the federal/state] balance in favor of the federal government. As has been amply demonstrated, virtually all criminal actions in the United States involve the use of some object that has passed through interstate commerce.” (alterations in original) (quoting St. Laurent, *supra* note 206)).

Act's jurisdictional element is likely still too broad because the materials-in-commerce prong allows for federal jurisdiction beyond the limits of the Commerce Clause. Since the jurisdictional element does not sufficiently limit the class of activities to those having the requisite connection with interstate commerce, the bill cannot be distinguished from *Morrison's* VAWA. Like VAWA, the bill is not an economic regulation, contains findings showing only an attenuated connection to interstate commerce, is not an essential part of a larger economic regulation, and does not contain a sufficiently limiting jurisdictional element. Therefore, as with VAWA, the Matthew Shepard Act is likely beyond Congress's power under the Commerce Clause.

V. THE FUTURE OF FEDERAL HATE CRIME LAWS

Because the Matthew Shepard Act is unconstitutionally broad, the question that remains is how Congress should remedy this defect. Congress can easily amend the bill to remove the constitutional question by simply eliminating the materials-in-commerce prong, without which the bill appears to be sufficiently limited to cases that qualify as "substantially affecting interstate commerce."²²⁷ Even if Congress chooses to take its chances with the current version of the bill, the Supreme Court can still easily declare the materials-in-commerce prong invalid under the above analysis but maintain the rest of the law by severing the unconstitutional prong. The debate, then, concerns the wisdom, not the possibility, of a federal hate crime law without a materials-in-commerce prong.

One reason why Congress will likely hesitate to remove the materials-in-commerce prong from the Matthew Shepard Act is that this prong is the hook that allows the bill to reach most cases. Unfortunately for the bill's supporters, it is precisely the prong's strength in bringing a large number of cases under the jurisdiction of the bill that makes the jurisdictional element unconstitutionally broad. It is clear that a Matthew Shepard Act without a materials-in-commerce prong is much more limited in scope than a Matthew Shepard Act with such a prong because, in its absence, federal prosecutors will have to estab-

²²⁷ That is, the other prongs of the bill's jurisdictional element appear to limit the class of potential cases to those that "substantially affect interstate commerce" under the tests laid out in the Court's Commerce Clause jurisprudence. Whether or not these cases actually affect interstate commerce is another, more normative, question that this Comment does not seek to answer.

lish that the crime in question qualifies under one of the other, much more limited, prongs of the bill's jurisdictional element.

In fact, without the materials-in-commerce prong, even the murder of Matthew Shepard would have been beyond the reach of the Matthew Shepard Act. In that case, the gun that the defendants used to beat Shepard was, most likely, manufactured outside of Wyoming,²²⁸ therefore triggering jurisdiction under a materials-in-commerce prong. But without a materials-in-commerce prong, it is clear that Shepard's murder would not trigger jurisdiction under any of the bill's remaining jurisdictional-element prongs because no one crossed state lines, was engaged in commercial activity, or used a channel of interstate commerce to commit the crime.²²⁹

Not only would a Matthew Shepard Act without a materials-in-commerce prong fail to reach the murder of Matthew Shepard, but the murder of James Byrd, Jr., would also be beyond the reach of such a bill. In that case, the objects used by the defendants to beat Byrd, the chain used to tie him to the back of the pickup truck, and even the truck with which the defendants dragged him could all arguably have been grounds for jurisdiction under a materials-in-commerce prong.²³⁰ Absent such a prong, however, federal prosecutors would have been unable to prove the connection to interstate commerce required to establish jurisdiction over the crime, and prosecution would have been left to the state, just as it was without the Matthew Shepard Act.

Without a materials-in-commerce prong, the Matthew Shepard Act reaches only a very limited class of cases in which a defendant crosses state lines, uses a channel of interstate commerce, or somehow interferes with the economic activity of the victim. What, then, is the need for an essentially powerless federal hate crime statute that does not even respond to the two headline-making crimes that led to its proposal?

Given that an amended Matthew Shepard Act is essentially powerless, Congress should abandon its attempt to pass the bill because the expansion of federal criminal law brings costs of its own. First, federal prosecutions tend to make the criminal justice system less efficient by introducing complexities that do not exist in state prosecutions.²³¹

²²⁸ See Brooke, *supra* note 21, at A9 (describing the circumstances of Shepard's murder and noting that the defendants beat him with a .357 magnum handgun).

²²⁹ See Matthew Shepard Act, S. 1105, 110th Cong. § 7(a)(2)(B) (2007).

²³⁰ For a detailed description of the circumstances of Byrd's murder, see ROBINSON, *supra* note 17, at 235-41.

²³¹ See *supra* note 78 and accompanying text.

Even though the deletion of the materials-in-commerce prong will reduce the number of federal prosecutions under the bill, federal officials must expend resources before a prosecution can be brought to determine if the other jurisdictional elements of the Matthew Shepard Act can be met, even if it is ultimately decided that a case does not qualify for federal prosecution. Second, the respect for residual state sovereignty is seriously diminished whenever the federal government attempts to exert power over areas traditionally subject to state control.²³² Even a properly limited Matthew Shepard Act tends to undercut the power of the states to protect the safety of its citizens through the police power by pressuring them to relinquish jurisdiction in cases in which the federal government wants to get involved. If state law were inadequate in some way, these intrusions may be justifiable, but, as previously noted, state law has been able to do exactly what an amended Matthew Shepard Act could not: send the murderers of Matthew Shepard and James Byrd, Jr., to prison for the rest of their lives.²³³ Given that a Matthew Shepard Act without a materials-in-commerce prong gives federal prosecutors jurisdiction over a very small number of cases in which state law already provides more than adequate coverage, the benefits of a federal hate crime law do not seem to justify its costs. Congress should therefore abandon its attempt to enact a federal hate crime statute rather than settle for a Matthew Shepard Act amended to cure its constitutional defect.

CONCLUSION

Lopez signaled an important change not only in Commerce Clause jurisprudence, but also in the way that the Supreme Court will approach federal legislation in the future. In emphasizing that the Commerce Clause is, in fact, a limited grant of legislative authority, the Court signaled its intent to police the outer limits of the commerce power in order to maintain a proper federal/state balance. The Court made clear that it will not hesitate to strike down statutes

²³² See *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”); see also *Alden v. Maine*, 527 U.S. 706, 748 (1999) (“Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”).

²³³ See *supra* notes 79-82 and accompanying text.

that impermissibly encroach on that balance without a sufficient connection to interstate commerce.

Congress, for its part, has attempted to circumvent this limit in many ways. The three primary tools at its disposal after *Lopez* are the jurisdictional element, congressional findings, and large regulatory schemes aimed at interstate economic activity. In *Morrison*, the Court had the opportunity to provide guidance about the effect of congressional findings on a Commerce Clause challenge, holding that these findings would not support a statute with an overly attenuated connection to interstate commerce. In *Raich*, the Court clarified the types of situations in which a particular regulation will qualify as a necessary part of a larger regulation of economic activity. Remaining after these three cases is the question of how limiting a jurisdictional element must be in order to withstand constitutional challenge under the Commerce Clause. If the Matthew Shepard Act is passed into law as currently written, the Supreme Court will have the opportunity to round out modern Commerce Clause doctrine by clarifying the law regarding jurisdictional elements.

Moreover, the current version of the Matthew Shepard Act provides the perfect opportunity for the Court to place the final piece in this doctrinal puzzle. First, because the Matthew Shepard Act is so similar to VAWA, the bill is clearly unconstitutional without the jurisdictional element.²³⁴ Because the bill is unconstitutional without the jurisdictional element, the Court will be able to isolate the effect of the element and speak directly to this point without concerning itself with any complications that may have arisen from a different outcome on one of the other two *Lopez* factors (i.e., that the findings are less attenuated or that the regulation may more easily be considered part of a larger economic regulation). The ability to isolate the effect of the jurisdictional element in the Matthew Shepard Act means that the Court will be able to clearly present its reasoning on exactly what an element must do in order to ensure a statute's constitutionality.

Second, because the Matthew Shepard Act contains practically every type of jurisdictional-element prong currently present in federal statutes, the Court will be able to address all prongs and assess the constitutionality of each. As noted above, many of the prongs seem to

²³⁴ This similarity includes both the type of conduct regulated (i.e., violence toward a person based on that person's gender) and the findings relied on in support of each statute.

be constitutional based on the dicta of other cases,²³⁵ and it seems to be only the materials-in-commerce prong that gives the bill unconstitutional breadth. By drawing this contrast between the properly limiting prongs of the bill's jurisdictional element and the unconstitutional materials-in-commerce prong, the Court will be able to give this area of law a level of clarity that it has not enjoyed since *Lopez*. Ultimately, this would serve both the lower courts, in their efforts to assess the constitutionality of federal laws limited by jurisdictional elements, and Congress, as it attempts to craft laws in accordance with the requirements and limits of the Constitution.

The controversial nature of the Matthew Shepard Act indicates that challenges to its constitutionality will accompany any attempted prosecutions. Because the bill's materials-in-commerce prong, which brings a nearly limitless class of cases under its scope, is squarely at odds with *Lopez's* resistance to a general federal legislative and police power, the Matthew Shepard Act seems to be on a collision course with the Court's new Commerce Clause doctrine. Congress can prevent this collision by amending the bill to remove the materials-in-commerce prong, but the political popularity of federal hate crime legislation seems to indicate that Congress is unlikely to remove the one part of the bill's jurisdictional element that gives it any bite. Should Congress leave it to the Supreme Court to decide the constitutionality of the bill's materials-in-commerce prong, the result will likely be a landmark case of modern Commerce Clause doctrine, the holding of which will define the role of the jurisdictional element throughout all of federal law.

²³⁵ See *supra* Part IV.B.1-2.