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Anchoring Justice: The Constitutionality of the Local Law Enforcement Enhancement Act in *United States v. Morrison's* Shifting Seas

by
Anthony E. Varona and Kevin Layton

On May 15, 2000, the Supreme Court announced its decision in *United States v. Morrison*,¹ invalidating the federal civil remedy for victims of gender-motivated violence enacted by Congress as part of the Violence Against Women Act (VAWA).² Christy Brzonkala originally brought the case that led to the *Morrison* decision. She alleged that two fellow students raped her at Virginia Polytechnic Institute in September 1994. After a school disciplinary proceeding failed to discipline either of the two alleged rapists, Brzonkala filed suit in federal court against the individuals under the VAWA civil remedy (and against the school under Title IX of the Education Amendments Act of 1972).³ Both the District

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Court⁴ and the Fourth Circuit Court of Appeals⁵ struck down VAWA's civil remedy, and the United States intervened to defend the constitutionality of the statute. A five-to-four majority of the Supreme Court found no constitutional support in either the Commerce Clause or the Fourteenth Amendment for VAWA's federal civil remedy.⁶

More than a disappointing defeat for women's rights advocates, the *Morrison* decision rang an alarm through the civil rights community. Not only does it bring into question the validity of a large body of existing statutes, it could also be a bad harbinger for pending civil

rights legislation, in particular, the Local Law Enforcement Enhancement Act (LLEEA). Like VAWA, LLEEA would be a federal civil rights law that prohibits bias-motivated incidents. LLEEA would expand existing law to allow federal prosecution of hate crime committed on the basis of sexual orientation, gender, and disability status.

The predecessor bill of LLEEA faced misinformed criticism and critique by opponents,⁷ but now the *Morrison* decision provides traction for the entirely different argument that Congress does not have authority under the Commerce Clause or the Fourteenth Amendment to enact LLEEA. This article will show how instead of tolling the demise of congressional hate crime legislation such as LLEEA, *Morrison* actually reaffirms

the legislation's constitutionality. First we will examine LLEEA in detail, and then consider the shifting legal seas created by the addition of the *Morrison* decision to Supreme Court congressional authority jurisprudence. Specifically, we will examine *Morrison* in light of the two recent major cases, *United States v. Lopez* and *Flores v. City of Boerne*, that seem to have marked the beginning of these "shifting seas." To illuminate the legal shift, we will examine past use of the Commerce Clause to enact federal criminal and civil rights legislation and review the Court's discussion of the limits of the Commerce Clause in *Morrison*. We will explore the decision's potential effect on enacting LLEEA and the multiple jurisdictional elements written into LLEEA to address, in part, the perceived shortcomings of the legislation's constitutionality under the Commerce Clause in a post-*Morrison* world. We will then turn to the Fourteenth Amendment, review its past role in enacting similar legislation, its treatment in *Morrison*, and the impact *Morrison* should have on the decision to enact LLEEA. We conclude with a judgment on the constitutionality of LLEEA and an optimistic vision for its future enactment.

I. THE LOCAL LAW ENFORCEMENT ENHANCEMENT ACT

LLEEA is only the latest in a series of federal criminal statutes debated by Congress. While arguing that criminal law is solely an area of state interest, the Republican-controlled Congress has enacted at least thirty-five laws since 1995⁸ that create new federal crimes or impose new federal criminal penalties for conduct that is or may also be criminal under state law.

The 106th Congress considered three separate pieces of hate crime legislation in its waning days.⁹ Of the three, LLEEA had the strongest support. Despite the strong showing of support for this legislation in both the House of Representatives¹⁰ and the Senate,¹¹ as part of their last-minute deliberations the Republican congressional leadership removed LLEEA from the Department of Defense Authorization bill to which it had been attached.¹²

LLEEA is likely to be the starting point for hate crimes legislation in the 107th Congress. Thus, a review of LLEEA's provisions and the constitutional issues raised by the Supreme Court in *Morrison* will better inform the debate in Congress. As passed by the United States Senate, LLEEA (like the Hate Crimes Prevention Act introduced earlier in the 106th Congress) would expand federal jurisdiction to reach serious, violent hate crimes. Congress enacted the existing federal criminal civil rights law, 18 U.S.C. § 245, as part of the Civil Rights Act of 1968 in response to *inaction* on the part of state and local law authorities in protecting the federally protected civil rights of victims of race- and religion-based hate violence.

The law requires two elements to be met before the federal government may prosecute a hate crime. First, the statute requires that the crime be committed because of the victim's race, religion, national origin, or color. Second, the perpetrator must have *intended* to prevent the victim from exercising a "federally protected right" (such as voting, serving on a jury, or attending a public school). Although successful prosecutions have been brought under this statute,¹³ this dual requirement substantially limits the potential for federal assistance in investigating or prosecuting hate crimes, even when the crime is particularly heinous.

Similarly, LLEEA is, in part, a response to *inaction* on the part of state and local law enforcement in protecting the civil rights of victims of gender-, disability-, and sexual orientation-based hate crimes. LLEEA defines a "hate crime" as a crime *motivated* "because of the actual or perceived race, color, religion, national origin, *gender, sexual orientation, or disability*" of the victim.¹⁴ Under LLEEA's first provision, hate crimes that result in bodily injury could be investigated and prosecuted by the federal government, whether or not the victim was exercising a federally protected right.¹⁵ Under LLEEA's second provision, in a hate crime motivated because of the victim's real or perceived religion, national origin, sexual orientation, gender, or disability, the federal government is required to prove a nexus between the crime and interstate or foreign commerce.¹⁶

LLEEA would thus do two things. First, the statute would provide new authority for federal officials to investigate and prosecute cases in which the hate violence occurs because of the victim's real or perceived sexual orientation, gender, or disability. The current statute, 18 U.S.C. § 245, already provides authority for federal prosecution of hate crimes committed because of the victim's race, religion or national origin. Second, LLEEA would not impose overly-restrictive requirements to federal prosecution—such as showing that the victim was attacked because he or she was engaged in a federally-protected activity—and instead would require the hate crime to be tied to interstate or foreign commerce in only one of several ways.¹⁷ Thus LLEEA should increase the potential for federal assistance in investigating or prosecuting hate crimes.

II. THE CONSTITUTIONALITY OF LLEEA

The *Morrison* decision is both timely and relevant as Congress considers hate crime legislation. Prior to *Morrison*, Congress had smooth sailing when it came to laws protecting civil rights. It enacted statutes on the calm sea of court-approved constitutional authority under the Commerce Clause and other parts of the Constitution.

One of its enactments was VAWA. Although VAWA's civil remedy did not contain a jurisdictional element requiring a link to interstate commerce, it did require the plaintiff to prove that she (or he) was a victim of a crime of violence *and* that the crime was committed because of or on the basis of gender, and that the violence was due, at least in part, to an animus based on the victim's gender.¹⁸ The Court's invalidation of that civil remedy on both Commerce Clause and Fourteenth Amendment grounds appears to call into question the authority of Congress to enact LLEEAA on either of those constitutional bases. This decision joins two issues on which the Court has become increasingly conservative—congressional authority to enact legislation under the Commerce Clause and under the Fourteenth Amendment. With respect to Commerce Clause jurisprudence, the decision builds on the Court's unexpected holding in *United States v. Lopez*, which struck down a federal criminal statute punishing the possession of a firearm within 1,000 feet of a school.¹⁹ The *Morrison* Court's discussion of the limits of the Fourteenth Amendment, in turn, builds on the Court's invalidation of provisions of the Religious Freedom Restoration Act ("RFRA") in *City of Boerne v. Flores*.²⁰ These two streams of conservative legal precedent converge in *Morrison* to become the shifting seas Congress must navigate to enact LLEEAA.

III. THE COMMERCE CLAUSE

The Commerce Clause provides the constitutional authority for federal jurisdiction over many modern-day civil rights and criminal laws.²¹ When Congress enacted legislation in the 1960s to protect individuals' civil rights against violations by other private individuals, it acted pursuant to its federal authority to regulate interstate commerce. The Supreme Court affirmed Congress' enactment of the civil rights legislation by upholding the public accommodations provisions of the Civil Rights Act of 1964 in *Heart of Atlanta Motel v. United States*²² and *Katzenbach v. McClung*.²³

In *Heart of Atlanta Motel*, a Georgia hotel owner refused to accommodate black travelers,²⁴ and in *McClung*, an Alabama restaurant owner refused to serve black customers.²⁵ The hotel served interstate travelers²⁶ and the restaurant, though it served primarily local customers, bought a substantial number of food products that had moved through interstate commerce.²⁷ As a consequence, both businesses were subject to Congress' constitutional authority to regulate interstate commerce under the Commerce Clause.²⁸

However, in 1995, the Supreme Court struck down a federal criminal statute in *United States v. Lopez* prohibiting possession of a gun within 1,000 feet of a public, parochial, or private school.²⁹ Alfonso Lopez, Jr.

was a high school senior at the time he was indicted by a federal grand jury for violating the Gun-Free School Zones Act of 1990 ("GFSZA") by knowingly possessing a firearm in a school zone. Lopez challenged his indictment at the District Court level, lost his challenge, and was tried and convicted of violating the Act. Lopez appealed his conviction, arguing that GFSZA was an unconstitutional exercise of Congress' authority under the Commerce Clause. The Fifth Circuit,³⁰ and ultimately the Supreme Court, agreed.

It was not the "criminal" nature of the possession of a gun within 1,000 feet of a school, but the alleged lack of a connection to commerce, that was fatal to the Gun-Free School Zones Act of 1990.³¹ In fact, the *Morrison* court noted that the noneconomic nature of gun possession was "central to [the] decision" in *Lopez*.³²

A. THE MORRISON DECISION

The legal uncertainty that arose around the Commerce Clause in the wake of the Supreme Court's decision in *Lopez*³³ is even stronger now that *Morrison* struck down another federal law as unconstitutional.³⁴ In its Commerce Clause analysis, the *Morrison* majority used unnecessarily broad language—the rhetorical equivalent of using a cannon to kill a fly—to announce that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."³⁵ According to the majority, "crimes of violence" are *not* economic activity and congressional action attempting to provide a federal remedy for what the Court characterized as "more purely intrastate . . . violent crime"³⁶ is an unconstitutional use of Congress' Commerce Clause power. Opponents of LLEEAA can be counted on to parrot this argument in support of their own argument that Congress does not have the authority to add gender, disability, or sexual orientation to 18 U.S.C. § 245.

The Court dodged the obvious question of the constitutionality of previous decisions (such as *Heart of Atlanta Motel* and *McClung*) by stating simply that violence is not economic activity while citing those decisions as examples of the Court's cases upholding federal statutes that substantially affected interstate commerce.³⁷ Indeed, the *Morrison* majority went so far as to assert that even *Wickard v. Filburn*³⁸ dealt with economic activity.³⁹ That interpretation, however, is not shared by Justice Souter, who noted that:

The *Wickard* Court admitted that Filburn's activity "may not be regarded as commerce" but insisted that "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . ." The characterization of home

wheat production as “commerce” or not is, however, ultimately beside the point. For if substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial? The Court’s answer is that it makes a difference to federalism, and the legitimacy of the Court’s new judicially derived federalism is the crux of our disagreement.⁴⁰

Justice Souter’s challenge to the relevance of the *causes* of “substantial effects” on commerce deserves more discussion. If the activity regulated by Congress has a substantial *effect* on commerce, the *cause* or origin of those effects should be irrelevant. The *Morrison* majority’s mandatory inquiry into whether the *source* of the “substantial effects” has a link to commerce weakens Congress’ ability to exercise its Commerce Clause power by creating additional obstacles to effective regulation. This new analysis seemingly requires that both the *origin* of the “effects” and the “effects” have a direct link to commerce. The Court’s prior decisions do not dictate this novel origin/source determination requirement which would unnecessarily cabin the Commerce Clause power.⁴¹ In fact, the Court’s decisions state quite clearly that if an activity “substantially affects” commerce, it may be regulated by Congress under the Commerce Clause.⁴² It is truly questionable whether the very action of growing wheat, or any food, for purely private consumption has any *direct* link to commerce—as the *Wickard* court readily admitted.⁴³ The *Morrison* Court’s attempt to reconcile the affirmation of the Agricultural Adjustment Act of 1938 with the invalidation of § 13981 of VAWA does nothing more than compound the already confusing history of Commerce Clause jurisprudence.⁴⁴

In *Lopez*, the absence of congressional findings was also a factor in the Court’s decision.⁴⁵ In *Morrison*, however, volumes of congressional findings supported the need for § 13981 of VAWA—findings which stood, in part, between the majority and their goal of striking down the statute. The Court cleared away this troublesome evidence showing the link between gender-based violence and interstate commerce by simply declaring that the findings supported an argument that had been “rejected as unworkable.”⁴⁶ Thus, the majority found, the Congressional findings were inapplicable.

B. COMMERCE CLAUSE ANALYSIS OF LLEEA UNDER MORRISON

For the purposes of LLEEA, Congress has considered evidence and testimony that acts of violence based on disability, sexual orientation, and gender

substantially affect interstate commerce.⁴⁷ Although this would clearly meet the requirements established by earlier Commerce Clause jurisprudence, as discussed above, it could now prove insufficient. Putting aside one’s own view of the merits of the majority’s rejection of the use of the Commerce Clause in *Morrison*, the current direction of this tug-of-war between opposing views of the constitutional use of Congress’ authority is no more likely to be permanent than was a much-different majority’s direction fifteen years ago.⁴⁸

C. THE JURISDICTIONAL ELEMENTS IN LLEEA: ESTABLISHING THE INTERSTATE COMMERCE NEXUS

The *Morrison* Court prohibited congressional regulation of “noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”⁴⁹ The strongest case for the constitutionality of federal criminal statutes—at least those based on the Commerce Clause—would seem to be those statutes that require proof of a connection between the criminal conduct and interstate or foreign commerce. Such a requirement has been utilized in many federal criminal statutes.⁵⁰ In fact, the Supreme Court based its rulings in *Lopez*⁵¹ and *Morrison*⁵² to a great degree on the lack of a jurisdictional element in GFSZA and § 13981 of VAWA, respectively. The *Morrison* majority also made passing reference to another provision of VAWA, 18 U.S.C. § 2261(a)(1)⁵³ (which was not at issue in *Morrison* because Brzonkala sought relief under the statute’s civil remedy), noting that this provision had been “uniformly upheld [by the Courts of Appeals] as an appropriate exercise of Congress’ Commerce Clause authority, reasoning that the provision properly falls within the first of *Lopez*’s categories⁵⁴ 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.”⁵⁵ LLEEA, by employing jurisdictional elements, clearly requires *more* than a simple showing of the conduct’s aggregate effect on interstate commerce. The Act requires the government to allege and prove, *beyond a reasonable doubt*, a connection between the bias crime committed because of the victim’s gender, disability, or sexual orientation and interstate or foreign commerce. This would satisfy the high court’s developing standard of Commerce Clause scrutiny.

We will address each of LLEEA’s jurisdictional elements below—crossing state lines; using a channel, facility, or instrumentality of commerce; using a weapon that has traveled in commerce; interfering with commercial or other economic activity; or otherwise affecting interstate or foreign commerce—as they appear in the legislation.

1. *Crossing State Lines*

The first of LLEEA's jurisdictional elements is similar to the criminal provision in VAWA, not at issue in *Morrison*, that requires travel across state lines in the commission of a crime. This LLEEA jurisdictional provision requires the government to prove a defendant or victim crossed a state line or national border, bringing it clearly within Congress' Commerce Clause power to "regulate the use of the channels of interstate commerce,"⁵⁶ and to "regulate and protect persons or things in interstate commerce."⁵⁷

Some might suggest that the congressional sponsors of this legislation restrict the jurisdictional element to this provision alone. However, the Justice Department's experience with even broader language in the Church Arson Prevention Act, 18 U.S.C. § 247, demonstrates that such a restrictive cabining of Congress' Commerce Clause authority would limit the ability of federal prosecutors to investigate and prosecute bias crimes under the statute and, as a result, would provide no service to victims of hate violence based on gender, disability, or sexual orientation.⁵⁸

2. *Using a Channel, Facility, or Instrumentality of Interstate or Foreign Commerce*

This jurisdictional provision, requiring the use of a "channel, facility, or instrumentality of interstate or foreign commerce,"⁵⁹ is also clearly within Congress' Commerce Clause authority to "regulate the use of the channels of interstate commerce" and "to regulate and protect the instrumentalities of interstate commerce."⁶⁰ This particular jurisdictional element exists in various statutes in the federal criminal code.⁶¹ While these statutes have not been tested in the Supreme Court, it is likely that they would pass the Court's Commerce Clause scrutiny.⁶²

3. *Use of a Weapon That Has Traveled in Interstate or Foreign Commerce*

The movement of weapons across state lines or national borders is a clear example of the kind of connection to interstate or foreign commerce that lies well within the reach of Congress' Commerce Clause authority.⁶³

4. *Interference With Commercial or Other Economic Activity*

This provision requires that the criminal conduct "interfere with commercial or other economic activity in which the victim is engaged."⁶⁴ In 1994, for example, Congress assured freedom of access to reproductive services by passing the Freedom of Access to Clinic Entrances Act (FACE).⁶⁵ The Act made it a federal crime

to use force or the threat of force to intentionally injure, intimidate, or interfere with any person "because that person is or has been . . . obtaining or providing reproductive health services."⁶⁶ While the statute arguably may not relate to interstate commerce on its face, numerous federal courts have found it to be a valid exercise of Congress' Commerce Clause power, including seven circuit courts of appeals that have ruled since the Supreme Court's decision in *Lopez*.⁶⁷ The Fourth Circuit—the same Circuit that invalidated VAWA's civil remedy—upheld FACE against a Commerce Clause challenge, reasoning as follows:

FACE does not regulate the provision of reproductive health care. Rather, it regulates the use of force, threat of force, or physical obstruction to intentionally injure, intimidate, or interfere with persons because they are or have been obtaining or providing reproductive health care services. Although this regulated activity is not itself commercial or economic in nature, it is closely connected with, and has a direct and profound effect on, the interstate commercial market in reproductive health care services.⁶⁸

For a successful prosecution using this jurisdictional element, federal prosecutors must provide evidence of some connection between the act of bias-motivated violence and the victim's commercial or economic activity. The Hobbs Act,⁶⁹ which prohibits interference with interstate commerce by robbery, has a similar jurisdictional requirement and has been upheld by the Tenth and Seventh Circuits. In *United States v. Nguyen*,⁷⁰ the Tenth Circuit affirmed a federal conviction under the Act concluding that evidence showing that the restaurant jointly owned by the deceased victim and her husband "failed as a result of the robbery because [the husband] could not run the restaurant himself, attract customers, or generate revenue" was sufficient to "demonstrate[] the requisite effect on interstate commerce."⁷¹ In *United States v. Thomas*,⁷² the Seventh Circuit affirmed another conviction involving the theft of \$675 that federal drug enforcement agents had supplied to the robbery victim, a confidential informant. In concluding that the defendants had obstructed interstate commerce in violation of the Act, Judge Richard Posner noted that the evidence showed the victim intended to buy cocaine, the cocaine would have originated in South America, and the cocaine would have traveled via interstate commerce.⁷³ The amount of cocaine in question was irrelevant to the decision. Judge Posner also noted that "the cases involving prosecutions that hinge on proving an effect on interstate commerce hold that that the relevant issue is the effect on commerce

of the *entire* class of transactions to which the transaction or transactions at issue in the particular case belong.”⁷⁴

5. *Otherwise Affects Interstate or Foreign Commerce*

Congress has frequently used the wording “affects interstate or foreign commerce” to invoke its authority under the Commerce Clause.⁷⁵ This jurisdictional element appears in a number of federal statutes, including criminal provisions that prohibit violent conduct or conduct that facilitates violence.⁷⁶ The reach of the “affects commerce” jurisdictional element is not unlimited, however, and requires a case-by-case analysis. Indeed, there may be some cases where the assertion that the activity allegedly “affect[s] commerce” will be questionable.⁷⁷ Nonetheless, this jurisdictional element is well within the Commerce Clause power.⁷⁸

LLEEA’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. Until the Supreme Court significantly narrows the use of Congress’ Commerce Clause authority, the legal ground supporting the constitutional authority for federal criminal legislation stands firm.

IV. CONGRESSIONAL AUTHORITY UNDER THE FOURTEENTH AMENDMENT

After the Civil War, the federal government recognized civil rights essential to national citizenship, and sought to protect and enforce those rights under the Fourteenth Amendment.⁷⁹ The Civil Rights Act of 1866 set forth the rights all citizens possess regardless of race, including the ability to bring private lawsuits, make private contracts, and benefit from all laws regarding “security of person and property.”⁸⁰ Congress then protected those rights through criminal sanction. For example, a defendant could spend up to ten years in prison if convicted of “conspir[ing] to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States,” or for traveling with at least one other person “in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured.”⁸¹

In response to a challenge of the constitutionality of this statute, the Supreme Court affirmed Congress’ power to protect civil rights through criminal statutes. In *The Ku Klux Klan Cases*, several people were convicted and imprisoned for conspiring to intimidate “a citizen of African descent, in the exercise of his right to vote for a

member of the congress of the United States, and in the execution of that conspiracy they beat, bruised, wounded, and otherwise maltreated him.”⁸² They had plainly acted “on account of [the victim’s] race, color, and previous condition of servitude.”⁸³ Defendants charged that the Civil Rights Act represented an unconstitutional encroachment by the federal government into an area of criminal law expressly reserved to the states. The Supreme Court rejected the notion that “when a question of the power of congress arises the advocate of the power must be able to place his finger on words which expressly grant it.”⁸⁴ Instead, upholding Congress’ authority to impose criminal sanctions against the defendants, the Supreme Court warned that:

[I]f the government of the United States has within its constitutional domain no authority to provide against these evils . . . then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.⁸⁵

The Supreme Court reaffirmed these principles in *Screws v. United States*,⁸⁶ a 1945 case that arose when law enforcement officers arrested a black man for stealing a tire and then beat him to death. The federal indictment charged the officers with depriving the man of “‘rights, privileges, or immunities secured or protected’ to him by the Fourteenth Amendment—the right not to be deprived of life without due process of law; [and] the right to be tried, upon the charge on which he was arrested, by due process of law.”⁸⁷ Rejecting an argument that the charge was unconstitutionally vague, the Supreme Court held that Congress was constitutionally authorized to protect, through criminal sanction, any “right which has been made specific either by the express terms of the Constitution or by decisions interpreting them.”⁸⁸ The Supreme Court recognized that Congress could create and expand federal criminal civil rights laws to protect rights that were not specifically enumerated in the Constitution.

The Supreme Court again recognized the federal government’s authority to protect civil rights through criminal sanction in 1966, when it decided two landmark cases. The first, *United States v. Price*, arose from the murder of civil rights workers Michael Schwerner, James Chaney, and Andrew Goodman, and the second, *United States v. Guest*, arose from the murder of educator Lemuel Penn. In *Price* and *Guest*, the Court ruled that Fourteenth Amendment due process and equal protection rights were

legitimate bases for 18 U.S.C. § 241, a federal criminal statute against conspiracy to “injure, oppress, threaten, or intimidate [any person] in the free exercise or enjoyment” of any constitutional or legal right.⁸⁹ The opinions suggested, however, that § 241 may not have covered the discriminatory acts of private individuals.

In response to this and other limitations in existing federal statutes, Congress passed the Civil Rights Act of 1968.⁹⁰ A section of the Act, which became 18 U.S.C. § 245,⁹¹ imposed criminal sanctions on private individuals for knowingly interfering with a person because of his race, color, religion, or national origin or because he was participating in federally protected activities. Such activities included interstate travel, voting in federal elections, attending public schools, or using state facilities. The Senate report accompanying the bill acknowledged that law enforcement is usually an area of local concern, but in the face of unwillingness by local officials to prosecute crimes of racial violence, there is “need for Federal action to compensate for the lack of effective protection and prosecution on the local level.”⁹² When a citizen is prevented from exercising a federal right on the basis of racial animosity, the report noted that “it is not only the individual Negro and the peace and dignity of the State that is injured. Such lawless acts are distinctly Federal crimes and it is, therefore, appropriate that responsibility for vindication of the rights infringed should be committed to the Federal courts.”⁹³

The certainty of the appropriate limits to Congress’ authority to enact legislation under the Fourteenth Amendment was thrown into doubt by the Court’s decision in a 1997 case, *City of Boerne v. Flores*.⁹⁴ In *City of Boerne*, the Court invalidated provisions of the Religious Freedom Restoration Act (RFRA),⁹⁵ holding that Congress had exceeded its authority under the Fourteenth Amendment in enacting certain provisions of the statute which allowed individuals to challenge neutral state or local laws of general applicability on the grounds that such laws violated an individual’s free exercise of religious rights under the First Amendment.⁹⁶ The case arose from a dispute between the Archbishop of San Antonio and city authorities in Boerne, Texas after the authorities denied his application for a building permit to enlarge a local church. The Archbishop challenged the denial of the building permit in federal district court, arguing that RFRA allowed the church to challenge the city of Boerne’s building permit decision. However, the district court concluded that Congress’ enactment of RFRA was an unconstitutional exercise of its authority under section five of the Fourteenth Amendment.⁹⁷ The Fifth Circuit Court of Appeals disagreed and reversed, finding the statute constitutional.⁹⁸ The Supreme Court, however, agreed with the district court and invalidated

those provisions of RFRA relied upon by the Archbishop of San Antonio.

The Court’s decision in *City of Boerne* laid the foundation for the later analysis of VAWA’s civil remedy handed down in *Morrison*. In *City of Boerne*, the Court noted that that section five of the Fourteenth Amendment grants Congress the authority to enact only “measures that remedy or prevent unconstitutional actions.”⁹⁹ The Court stated:

There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.¹⁰⁰

A. BUILDING ON *CITY OF BOERNE*

In their analysis, the *Morrison* majority dismisses the Fourteenth Amendment arguments in support of VAWA’s civil remedy, relying in part on a narrow interpretation of “state action” that ignores both the authority for—as well as the necessity of—congressional action when faced with state *inaction*. This, combined with the RFRA decision, may challenge Congress’ authority to enact legislation under section five of the Fourteenth Amendment.

The *Morrison* majority made much of the “time-honored principle” that the Fourteenth Amendment prohibits only *state action*. What the majority failed to also acknowledge, however, is that state *inaction* is a form of “state action.” As Justice Breyer’s dissent pointed out:

The Federal Government’s argument . . . is that Congress used § 5 to remedy the actions of state actors, namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide adequate (or any) state remedies for women injured by gender-motivated violence—a failure that the States, and Congress, documented in depth.¹⁰¹

Justice Breyer further noted that the cases relied upon by the majority, *United States v. Harris*¹⁰² and *The Civil Rights Cases*,¹⁰³ did not address state *inaction* and therefore cannot stand for the proposition that remedying state *inaction* to protect the civil rights of individuals lies beyond the reach of the Fourteenth Amendment. In both of these cases, in fact, the statutes in question neither “[referred] to the laws of the State or their administration

by her officers”¹⁰⁴ nor “profess[ed] to be corrective of any constitutional wrong committed by the States.”¹⁰⁵ In fact, in correspondence with Circuit Judge Woods, Justice Bradley, the author of the Court’s opinion in *The Civil Rights Cases*, concluded: “Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.”¹⁰⁶ This exchange of letters clearly influenced Judge Woods, who wrote in *United States v. Hall*¹⁰⁷ that the Fourteenth Amendment provides authority for Congress to legislate

to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.¹⁰⁸

B. FOURTEENTH AMENDMENT ANALYSIS OF LLEEA UNDER MORRISON

For purposes of LLEEA, having the Fourteenth Amendment provide authority for federal involvement in instances of state inaction, or failure to enforce laws already in place, is key. The congressional debates over the reach of Fourteenth Amendment indicate a consensus of opinion that any state “systematically” refusing to provide legal protection to a particular group would violate the amendment’s Equal Protection guarantee.¹⁰⁹ That is not to say that a private action can be transformed into state action by a simple declaration.¹¹⁰ Neither can a state’s inaction or abdication of duty be absolved simply because it is, in essence, a non-occurrence.¹¹¹

Justice Breyer also deftly refuted the majority’s assertion that § 13981 of VAWA lacks “‘congruence and proportionality’ to the state discrimination that it purports to remedy”¹¹² because it “is not ‘directed . . . at any State or state actor’”¹¹³ by noting that Congress had received voluminous testimony over a four-year period on the “pervasive gender-based stereotypes hampering many state legal systems,”¹¹⁴ including “the task force reports of at least twenty-one States documenting constitutional violations.”¹¹⁵

In the case of LLEEA, Congress has heard from constitutional scholars, state and local law enforcement officials, U.S. Department of Justice officials, and

individual victims of bias-motivated violence since the original legislation, the Hate Crimes Prevention Act, was first drafted and introduced in 1997.¹¹⁶ While this testimony is clear and convincing of the need for this legislation, it does not represent evidence from each and every state of the union. The question remains from *Morrison* whether such exhaustive evidence is required to justify or support remedial congressional action. If such an extraordinary burden did exist, it would impede any form of immediate congressional response to a national crisis or epidemic of violence. Further, such a requirement would delay (if not, in fact, prevent) congressional action by way of legislative remedy. Thankfully, such evidence is not required. As Justice Breyer noted, “This Court has not previously held the Congress must document the existence of a problem in every State prior to proposing a national solution.”¹¹⁷

V. CONCLUSION: CONGRESSIONAL AUTHORITY TO ENACT LLEEA

Federal criminal sanctions for violations of civil rights are not new. Since the Civil War, Congress has repeatedly enacted¹¹⁸—and federal courts have upheld¹¹⁹—laws with criminal sanctions designed to establish national standards for civil rights enforcement. Like similar federal criminal legislation dating back to the Civil War,¹²⁰ these statutes prohibit conduct that could also be unlawful and subject to criminal prosecution under state law. The federal government has historically played a significant role in the prosecution and punishment of these civil rights violations. Although criminal law is traditionally the domain of the states, Congress has regularly criminalized behavior with broad national implications, including organized crime, terrorism, corporate fraud transcending state lines, and the violation of civil rights.¹²¹ In fact, the federal government has enacted more than 3,000 criminal statutes since 1866, many of which have concerned civil rights.¹²²

Critics of LLEEA have questioned whether Congress has the authority to enact such a statute. Such criticism increased sharply after *Morrison* was handed down.¹²³ This criticism, however, ignores the reality that the statute LLEEA is based upon, 18 U.S.C. § 245, has been upheld as constitutional by both the Eighth and the Tenth Circuit Courts of Appeals.¹²⁴ Additionally, these critics underestimate the constitutional authority granted to Congress to enact such statutes. Many of the “civil rights” statutes enacted by Congress—both criminal and civil—have been based upon two sources of congressional authority: the Commerce Clause and the Fourteenth Amendment. Recognizing that basic civil rights are matters of overriding federal interest, Congress consistently uses its authority under these constitutional

provisions—either alone or in combination—to enact legislation aimed at establishing a national standard for civil rights enforcement. The Court’s decision in *Morrison* did nothing to alter the precedential weight that underlies Congress’ authority under the Commerce Clause and the Fourteenth Amendment to enact this legislation.

LLEEA failed to pass in the 106th Congress. The debate and dialogue that accompanied the progression from the language of HCPA to the strengthened version that is LLEEA will set the stage for renewed efforts in the 107th Congress to address the epidemic of hate violence in America. It is impossible to predict either the chances of LLEEA becoming law in the 107th Congress or the next stage of the Supreme Court’s evolving Commerce Clause and Fourteenth Amendment jurisprudence. One thing is clear: the Court’s decision in *Morrison* resonated on Capital Hill and was taken seriously. Sponsors of LLEEA responded with an enhanced bill that addresses the Court’s concerns and merits immediate enactment.

NOTES

¹ United States v. Morrison, 120 S. Ct. 1740 (2000).

² 18 U.S.C. § 2661 (2000).

³ 20 U.S.C. § 1681 (2000).

⁴ Brzonkala v. Va. Polytechnic and State Univ., 935 F. Supp. 772 (W.D. Va. 1996) (also dismissing Brzonkala’s claim against the educational institution).

⁵ Brzonkala v. Va. Polytechnic and State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc).

⁶ *Morrison*, 120 S. Ct. at 1759.

⁷ See, e.g., *Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government: Hearing on S. 622 Before the Senate Comm. on the Judiciary*, 106th Cong. 38 (1999) [hereinafter *Senate HCPA Hearing*] (testimony of Robert H. Knight, Senior Director for Cultural Studies, Family Research Council: “[The legislation] sets up special classes of victims . . . politicize[s] criminal prosecutions . . . add[s] nothing to the prosecution of real crimes of violence . . . vastly expand[s] the power and jurisdiction of the federal government . . . [and] would have a chilling effect on free speech . . .”). HCPA encountered similar opposition in the House hearings:

There are at least four key reasons why I believe that federal hate crimes legislation or the expansion thereof is unnecessary and in fact counterproductive. First, basing the degree of punishment on status or

characteristics of the victim marks a step away from the recognition that every one of us is a child of G-d (sic), equal in His eyes, and therefore entitled to the equal protection of the law. Second, hate crimes legislation further balkanizes American society along racial and ethnic lines, building walls instead of bridges. Third, I am generally opposed to more federal crime legislation, especially in circumstances where, as here, the data shows that the states are enforcing the law. Finally, hate crimes legislation punishes thought in a manner at odds with the First Amendment.

Hate Crimes Violence: Hearing on H.R. 1082 Before the House Comm. on the Judiciary, 106th Cong. 30 (1999) [hereinafter *House HCPA Hearing*] (testimony of Daniel E. Troy, Associate Scholar of Legal Studies, American Enterprise for Public Policy).

⁸ See, e.g., Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (creating federal felony of willful failure to pay legal child support obligations); Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, 110 Stat. 3807 (criminalizing distribution of controlled substances without the victim’s knowledge in the commission of a crime of violence, including rape); Sex Crimes Against Children Prevention Act of 1995, Pub. L. No. 104-71, 109 Stat. 774 (increasing penalties for conduct involving the sexual exploitation of children); Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (clarifying federal jurisdiction over crimes relating to damage of religious property).

See also Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, 112 Stat. 520; Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (enacting criminal penalties for circumventing technology designed to protect digital copyrights); Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974; Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007; Criminal Use of Guns Act, Pub. L. No. 105-386, 112 Stat. 3469 (1998); Veterans’ Cemetery Protection Act of 1997, Pub. L. No. 105-101, 111 Stat. 2202; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, 110 Stat. 3099; False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459; Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488.

The generous body of federal law making drug trafficking and possession a federal offense demonstrates this principle dramatically. See, e.g., 21 U.S.C. § 841(a)(1) (“Except as authorized by this subchapter, it shall be unlawful for any

person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”); 21 U.S.C. § 844(a) (“It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter.”).

⁹ LLEEA was an enhanced version of a bill called the Hate Crimes Prevention Act (HCPA), that was introduced in the House and Senate (H.R. 1082/S. 622) in 1999, early in the 106th Congress. As the 106th Congress began to wind down in the summer of 2000, the main goal of congressional supporters of the legislation became finding a legislative vehicle that could be amended with a hate crime bill. Because of a perception that LLEEA was the stronger of the two pieces of legislation, it was LLEEA – not HCPA – that was offered as an amendment to the Fiscal Year 2000-2001 Department of Defense Authorization bill in the Senate on June 20, 2000. In addition to LLEEA, the Senate attached an additional hate crimes measure – offered by Judiciary Chairman Orrin Hatch – to the Defense Authorization bill.

¹⁰ The House of Representatives voted, 232-192, to support the inclusion of LLEEA in the Department of Defense Authorization bill on September 13, 2000. The vote was on a non-binding motion instructing the House members of the joint House-Senate Conference Committee on the Department of Defense Authorization bill to accept the Senate-passed LLEEA even though the hate crimes bill had never been voted on in the House of Representatives.

¹¹ The amendment passed by a vote of fifty-seven to forty-two and became part of the Senate’s version of the Defense Authorization bill with support from thirteen Republican senators. See H.R. 4205, 106th Cong. §§ 1501-10 (2000). This legislation is also known as the “Kennedy-Smith amendment” after the amendment’s sponsors, Senators Edward Kennedy (D-MA) and Gordon Smith (R-OR). The thirteen Republican senators voting for LLEEA were Conrad Burns (MT), Lincoln Chafee (RI), Susan Collins (ME), Mike DeWine (OH), Jim Jeffords (VT), Richard Lugar (IN), Connie Mack (FL), Bill Roth (DE), Gordon Smith (OR), Olympia Snowe (ME), Arlen Specter (PA), Ted Stevens (AK), and George Voinovich (OH).

¹² Helen Dewar, *GOP Shelves Expansion of Law on Hate Crimes*, WASH. POST, Oct. 6, 2000, at A14.

¹³ See *United States v. Page*, 84 F.3d 38 (1st Cir. 1996); *United States v. Nelson*, 90 F.3d 636 (2d Cir. 1996); *United States v. Dunnaway*, 88 F.3d 617 (8th Cir. 1996); *United States*

v. Baird, 85 F.3d 450 (9th Cir. 1996); *United States v. Sowa*, 34 F.3d 447 (7th Cir. 1994); *United States v. Piche*, 981 F.2d 706 (4th Cir. 1992); *United States v. Lane*, 883 F.2d 1484 (10th Cir. 1989); *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986); *United States v. Bledsoe*, 728 F.2d 1094 (8th Cir. 1984); *United States v. Franklin*, 704 F.2d 1183 (10th Cir. 1983), *cert. denied*, 464 U.S. 845 (1983); *United States v. McDermott*, 822 F. Supp. 582, (N.D. Iowa 1993), *rev’d on other grounds*, 29 F.3d 404 (8th Cir. 1994); *United States v. Creekmore*, 648 F. Supp. 1369 (N.D. Ala. 1986).

¹⁴ The Local Law Enforcement Enhancement Act, an amendment to the National Defense Authorization Act for Fiscal Year 2001, H.R. 4205, 106th Cong. § 1504, 1507 (2000). See also Violent Crimes Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2096 (codified at 28 U.S.C. § 994 (2000)).

¹⁵ This provision applies to hate crimes motivated by the real or perceived race, color, religion, or national origin of the victim.

¹⁶ Hate crimes motivated by the religion or national origin of the victim are prohibited under both provisions of LLEEA.

¹⁷ The jurisdictional element in LLEEA requires a federal prosecutor to prove a connection between the hate crime and interstate or foreign commerce in one of the following ways:

(i) [The crime] occurs during the course of, or as the result of, the travel of the defendant or the victim — (I) across a State line or national border; or (II) using [sic] a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility or instrumentality of interstate or foreign commerce in connection with [the crime];

(iii) in connection with [the crime] the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) [the crime] (I) interferes with commercial or other economic activity in which the victim is engaged at the time of [the crime]; or (II) otherwise affects interstate or foreign commerce.

H.R. 4205, 106th Cong. § 1507 (2000).

¹⁸ 42 U.S.C. § 13981 (2000).

¹⁹ *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zone Act, 18 U.S.C. § 922(q) (1988 & Supp. V 1993), as an unconstitutional use of Commerce Clause authority by Congress).

²⁰ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²¹ *See, e.g., Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); statutes and cases cited *infra* notes 63, 67, 70, 72, 78.

²² 379 U.S. 241 (1964).

²³ 379 U.S. 294 (1964).

²⁴ *Heart of Atlanta*, 379 U.S. at 243.

²⁵ *McClung*, 379 U.S. at 296.

²⁶ *Heart of Atlanta*, 379 U.S. at 243.

²⁷ *McClung*, 379 U.S. at 296-97.

²⁸ *Heart of Atlanta Motel*, 379 U.S. at 260; *McClung*, 379 U.S. at 304.

²⁹ *United States v. Lopez*, 514 U.S. 549, 551 (1995).

³⁰ *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993).

³¹ In considering the lack of such a connection, the court reasoned that:

Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Lopez, 514 U.S. at 561 (footnote omitted).

³² *United States v. Morrison*, 120 S. Ct. 1740, 1750 (2000); *see also Lopez*, 514 U.S. at 551.

³³ The *Lopez* court vocalized such legal uncertainty:

Admittedly, a determination whether an intrastate

activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty."

Lopez, 514 U.S. at 566.

³⁴ If the aftermath of *Lopez* gives any guidance, the Court's decision in *Morrison* should provide quite a boon to federal criminal defendants. For example, in the eighteen months following the Supreme Court's decision, at least fifteen federal criminal statutes were subject to *Lopez* challenges in thirty cases in nineteen federal Appellate and District courts. The Sixth Circuit examined recent challenges to the Commerce Clause authority in *United States v. Wall* and referenced the following cases:

United States v. Chesney, 86 F.3d 564 (6th Cir. 1996)[*cert. denied*, 520 U.S. 1282 (1997)] (upholding 18 U.S.C. § 922(g), which prohibits the possession of a firearm by a felon); *United States v. Turner*, 77 F.3d 887 (6th Cir. 1996) (same); *United States v. Michael R.*, 90 F.3d 340, (9th Cir. 1996) (upholding 18 U.S.C. § 922(x)(2), which prohibits juvenile possession of a handgun); *United States v. Staples*, 85 F.3d 461 (9th Cir. 1996) (upholding 18 U.S.C. § 924(c)(1), which prohibits the use of a firearm while engaged in drug trafficking); *United States v. Folen*, 84 F.3d 1103 (8th Cir. 1996) (upholding 18 U.S.C. § 842(i), which prohibits felons from possessing explosives); *United States v. Lomayaoma*, 86 F.3d 142 (9th Cir. 1996) (upholding the Indian Major Crimes Act, 18 U.S.C. § 1153); *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995) (upholding the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a)(1)); *United States v. Sherlin*, 67 F.3d 1208 (6th Cir. 1995) (upholding federal arson statute, 18 U.S.C. § 844(i)), *cert. denied*, 116 S. Ct. 795 (1996) and 116 S. Ct. 1548 (1996); *United States v. Bolton*, 68 F.3d 396 (10th Cir. 1995) (upholding the Hobbs Act, 18 U.S.C. § 1951), *cert. denied*, 116 S. Ct. 966 (1996); *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995) (upholding 21 U.S.C. § 841(a)(1), which prohibits the manufacture of marijuana); *United States v. Bishop*, 66 F.3d 569 (3rd Cir. 1995) (upholding carjacking statute 18 U.S.C. § 2119), *cert. denied*, 116 S. Ct. 681 (1995) and 116 S. Ct. 750 (1996), *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995) (upholding a statute that prohibited the possession or transfer of machine guns, 18 U.S.C. § 922(o)); *cf. Pic-A-State Pa., Inc. v. Reno*, 76

F.3d 1294 (3d Cir. 1996) (upholding Interstate Wagering Amendment, 18 U.S.C. § 1301, which prohibits the transmission in interstate commerce of information to be used for the purpose of procuring a lottery ticket), *cert. denied*, 116 S. Ct. 2504 (1996) . . . Few courts have cited *Lopez* to reverse a conviction. *See, e.g., United States v. Pappadopoulos*, 64 F.3d 522, 527 (9th Cir. 1995) (holding that receipt of natural gas from out-of-state source was insufficient to confer federal jurisdiction for arson conviction); *United States v. Mussari*, 894 F. Supp. 1360, 1363-64 (D. Ariz. 1995) (holding that the Child Support Recovery Act, 18 U.S.C. § 228, which punished the failure to pay child support, was an unconstitutional exercise of congressional power)[*rev'd by* 95 F.3d 787 (9th Cir. 1996), *cert. denied*, (520 U.S. 1203) (1997)] . . . *United States v. Olin Corp.*, 927 F. Supp. 1502, 1522-32 (S.D. Ala. 1996) (holding that *Lopez* prohibits the application of CERCLA [Comprehensive Environmental Response, Compensation and Liability Act] liability)[*rev'd by* 107 F.3d 1506 (11th Cir. 1997)].

United States v. Wall, 92 F.3d 1444, 1448 & nn.8-10 (6th Cir. 1996), *cert. denied*, 519 U.S. 1059 (1997). *See also infra* notes 41 and 123.

³⁵ *Morrison*, 120 S. Ct. at 1751.

³⁶ *Id.* at 1752.

³⁷ *Id.* at 1750.

³⁸ *Wickard v. Filburn*, 317 U.S. 111 (1942). Filburn, an Ohio farmer, challenged the constitutionality of the Agricultural Adjustment Act of 1938 which, in part, regulated the amount of wheat he could grow on his own farm for his own consumption. In mounting his Commerce Clause attack on the Act, Filburn argued that the production and consumption of wheat were activities beyond the reach of Congress under the Commerce Clause because they were local in nature and their effects upon interstate commerce were at most "indirect." The Supreme Court disagreed. Upholding the statute, the Court noted that:

[E]ven if [Filburn's] activity [is] local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

317 U.S. at 125. Finding that one of the primary purposes of the Act was to limit the volume of wheat to increase the market price, the Court noted that allowing individuals to grow and

consume their own wheat circumvented the desired limitation. The consumption of home-grown wheat, in turn, would undercut the market demand, drive prices down, and "would have a substantial effect in defeating and obstructing [Congress' purpose] to stimulate trade . . . at increased prices." 317 U.S. at 129.

³⁹ *Morrison*, 120 S. Ct. at 1750 (citing *United States v. Lopez*, 514 U.S. 549, 560 (1995)).

⁴⁰ *Id.* at 1767, n.13 (Souter, J., dissenting) (citations omitted).

⁴¹ The debate over where such words fall on the continuum from mere semantics to critical substance is hardly new.

"[D]irect" has been contrasted with "indirect," and what is "remote" or "distant" with what is "close and substantial." Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as "interstate commerce," "due process," [and] "equal protection."

Santa Cruz v. Labor Board, 303 U.S. 453, 466-67 (1938). This was also quoted in *Wickard*, 317 U.S. at 123, n.24.

⁴² *See Lopez*, 514 U.S. at 559 ("We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."); *Morrison*, 120 S. Ct. at 1749 ("[Petitioners] seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Given § 13981's focus on gender-motivated violence wherever it occurs . . . we agree that this is the proper inquiry.").

⁴³ *See supra* note 38; *see also supra* text accompanying note 40.

⁴⁴ *See Morrison*, 120 S. Ct. at 1767 (Souter, J., dissenting). While the Court's previous Commerce Clause decisions demonstrate the vitality of the "substantially affects" test, the history of the Court's interpretation of the Commerce Clause has experienced wide fluctuations in the degree to which the "commercial" basis of the activity being regulated was considered to be "commerce" by the Court. As Justice Souter pointed out in his dissent in *Morrison*:

In the half century following the modern activation of the commerce power with passage of the Interstate Commerce Act in 1887, this Court has from time to time created categorical enclaves beyond congressional reach

by declaring such activities as “mining,” “production,” “manufacturing,” and union membership to be outside the definition of “commerce” and by limiting application of the effects test to “direct” rather than “indirect” commercial consequences. *See, e.g., United States v. E. C. Knight Co.*, 156 U.S. 1, 39 . . . (1895) (narrowly construing the Sherman Antitrust Act in light of the distinction between “commerce” and “manufacture”); *In re Heff*, 197 U.S. 488, 505-506 . . . (1905) (stating that Congress could not regulate the intrastate sale of liquor); *The Employers’ Liability Cases*, 207 U.S. 463, 495-496 . . . (1908) (invalidating law governing tort liability of common carriers operating in interstate commerce because the effects on commerce were indirect); *Adair v. United States*, 208 U.S. 161 . . . (1908) (holding that labor union membership fell outside “commerce”); *Hammer v. Dagenhart*, 247 U.S. 251 . . . (1918) (invalidating law prohibiting interstate shipment of goods manufactured with child labor as a regulation of “manufacture”); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 . . . (1935) (invalidating regulation of activities that only “indirectly” affected commerce); *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330 . . . (1935) (invalidating pension law for railroad workers on the grounds that conditions of employment were only indirectly linked to commerce); *Carter v. Carter Coal Co.*, 298 U.S. 238, 303-304 . . . (1936) (holding that regulation of unfair labor practices in mining regulated “production,” not “commerce”) . . . [Today’s] revival of a distinction between commercial and noncommercial conduct is at odds with *Wickard*, which repudiated that analysis, and the enquiry into commerce purpose, first intimated by the *Lopez* concurrence . . . is cousin to the intent-based analysis employed in *Hammer* . . . but rejected for Commerce Clause purposes in *Heart of Atlanta* . . . and *Darby* . . .

Morrison, 120 S. Ct. at 1767 (Souter, J., dissenting).

⁴⁵ The Court explicitly noted the lack of Congressional findings:

We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

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

⁴⁶ *Morrison*, 120 S. Ct. at 1752.

⁴⁷ *See generally House HCPA Hearing, supra note 7; Senate HCPA Hearing, supra note 7.*

⁴⁸ Compare then-Associate Justice Rehnquist’s dissent in *Garcia v. San Antonio Metropolitan Transit Authority*, (“I do not think it incumbent on those of us in dissent to spell out further . . . a principle that will, I am confident, in time again command the support of a majority of this Court.”), *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting), with Justice Souter’s dissent in *Morrison*, (“All of this convinces me that today’s ebb of the commerce power rests on error, and at the same time leads me to doubt the majority’s view will prove to be enduring law.”) *Morrison*, 120 S. Ct. at 1773 (Souter, J., dissenting).

⁴⁹ *Morrison*, 120 S. Ct. at 1754.

⁵⁰ *See* statutes and cases cited *infra* notes 61, 63, 67, 70, 72, 78.

⁵¹ *Lopez*, 514 U.S. at 561-62.

⁵² *Morrison*, 120 S. Ct. at 1750-51.

⁵³ This provision states:

A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person’s spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).

18 U.S.C. §2261(a)(1) (2000).

⁵⁴ In *Lopez*, the Court identified three categories of activity that Congress may regulate under its commerce power: the use of channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things in interstate commerce; and “those activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce.” *Lopez*, 514 U.S. at 558-59.

⁵⁵ *Morrison*, 120 S. Ct. at 1752, n.5 (citing *United States v. Lankford*, 196 F.3d 563, 571-72 (9th Cir. 1999)).

⁵⁶ *Lopez*, 514 U.S. at 558.

⁵⁷ *Id.*

⁵⁸ As initially passed in 1988, the Church Arson Prevention Act (“CAPA”) authorized federal prosecution *only* when defendants, who intentionally defaced, damaged or destroyed religious property, traveled in interstate commerce or used a facility or instrumentality of interstate or foreign commerce in interstate commerce in committing the act. *See* 18 U.S.C. § 247(b)(1) (1995) (codified as amended by Pub. L. No. 104-155 § 3(3), 110 Stat. 1392 (1996)). *See also* H.R. REP. NO. 104-621, at 4 (1996). The Department of Justice found that “the highly restrictive and duplicative language of the interstate commerce requirement . . . made § 247 ‘nearly impossible to use.’” *See id.* In fact, despite a dramatic increase in the number of arsons in churches across the United States between 1988 and 1996, only one case was brought under CAPA, and it had nothing to do with destroying religious property. *See id.* (citing *United States v. Barlow*, 41 F.3d 935 (5th Cir. 1994)).

⁵⁹ The Local Law Enforcement Enhancement Act, H.R. 4205, 106th Cong. 15 § 1507 (2000).

⁶⁰ *Lopez*, 514 U.S. at 558-59.

⁶¹ Memorandum from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to Sen. Edward Kennedy 5 n.7 (June 13, 2000) (on file with authors) [hereinafter Raben memorandum]. Raben provides the following statutes as examples:

18 U.S.C. § 231(a)(2) (1994) (prohibiting the transport in commerce of any firearm, explosive, or incendiary device, knowing or having reason to know, or intending, that it will be used unlawfully in furtherance of a civil disorder);

18 U.S.C. § 875 (1994) (prohibiting the transmission in interstate or foreign commerce of certain categories of threats and ransom demands);

18 U.S.C. § 1201(a)(1) (Supp. IV 1998) (prohibiting the willful transportation in interstate or foreign commerce of a kidnapping victim);

18 U.S.C. § 1462 (1994 & Supp. II 1996) (prohibiting the transmission of obscene materials via common carrier);

18 U.S.C. § 1952 (1994) (prohibiting travel in interstate or foreign commerce, or the use of “any facility in interstate or foreign commerce,” with the intent to commit or facilitate certain unlawful activities). *Id.*

⁶² *See supra* note 54.

⁶³ This LLEEA provision is similar to other constitutionally upheld federal statutes that prohibit the use or possession of weapons and other articles that have traveled in interstate or foreign commerce. Raben notes the following as examples:

18 U.S.C. § 922(g) (1994 & Supp. 1999) (making it unlawful for convicted felons to receive any firearm or ammunition) (upheld in *Fraternal Order of Police v. United States*, 173 F.3d 898, 907-08 & n.2 (D.C. Cir. 1998), *cert. denied*, 120 S. Ct. 324 (1999)); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 704-06 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 934 (2000); *United States v. Bostic*, 168 F.3d 718, 723-24 (4th Cir. 1999), *cert. denied*, 527 U.S. 1029 (1999);

18 U.S.C. § 842(i) (1994) (making it unlawful for convicted felons to receive or possess any explosive “which has been shipped or transported in interstate or foreign commerce”) (upheld in *United States v. Folen*, 84 F.3d 1103, 1104 (8th Cir. 1996));

18 U.S.C. § 922(q)(2)-(3) (1994 & Supp. 1999) (responding to *Lopez*, 514 U.S. 549, making it unlawful (with certain exceptions) for any individual knowingly to possess or discharge a firearm “that has moved in or otherwise affects interstate or foreign commerce at a place that the individual knows . . . is a school zone”) (upheld in *United States v. Danks*, 187 F.3d 643 (8th Cir. 1999) (*per curiam*) (table), *cert. denied*, 120 S. Ct. 823 (2000));

18 U.S.C. § 2119 (West 2000) (making it unlawful, with the intent to cause death or serious bodily harm, to engage in carjacking of motor vehicles that “ha[ve] been transported, shipped, or received in interstate or foreign commerce”) (upheld in *United States v. Cobb*, 144 F.3d 319, 320-22 (4th Cir. 1998));

18 U.S.C. § 2252(a)(4)(B) (making it unlawful to knowingly possess matters containing any visual depiction that “involves the use of a minor engaging in sexually explicit conduct” that “has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials that have been mailed or so shipped or transported, by any means including by computer”) (upheld in *United States v. Bausch*, 140 F.3d 739, 741 (8th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999); *United States v. Robinson*, 137 F.3d 652, 655-56 (1st Cir. 1998)).

See Raben memorandum, *supra* note 61, at 6 nn.9-10.

⁶⁴ The Local Law Enforcement Enhancement Act, H.R. 4205, 106th Cong. § 1507 (2000).

⁶⁵ 18 U.S.C. § 248(a)(1) (2000).

⁶⁶ *Id.*

⁶⁷ *See, e.g.*, *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); *United States v. Bird*, 124 F.3d 667 (5th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998); *Terry v. Reno*, 101 F.3d 1412, 1415-18 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997); *United States v. Dinwiddie*, 76 F.3d 913, 919-21 (8th Cir.), *cert. denied*, 519 U.S. 1043 (1996); *United States v. Soderna*, 82 F.3d 1370 (7th Cir.) *cert. denied sub nom. Hatch v. United States* 519 U.S. 1006 (1996); *United States v. Wilson*, 73 F.3d 675, 680 (7th Cir.), *cert. denied*, 519 U.S. 806 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1519-21 (11th Cir. 1995); *American Life League v. Reno*, 47 F.3d 642 (4th Cir. 1995), *cert. denied*, 516 U.S. 809 (1995) (although decided in February 1995, this case is discussed in light of the Supreme Court's *Lopez* decision and cited as controlling authority in *Hoffman v. Hunt*).

⁶⁸ *Hoffman*, 126 F.3d at 587.

⁶⁹ 18 U.S.C. § 1951 (2000).

⁷⁰ *United States v. Nguyen*, 155 F.3d 1219 (10th Cir. 1998), *cert. denied*, 525 U.S. 1167 (1999).

⁷¹ *Nguyen*, 155 F.3d at 1224.

During trial, the government presented evidence which showed that the Mandarin Restaurant was a business engaged in interstate commerce and that its assets were depleted by the robbery. Mr. Sun [co-owner of the restaurant] testified that, before the robbery, the restaurant had often purchased specialty food products from vendors in California, Missouri, and Oklahoma, and that the money stolen by Defendant would have been used to purchase more of those items. He testified that the restaurant purchased fewer out-of-state items after the robbery, in part because it closed for twenty-two days and also because business decreased significantly after it reopened due to customers' fears about dining at the restaurant. Mr. Sun also testified that purchases by customers using out-of-state credit cards declined after the robbery. According to Mr. Sun's testimony, the business eventually failed as a result of the robbery because he could not run the restaurant himself, attract customers, or generate revenue, and, therefore, he could not purchase supplies in interstate commerce for the restaurant. An FBI agent confirmed Mr. Sun's statements, testifying that credit card sales declined and business revenues decreased after the robbery. We conclude that the record evidence

and the inferences therefrom demonstrated the requisite effect on interstate commerce.

Id.

⁷² *United States v. Thomas*, 159 F.3d 296, 297-98 (7th Cir. 1998), *cert. denied*, 527 U.S. 1023 (1999).

⁷³ *Id.*

⁷⁴ *Id.* at 299 (citing *Perez v. United States*, 402 U.S. 146, 154-55 (1971); *United States v. Staszczuk*, 517 F.2d 53, 57-58 (7th Cir. 1975) (en banc); *United States v. Zizzo*, 120 F.3d 1338, 1350 (7th Cir. 1997)).

⁷⁵ Raben memorandum, *supra* note 61, at 8 (citing *Jones v. United States*, 120 S. Ct. 1904 (2000) (“[T]he statutory term ‘affecting . . . commerce,’ . . . when unqualified, signal[s] Congress’ intent to invoke its full authority under the Commerce Clause.”), and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (“Th[e] phrase—‘affecting commerce’—normally signals Congress’s intent to exercise its Commerce Clause powers to the full.”)).

⁷⁶ Raben cites the following as examples:

18 U.S.C. § 231(a)(1) (1994) (prohibiting the teaching or demonstration of the use or making of firearms, explosives, or incendiary devices, or of techniques capable of causing injury or death, knowing or having a reason to know or intending that the teaching or demonstration will be unlawfully employed in, or in furtherance of, a civil disorder “which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce”);

18 U.S.C. § 247(a)-(b) (West 2000) (prohibiting the intentional defacement, damaging, or destruction of religious real property because of the religious character of that property, and the intentional obstruction by force or threat of force of any person in the enjoyment of that person’s free exercise of religious beliefs, where “the offense is in or affects interstate or foreign commerce”);

18 U.S.C.A § 2332a(a)(2) (West Supp. 2000) (prohibiting the use, without lawful authority, of a weapon of mass destruction, including any biological agent, toxin, or vector, where the results of such use “affect interstate or foreign commerce”).

Raben memorandum, *supra* note 61, at 6 n.13.

⁷⁷ See *Lopez*, 514 U.S. at 549, 562, 567 (1995).

⁷⁸ See *United States v. Green*, 350 U.S. 415, 420-21 (1956) (upholding the constitutionality of the Hobbs Act, 18 U.S.C. § 1951(a) (1952) (currently codified as amended by Pub. L. No. 103-322 § 330016(1)(L), 108 Stat. 2147 (1994))—which prohibits robbery or extortion that “in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce”—because “racketeering affecting interstate commerce [is] within federal legislative control”). See also *United States v. Valenzano*, 123 F.3d 365, 367-68 (6th Cir. 1997) (affirming that *Lopez* did not affect the constitutionality of the Hobbs Act); *United States v. Robinson*, 119 F.3d 1205, 1212-14 (5th Cir. 1997), cert. denied, 522 U.S. 1139 (1998).

⁷⁹ Section 1 of the Fourteenth Amendment provides that “[n]o State [shall] deprive any person of life, liberty, or property without due process of law; nor deny to any person . . . the equal protection of the laws.” The Constitution empowers Congress to enforce this guarantee in section 5 of the Fourteenth Amendment, which states that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, §§ 1, 5.

⁸⁰ 42 U.S.C. § 1981(a) (1994) (language from original statute unchanged by later amendment, Pub. L. No. 102-166 §101, 105 Stat. 1071 (1991)).

⁸¹ The Ku Klux Klan Cases, 110 U.S. 651, 654-55 (1884).

⁸² *Id.* at 657.

⁸³ *Id.*

⁸⁴ *Id.* at 658.

⁸⁵ *Id.* at 667.

⁸⁶ *Screws v. United States*, 325 U.S. 91 (1945) (plurality opinion).

⁸⁷ *Id.* at 93.

⁸⁸ *Id.* at 104 (emphasis added).

⁸⁹ *United States v. Price*, 383 U.S. 787, 797 (1966); *United States v. Guest*, 383 U.S. 745, 782 (1966); see also 18 U.S.C.S. § 241 (2000)

⁹⁰ See S. REP. NO. 90-721, at 5 (1967).

⁹¹ This section of the Civil Rights Act of 1968 provoked an

interesting exchange between Senator Sam Ervin (D-NC), Chairman of the Subcomm. on Constitutional Rights of the Senate Judiciary Comm. and civil rights lawyer Joseph Rauh, testifying in favor of the legislation. Sen. Ervin, who voted against both the Civil Rights Act of 1964, see 110 Cong. Rec. 14,511 (1964), and the Voting Rights Act of 1965, see 111 Cong. Rec. 11,751-52 (1965), was adamant in his belief that the Supreme Court had wrongly decided *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (9-0 decision), and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (8-1 decision), upholding both statutes as constitutional. He was equally adamant that Congress had no authority to enact the Civil Rights Act of 1968, including what later became 18 U.S.C. § 245. When Sen. Ervin, a former state Supreme Court Justice, implied that he was not bound to follow decisions of the U.S. Supreme Court as a U.S. Senator, he and Rauh engaged in a discussion of the meaning of the oath of office of a U.S. Senator:

Senator ERVIN: Well, Mr. Rauh, I have taken an oath to uphold the Constitution, not the mental aberrations of Supreme Court Justices.

Mr. RAUH: No, I do not think you have, sir. I think you took an oath to uphold the Constitution as the Supreme Court interprets it.

Senator ERVIN: No, here is the oath I took. I understand you say this oath does not apply to legislators anyway

Mr. RAUH: Of course it does, but it applies to the Constitution as the Supreme Court interprets it.

Senator ERVIN: Here is the oath I took. I read from Section 3 of Article VI of the Constitution. “The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution.” That is what I took an oath to support, the Constitution, not any judicial aberrations.

Mr. RAUH: I guess that is the real point of disagreement. I think that oath means “I support the Constitution as interpreted by the Supreme Court of the United States,” which is the body that the Constitution sets up as the final arbiter on that document.

Senator ERVIN: Can you find in this Constitution anything that says, “I swear to uphold the Constitution as the Supreme Court interprets it”?

Mr. RAUH: I think that is the interpretation of it.

Senator ERVIN: Those are not the words.

Mr. RAUH: There are no words either way between us, no words on your side and no words on my side.

Senator ERVIN: Mr. Rauh, I read you the words. It says I support this Constitution. And here is the Constitution.

Mr. RAUH: And the final arbiter of what those words mean is the Supreme Court of the United States until it is amended by the people.

Senator ERVIN: It does not say that anywhere there.

Proposed Civil Rights Act of 1967: Hearings on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516, and H.R. 10805 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 84th Cong. 292 (1967) (statements of Sen. Sam Ervin and Mr. Joseph Rauh).

⁹² S. REP. NO. 90-721, at 3.

⁹³ *Id.*

⁹⁴ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁹⁵ 42 U.S.C. § 2000bb-1 to § 2000bb-4 (1994) (currently codified as amended by Pub. L. No. 106-274 §7, 114 Stat. 806 (2000)).

⁹⁶ The Court invalidated only those provisions of the Act that purported to apply to the laws and actions of state and local entities. The Court left untouched those RFRA provisions that provide redress against *federal* governmental laws or actions that burden an individual's free exercise rights under the First Amendment.

⁹⁷ *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995).

⁹⁸ *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996).

⁹⁹ *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

¹⁰⁰ *Id.* at 520.

¹⁰¹ *United States v. Morrison*, 120 S. Ct. 1740, 1778-79 (2000) (Breyer, J., dissenting).

¹⁰² *United States v. Harris*, 106 U.S. 629 (1883).

¹⁰³ *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁰⁴ *Morrison*, 120 S. Ct. at 1779 (Breyer, J., dissenting) (quoting *United States v. Harris*, 106 U.S. 629, 640 (1883)).

¹⁰⁵ *Id.* (quoting *The Civil Rights Cases*, 109 U.S. at 14).

¹⁰⁶ *Bell v. Maryland*, 378 U.S. 226, 309-10 & nn.30-31 (1964) (Goldberg, J., concurrence) (quoting Mr. Justice Bradley).

¹⁰⁷ *United States v. Hall*, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).

¹⁰⁸ *Id.* at 81.

¹⁰⁹ See Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan as amici curiae in support of respondents at 12, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (citing statements made during the legislative debates over the Fourteenth Amendment for the proposition that any "selective refusal to provide legal protection [to any group] would constitute a 'denial' of equal protection of the laws."). The brief specifically cites:

Cong. Globe, 41st Cong., 2d Sess. 3611 (1870) (statement of Senator Pool) (noting that the Fourteenth Amendment's command that a state not "deny to any person . . . the equal protection of the laws" included the obligation not to "deny by acts of omission, by a failure to prevent its own citizens from depriving by force of any of their fellow citizens of these rights"); Cong. Globe, 42nd Cong., 1st Sess. 334 (1871) (statement of Representative Hoar) ("[I]t is an effectual denial by a state of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection"); *id.* at App. 1982 (statement of Representative Mercur) (explaining that the word "deny" as used in the Fourteenth Amendment Equal Protection Clause "means to refuse, or to persistently neglect or omit to give that 'equal protection' imposed upon the state by the Constitution"); *id.* at 501 (statement of Senator Frelinghuysen) ("A state denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A state denies protection as effectively by not executing as by not making laws."); Cong. Rec., 43rd Cong, 1st Sess. 412, 414 (1874) (statement of Representative Lawrence) (noting that the Civil Rights Act of 1866, which the Fourteenth Amendment essentially constitutionalized, and the Enforcement Act and the Ku Klux Klan Act, adopted to enforce the Fourteenth Amendment, "[a]ll . . . proceed upon the idea that if a state omits or neglects to secure the enforcement of equal rights, that it 'denies' the equal protection of the laws within the meaning of the fourteenth amendment," for the word 'deny' includes "an omission by any state to enforce or secure the equal rights designed to be protected. There are sins of

omission as well as commission. A state which omits to secure rights denies them.”).

Id. at 12 n.6. *See also supra* text accompanying note 106.

¹¹⁰ *See* *Flagg Bros. v. Brooks*, 436 U.S. 149, 164-65 (1978) (“[T]he Court’s earlier cases ‘clearly rejected . . . the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State’s inaction as ‘authorization’ or ‘encouragement.’”)

¹¹¹ *See* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (“But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith.”).

¹¹² *United States v. Morrison*, 120 S. Ct. 1740, 1779 (2000) (Breyer, J., dissenting).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *See generally* *House HCPA Hearing*, *supra* note 7; *Senate HCPA Hearing*, *supra* note 7.

¹¹⁷ *Morrison*, 120 S. Ct. at 1779 (Breyer, J., dissenting).

¹¹⁸ For a review of the legislative history and proposals that led to the enactment of the Civil Rights Act of 1968, beginning with the Civil Rights Act of 1866, *see* *United States v. Lane*, 883 F.2d 1484, 1488-93 (10th Cir. 1989).

¹¹⁹ The constitutionality of the existing federal criminal civil rights statute, 18 U.S.C. § 245, which serves as the model for LLEEA, has been upheld under the Commerce Clause, the Thirteenth Amendment, and section five of the Fourteenth Amendment. *See Lane*, 883 F.2d 1484 (upholding Commerce Clause authority); *United States v. Bledsoe*, 728 F.2d 1094 (8th Cir. 1984) (upholding Thirteenth and Fourteenth Amendment authority).

¹²⁰ *See, e.g.*, 42 U.S.C. § 1981 (2000).

¹²¹ *See* *Federalism and Crime Control: Hearing Before the Senate Comm. on Governmental Affairs*, 106th Cong. 65 (1999) (Judge Gilbert S. Merritt, U.S. Court of Appeals for the Sixth Circuit, testifying in support of the ABA Task Force Report, *Federalization of Criminal Law*, said that federal criminal

jurisdiction ought to be limited to, *inter alia*, “crime that involves a matter of overriding Federal interest, such as civil rights matters.”).

¹²² FREDERICK M. LAWRENCE, *PUNISHING HATE* 115 (1999).

¹²³ In addition to direct criticism of LLEEA, some national legal publications are predicting the increased use of a “Commerce Clause” defense to a multitude of federal laws, including criminal and environmental statutes, as a result of the *Morrison* decision. *See* Marcia Coyle and Harvey Berkman, *A Court Revolution Brewing?*, *NAT’L LAW J.*, June 5, 2000, at A1; James Dam, *New ‘Commerce Clause’ Defense to Criminal, Environment Laws*, *LAW. WKLY. USA*, May 29, 2000, at 1; Tony Mauro, *Split Branches*, *LEGAL TIMES*, May 22, 2000, at 1.

¹²⁴ *See supra* note 119.