

The Constitutionality and Scope of the Hate Crimes Prevention Act:

An Analysis of United States v. Hill

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Spring 2025

The Matthew Shepard and James Byrd, Jr., Hate Crime Prevention Act of 2009, 18 U.S.C. § 249, was signed into law by President Barack Obama in October 2009, which officially federally criminalized hate crimes.¹⁸⁸ Hate crimes were defined by the Act as causing willful bodily harm to another on the basis of religion, gender, sexual orientation, nationality, gender identity, or disability.¹⁸⁹ After the Act was signed into law, offenses classified as hate crimes could be placed under federal jurisdiction, as opposed to state jurisdiction, like the vast majority of assault cases.

The federal government justifies the enforcement of the Act through the Commerce Clause of the US Constitution, which grants the federal government jurisdiction over cases that affect interstate commerce.¹⁹⁰ However, even though the Commerce Clause has been the justification for the Constitutionality of the Act, does the Act's ability to federally criminalize hate crimes fall under the scope of the Commerce Clause, and if so, to what extent? This paper analyzes *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019), supplemented by past US Supreme Court cases, to help answer this question.

In *Hill*, the defendant, James Hill, admitted to physically assaulting his coworker, Curtis Tibbs, on the basis of his sexual orientation. Tibbs, a gay man, was repeatedly

¹⁸⁸ “The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009,” Civil Rights Division, May 30, 2023, <https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0>.

¹⁸⁹ 18 U.S.C. § 249 can be broken down into three main subsections. Subsection one criminalizes violent acts based on race, color, religion, or national origin. Crimes that fall under subsection one do not need to prove any other jurisdictional element for a federal conviction. Subsection two includes more protected classes, criminalizing acts of violence based on gender, gender identity, sexual orientation, or disability. In order to obtain a federal conviction, the government must show a link to interstate or foreign commerce. Subsection three applies the protected classes to crimes committed in US Special Maritime and Territorial Jurisdiction.

¹⁹⁰ US Constitution Article 1, Section 8, Clause 3: “[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”.

punched in the face by Hill and sustained significant bruising and injuries to his face.¹⁹¹ The passing of the Hate Crimes Prevention Act in 2009 makes this act of violence motivated by prejudice against Tibbs's sexual identity a hate crime under federal law. The assault took place in an Amazon fulfillment center which deals with packages that travel in interstate commerce, and took place during both of the men's shifts. The facility was forced to temporarily close down the area of the assault in order to clean blood from the floor. However, the performance of the fulfillment center was generally unaffected by the assault as the two men's work was reassigned to different employees.¹⁹² Despite this, the defendant assaulted Tibbs while fully knowing he was potentially impacting interstate commerce due to the nature of his job (and does not deny this), so the 4th Circuit Court ruled that the Commerce Clause of the US Constitution applies and this case should fall under federal jurisdiction instead of state jurisdiction. Under state law in Virginia, where the assault in *Hill* took place, the defendant's actions would not qualify as a hate crime.¹⁹³ The dissenting opinion argues that there is not a significant enough connection between interstate commerce and the assault, but the Court ruled that this argument does not hold with the specific details of the case.

From the majority opinion of *Hill*, when Congress enacted the Hate Crimes Prevention Act, Congress discussed how hate crimes are different from other violent crimes in terms of interstate commerce. "Violent hate crimes 'substantially affect interstate commerce in many ways'," including "members of targeted groups are

¹⁹¹ *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019)

¹⁹² *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019)

¹⁹³ State law in the Commonwealth of Virginia provides stricter penalties for crimes motivated by the victim's race, color, national origin, or religion. The Commonwealth of Virginia does not have stricter penalties for crimes motivated by sexual orientation, like the assault in *Hill*. In order for Hill to be convicted of committing a hate crime, Hill would need to be federally convicted.

prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity,” and “Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence.”¹⁹⁴ These two ideas apply to this case very well: after being assaulted in the workplace, it would be very difficult for Tibbs to retain their job under the hostile conditions at the fulfillment center. Similarly, the fulfillment center is a facility of interstate commerce, so the employment of both men at the fulfillment center during the same shift means that the facility was used to facilitate the hate crime.

Past US Supreme Court case decisions can also be used to support the federal conviction of Hill. In *Katzenbach v. McClung*, 379 U.S. 294 (1964), Ollie’s Barbecue, a restaurant in Alabama, was ruled subject to federal regulation and anti-discrimination laws due to its role in interstate commerce. The restaurant had been refusing to serve people of color in its dining room, and when the federal government attempted to regulate the restaurant’s behavior under the premise that it impacted interstate commerce, the restaurant argued that it did not have a direct enough impact on interstate commerce to be regulated.¹⁹⁵ The decision came just months after the passing of the Civil Rights Act of 1964, which disallowed private businesses from turning away customers on the basis of race or identity.¹⁹⁶

Katzenbach is a similar case to *Hill* in the sense that both are cases regarding discrimination and interstate commerce. In both cases, the discrimination at hand was of high public interest, so federal intervention in each case is important for there to be

¹⁹⁴ *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019)

¹⁹⁵ *Katzenbach v. McClung*, 379 U.S. 294 (1964)

¹⁹⁶ From Title II of The Civil Rights Act of 1964, 42 U.S.C. §2000a: “(a)All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.”

sufficient justice. Even though Constitutionally this is not a sufficient argument, in both cases, arguments regarding the Commerce Clause aid this high public interest. In *Katzenbach*, the restaurant's main argument was that its role in interstate commerce was too minute – but this was overruled by the Court.¹⁹⁷ In *Hill*, this argument is also weak. The Amazon facility directly handles goods that travel through interstate commerce and is a major contributor to interstate commerce. Thus, the connection between the facility and interstate commerce is unquestionably strong enough to apply to the Commerce Clause.

Part of the dissent's argument in *Hill* is that the jurisdictional element¹⁹⁸ in *Hill* referred to all commercial or economic activity, which is too broad to fall under the scope of the Commerce Clause. At his job, Tibbs handles Amazon packages that are traveling both interstate and intrastate, so not every package Tibbs handles will ultimately affect interstate commerce. The dissent used this to argue that Tibbs's actions that were affected as a result of the assault were not necessarily interstate in nature, so the commerce clause should not apply. However, the nature of Tibbs's actions at the specific time of the assault should not matter in a facility that participates in interstate commerce daily.

This principle can be corroborated by the holding of *Perez v. United States*, 402 U.S. 146 (1971). In *Perez*, the Court ruled that Perez, a “loan shark,” could be federally convicted even though his specific actions did not play a major role in interstate

¹⁹⁷ From the decision of *Katzenbach v. McClung*, 379 U.S. 294 (1964): “the impact of an activity on interstate commerce should be measured not by the individual enterprise but by all such enterprises in the aggregate. Restaurants in general would have a significant impact on interstate commerce if they all discriminated against African-Americans, according to factual findings made by Congress that the Court took at face value.”

¹⁹⁸ “Jurisdictional element” refers to the specific element in a law that establishes which judicial entity has jurisdiction over applications of the law. Under the Hate Crimes Prevention Act, the jurisdictional element for any hate crime that was motivated by sexual orientation is whether or not the crime affected interstate commerce.

commerce.¹⁹⁹ Loan sharking as a whole greatly impacts interstate commerce, as loan sharks can threaten businesses that participate in interstate commerce and hence affect interstate commerce. Even though Perez himself was loan sharking a small local butcher shop, loan sharks as a group had been impacting other interstate businesses, so Perez's illegal extortionate practices had a direct impact on interstate commerce.²⁰⁰ This argument can be applied to *Hill* – even if Tibbs was dealing with intrastate packages on the day of the assault, Tibbs's job requires the handling of packages that travel in interstate commerce, so the assault on Tibbs has a direct impact on interstate commerce and the Commerce Clause should still apply. In both *Katzenbach* and *Perez*, the Court ruled that the crimes at hand should be treated in aggregate. Just because one individual crime does not deeply affect interstate commerce does not mean that the kind of crime as a whole does not. In *Katzenbach*, racial discrimination in restaurants was a national problem, not solely in the one individual restaurant, so the Court enabling federal regulation over racial discrimination in places of public accommodation as a result of the case has a national impact. Similarly, in *Hill*, even if the specific assault of Tibbs did not have a large impact on interstate commerce, assaults of the kind in the aggregate may have a much larger impact, so the ability for the Court to federally criminalize assaults of the nature has a national impact.

The dissenting opinion based most of its argument on *United States v. Morrison*, 529 U.S. 598 (2000). *Morrison* was based on the rape of a student at Virginia Tech University, and through the Violence Against Women Act, the perpetrator, Morrison,

¹⁹⁹ *Perez v. United States*, 402 U.S. 146 (1971)

²⁰⁰ This interpretation of *Perez* is consistent with the Court's holding of *Katzenbach*, where it was held that the discrimination in the restaurant should be treated as discrimination by restaurants in the aggregate, not just the specific restaurant at hand. While one specific crime may not have a large impact on interstate commerce, crimes of similar nature in aggregate may have a much more significant impact on interstate or foreign commerce.

was legally responsible for paying a civil remedy to the victim. In *Morrison*, the application of the Violence Against Women Act to the crime at hand was challenged under the premise that it was beyond the scope of the Commerce Clause and the 14th Amendment. The Court ruled that interstate commerce was not substantially affected by the sexual assault. Hence, the Act and the federal government did not have jurisdiction over this case.²⁰¹ Instead, deferring to the federalist system of the US government, jurisdiction was given to the Commonwealth of Virginia.

The dissent uses *Morrison* to claim that *Hill* does not have a sufficient connection between interstate commerce and the targeted violence in the case, similar to how the targeted violence in *Morrison* (against women in this instance) did not have a sufficient enough impact on interstate commerce for the Supreme Court to convict Morrison. The Court in *Morrison* rejected the argument for how the targeted violence affected interstate commerce, which mainly focused on the idea that targeted violence deters potential victims from traveling interstate and by diminishing national productivity because potential victims will be avoiding potentially dangerous confrontations.

However, the dissent offers no comment on the other justifications Congress generated for how hate crimes differ from other violent crimes regarding interstate commerce – only mentioning the deterring of interstate travel. In *Hill*, Tibbs would be virtually unable to continue to hold his job in the Amazon fulfillment center, knowing that he was at high risk of future harm from hate crimes. Similarly, as aforementioned, the Amazon facility was used to facilitate a violent hate crime, and the facility is directly involved in interstate commerce. These key differences override the dissent's

²⁰¹ *United States v. Morrison*, 529 U.S. 598 (2000)

comparison to *Morrison* and the argument that there is not a sufficient connection between interstate commerce and the hate crime in *Hill*.

Ultimately, the Hate Crimes Prevention act is fully dependent on a sufficient link to interstate commerce in order to be enforced by the federal government. In *Hill*, *Katzenbach*, and *Perez*, the Court ruled that the Commerce Clause does apply, as the impact the cases have on interstate commerce was interpreted to be rather sufficient. On the other hand, in *Morrison*, the impact on interstate commerce was deemed to be less significant, so the Court could not rule that the Commerce Clause applies. This highlights that there are potentially inconsistencies in Commerce Clause holdings.

Similar to *Morrison*, in *United States v. Lopez*, 514 U.S. 549 (1995), the Court also held that the Commerce Clause does not apply to the act at hand. In *Lopez*, a high school student was federally charged with possessing a concealed firearm on school premises as a violation of the Gun-Free School Zones Act of 1990. The Court's interpretation of the case led to the holding that gun possession is not an economic activity and does not have any impact on interstate commerce. Therefore, the federal government cannot enforce the Act based on the Commerce Clause.²⁰² The holdings of *Lopez* and *Morrison*, amongst other past Commerce Clause cases, are intriguing because they are not fully consistent with holdings of similar cases, like *Katzenbach*, *Perez*, and *Hill*. While these cases all revolve around similar legal principles, Court holdings have gone both ways, leading to necessary analysis of why the Court does not rule in the same direction in each specific case.

This inconsistency in holdings regarding the Commerce Clause highlights how the criteria for determining sufficient linkage to interstate commerce is not fixed but

²⁰² *United States v. Lopez*, 514 U.S. 549 (1995)

instead is completely arbitrary. This characteristic of the Court's interpretation of the Commerce Clause is entirely subjective and up to interpretation by the Court, yet the Court is intended to rule with consistency and impartiality. In order to minimize unintentional bias from Commerce Clause holdings and similar loosely written laws, there are measures that need to be taken to regulate the Court's interpretations.

Lawrence Lessig wrote in his article "Translating Federalism: *United States v Lopez*" that "a rule is an inferior rule if, in its application, it appears to be political, in the sense of appearing to allow extra-legal factors to control its application."²⁰³ Lessig coined this the "Frankfurter constraint." Lessig, in his article, continued to argue that the federal government should speak specifically and with clarity about intent when regulating areas traditionally regulated by the states. This measure accomplishes two things. First, it ensures that some power remains in the hands of the states, as intended by the Constitution. It also accomplishes the goal of removing politicization from many Commerce Clause principles. When utilizing this measure, the Courts can turn to the specific statutory language in federal laws and past regulations instead of only basing Commerce Clause principles on opinion.

Many past federal laws have not utilized the specific style of writing that Lessig recommends in "Translating Federalism." When laws are written with language that is subject to interpretation, inconsistencies in Court holdings are more likely to occur. For example, the Violence Against Women Act in *Morrison* does not provide a line where the Commerce Clause does and does not apply, and instead states, "such violence has a devastating impact on women's physical and emotional health, financial security, and ability to maintain their jobs, and thus impacts interstate commerce and economic

²⁰³ Lawrence Lessig, "Translating Federalism: *United States v Lopez*," *The Supreme Court Review*, 1995, 125-215.

security.”²⁰⁴ If the Act provided a more specific definition of to what extent violence impacts interstate commerce and how directly interstate commerce needs to be affected in order for the law to apply, then inconsistencies in Court holdings can be minimized.

Under the context of specific legal writing, the Hate Crimes Prevention Act is a well-written law. The Act specifically states its definition of a hate crime, what specific protected classes classify violence needs to be targeted against to be considered a hate crime, and in what ways a hate crime can affect interstate commerce. This specific writing of the law can eliminate much bias in court rulings like the ruling of *Hill* and also legitimizes the enforcement of the law in past and future hate crime cases. Ultimately, the consistency of Commerce Clause interpretations depends on the clarity of congressional intent and statutory language in written laws. Given the specific writing of the Hate Crimes Prevention Act, the Act is Constitutionally justifiable and can properly enforce federal hate crime convictions compared to prior federal hate crime laws.

²⁰⁴ H.R.1620 - Violence Against Women Act Reauthorization Act of 2021