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# Hate, Interstate: The Fourth Circuit, Hate Crimes, and the Commerce Clause in *United States v. Hill*

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# Hate, Interstate: The Fourth Circuit, Hate Crimes, and the Commerce Clause in *United States v. Hill*[*]

*The past twenty-five years have seen a dramatic reevaluation of the judiciary's understanding of the Commerce Clause, hallmarked by a categorical approach to activity the Clause can reach. Congress has adapted as well, attempting to shore up the constitutionality of legislation by including language aimed at tying regulated activity to the Clause's categorical jurisdiction (so-called "jurisdictional elements"). Some courts have struggled in squaring these categorical limits with a traditionally broad understanding of Commerce Clause power. The Fourth Circuit's conviction of James Hill for a bias-motivated assault was one such struggle. This Recent Development argues that the Fourth Circuit's decision in* United States v. Hill *improperly analyzed Hill's conviction under the Hate Crimes Prevention Act in a manner unmoored from Commerce Clause precedent.*

## INTRODUCTION: *UNITED STATES V. HILL*

Amazon opened its Chester, Virginia, facility in 2012.[1] The expansive facility is responsible for storing, packaging, and shipping millions of products with help from the 2200 (or as many as 3200 depending on the season) employees that roam the 1.2 million square-foot warehouse floor.[2] On May 22, 2015, that same floor was wiped clean of Curtis Tibbs's blood.[3]

Tibbs was a fulfillment associate for Amazon.[4] Colloquially known as "packers," these employees are responsible for moving items from conveyor belts, scanning them, and boxing them for movement to other locations throughout the facility.[5] It was in the midst of this boxing that Tibbs was violently assaulted.[6] Surveillance footage from the warehouse showed the assailant—fellow Amazon employee James Hill—approaching Tibbs from behind as Tibbs was carrying packages.[7] Without warning, Hill repeatedly punched Tibbs in the face leaving him with bruises, cuts, and a bloody nose.[8]



1. John Reid Blackwell, *A Look Inside One of Amazon's Warehouses in Virginia*, ASSOCIATED PRESS (May 18, 2019), https://www.apnews.com/dbb079b6655d4a73a1b8659423a4e67e [https://perma.cc/8WUY-35ML].

2. *Id.*

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

4. *Id.* at 193.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 194.

During subsequent questioning by an Amazon investigator and a police officer, Hill freely admitted that he "didn't like homosexuals," and that he believed Tibbs disrespected him "because he is a homosexual."[9] That justification for the assault gave rise to a novel constitutional question.

In *United States v. Hill*,[10] the Fourth Circuit became the first circuit court to evaluate the constitutionality of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act ("HCPA" or "Act")[11] as applied to an unarmed assault of a victim engaged in activity at his place of work. The court's analysis disregarded and misapplied precedent to achieve a just outcome for Tibbs's bias-motivated assault, pushing the Commerce Clause beyond its constitutional bearings in the process.

This Recent Development explores the flawed analysis of the Fourth Circuit with a specific critique of its reliance on *Taylor v. United States*[12] and its focus on the presence of (yet lack of analysis of) a jurisdictional hook provision. Part I provides an overview of Hill's prosecution and the related provisions of the HCPA. Part II provides relevant background on the modern, foundational Commerce Clause cases. Part III analyzes the Fourth Circuit opinion in *Hill*. Finally, Part IV recommends an alternative constitutional approach for regulating hate crimes and questions whether increased penalties for hate crimes achieves the goal of future prevention.

## I. THE HCPA AND THE CHARGE AGAINST HILL

By most accounts, Hill's assault of Tibbs would be considered a hate crime, which the Justice Department defines in simple terms as "a crime + motivation for committing the crime based on bias."[13] Accordingly, the analysis is straightforward. Hill committed assault—a crime. When asked why he committed assault, he told investigators he did not like gay people,

9. *Id.*

10. 927 F.3d 188 (4th Cir. 2019).

11. Pub. L. No. 111-84, div. E, 123 Stat. 2835 (2009) (codified as amended in scattered sections of 18 and 42 U.S.C. (2018)).

12. 136 S. Ct. 2074 (2016).

13. *Learn About Hate Crimes*, U.S. DEP'T JUST., https://www.justice.gov/hatecrimes/learn-about-hate-crimes [https://perma.cc/N3SL-R6VV]. More specifically, hate crimes require that the motivating bias be unlawful under relevant statutory law. Harbani Ahuja, Note, *The Vicious Cycle of Hate: Systemic Flaws in Hate Crime Documentation in the United States and the Impact on Minority Communities*, 37 CARDOZO L. REV. 37, 1867, 1870–71 (2016) ("Every hate crime consists of two elements: first, the perpetrator must commit a crime; and second, the perpetrator must have been motivated by an unlawful bias that is protected by hate crimes laws. The bias motive is what makes hate crimes distinct: the victims of hate crimes are selected as targets due to some actual or perceived protected characteristic such as race, gender, disability, religion, or sexual orientation.").

demonstrating bias.[14] Hill did not even attempt to provide another justification for the assault.[15] Therefore, Hill committed a hate crime.

While the superficial analysis is simple, the prosecution was not. That is because Virginia's hate crime provision for assault and battery does not include sexual orientation[16] as one of the classes protected by the statute.[17] Initially, Hill was charged only with misdemeanor assault.[18] The state prosecutor, seeing an opportunity for greater penalties, referred the case for federal prosecution under the HCPA.[19] The Act, passed in 2009, was motivated in part by two notable crimes.[20] Its namesakes, Matthew Shepard and James Byrd, Jr., were the victims of brutal and highly publicized bias-motivated tortures and murders—Shephard's based on his sexual orientation and Byrd's based on his race.[21]

The specific provision of the HCPA used against Hill imposes criminal liability when an individual

> willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.[22]

But this is only the first step of an HCPA charge. Since the HCPA was passed under the auspices of the Commerce Clause of the Constitution,[23] conviction under the Act requires that the crime also involve at least one of the Act's "jurisdictional hooks" to support conviction. In Commerce Clause legislation, a jurisdictional hook (sometimes referred to as a jurisdictional

14. *Hill*, 927 F.3d at 194.

15. *See id.*

16. The statute provides increased criminal penalties "if a person intentionally selects the person against whom an assault and battery resulting in bodily injury is committed because of his race, religious conviction, color or national origin." VA. CODE ANN. § 18.2-57(B) (LexisNexis current through the 2020 Reg. Sess. of the Gen. Assemb.).

17. *Id.*

18. United States v. Hill, 182 F. Supp. 3d 546, 548 (E.D. Va. 2016), *rev'd and remanded*, 700 F. App'x 235 (4th Cir. 2017).

19. *Hill*, 927 F.3d at 194.

20. *See Obama Signs Hate Crimes Bill into Law*, CNN POL. (Oct. 28, 2009, 7:39 PM), https://www.cnn.com/2009/POLITICS/10/28/hate.crimes/ [https://perma.cc/E6CC-B6AW] (discussing the murders of Matthew Shepherd and James Byrd, Jr.).

21. *See* Audra Burch, *In Texas, a Decades-Old Hate Crime, Forgiven but Never Forgotten*, N.Y. TIMES (July 8, 2018), https://www.nytimes.com/2018/07/09/us/james-byrd-jasper-texas-killing.html [https://perma.cc/59EP-J62V (dark archive)]; Jude Sheerin, *Matthew Shephard: The Murder That Changed America*, BBC NEWS (Oct. 26, 2018), https://www.bbc.com/news/world-us-canada-45968606 [https://perma.cc/CS97-M46V].

22. 18 U.S.C. § 249(a)(1) (2018).

23. Article I Section 8 of the Constitution provides one of Congress's enumerated legislative powers as the ability to regulate "Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

element) is the part of a statute included to tie the regulated behavior to the enumerated power, therefore allowing Congress to regulate the behavior.[24] These provisions, in theory, allow for courts to evaluate the constitutionality of the Act's application on a case-by-case basis.

The HCPA contains four such jurisdictional hooks.[25] The hook used in Hill's conviction requires that, in addition to showing bodily injury and biased motivation, the prosecution must also show: "the conduct . . . interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or . . . otherwise affects interstate or foreign commerce."[26]

Note that the jurisdictional element contains two pathways for showing connection to commerce: the bodily injury may either (1) interfere with commercial or economic activity, or (2) "otherwise affect[]" interstate commerce. The indictment and eventual conviction of Hill rested on 18 U.S.C. § 249(a)(2)(B)(iv)(I),[27] requiring that the assault and battery interfere with commercial or economic activity in which Tibbs was engaged in at the time.[28]

The district court dismissed the indictment as unconstitutional on Commerce Clause grounds.[29] However, the Fourth Circuit reversed the dismissal and reinstated the indictment in an unpublished opinion.[30] The reinstated indictment alleged that

24. *See* United States v. Rodia, 194 F.3d 465, 471 (3d Cir. 1999) ("A jurisdictional element, as the term has been used in and after *Lopez*, refers to a provision in a federal statute that requires the government to establish specific facts justifying the exercise of federal jurisdiction in connection with any individual application of the statute."); Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1153 (2003) ("Congress sometimes chooses to include in its statutes a 'jurisdictional nexus'—that is, a requirement that the government prove that the acts to which a statute is applied in a given case themselves affect interstate commerce."); Tara M. Stuckey, *Jurisdictional Hooks in the Wake of* Raich*: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101, 2102 (2006) ("A jurisdictional hook is a statutory clause requiring that the regulated activity have a connection with interstate commerce.").

25. The HCPA's four hooks allow for a prosecution when the bias-motivated bodily injury (1) occurred as a result or during the victim or defendant's travel across a state or national border or while using a channel or facility of interstate commerce; (2) was caused by the defendant using an instrumentality of interstate commerce in connection with the conduct; (3) was caused with a weapon that had traveled in interstate or foreign commerce; or (4) interfered with commercial or economic activity that the victim was engaged in at the time or otherwise affected interstate or foreign commerce. 18 U.S.C. § 249(a)(2)(B).

26. *Id.* § 249(a)(2)(B)(iv)(I)–(II).

27. *Id.* § 249(a)(2)(B)(iv)(II) (requiring that the crime "otherwise affects interstate or foreign commerce"). The original crime against Hill also included this § 249(2)(B)(iv)(II) charge. However, the government dropped the charge on remand and solely relied on the language tying the crime to interference with commercial conduct the victim was engaged in at the time of the crime. United States v. Hill, 927 F.3d 188, 195 (4th Cir. 2019).

28. *Hill*, 927 F.3d at 195.

29. United States v. Hill, 182 F. Supp. 3d 546, 555–556 (E.D. Va. 2016), *rev'd and remanded*, 700 F. App'x 235 (4th Cir. 2017).

30. *Hill*, 700 F. App'x at 238.

> on or about May 22, 2015 . . . [Defendant] did willfully cause bodily injury to [Tibbs] by assaulting [Tibbs], including by punching [Tibbs], because of [Tibbs's] actual and perceived sexual orientation, namely that he is gay; and that, in connection with the offense, [Defendant] [1] *interfered with commercial and other economic activity in which [Tibbs] was engaged at the time of the conduct*.[31]

After a two-day trial in district court following remand, the jury found Hill guilty and determined that Hill caused bodily injury to Tibbs, that he did so willfully, that he did so because of Hill's perceived sexual orientation, and that his action "interfered with the commercial or economic activity in which Tibbs was engaged at the time of the conduct."[32] Hill then moved for acquittal on similar grounds to those of his original dismissal: namely, that the HCPA as applied exceeded Congress's Commerce Clause authority.[33] The district court agreed and acquitted Hill.[34] The government appealed and the Fourth Circuit reversed the acquittal.[35]

The Fourth Circuit, looking to the foundational cases of Commerce Clause jurisprudence for guidance, found that Hill's conviction was sufficiently connected to commerce.[36] In doing so, the court improperly upheld the provision of the HCPA that supported his conviction, holding that the existence of the jurisdictional elements was sufficient for constitutionality.[37]

As much of the court's reasoning stems from the essential Commerce Clause precedent, it is helpful in analyzing the *Hill* court's holding to discuss the broad holdings and implications of each relevant case. We begin, as the Fourth Circuit did, with *United States v. Lopez*.[38]

31. *Hill*, 927 F.3d at 194 (emphasis added).

32. *Id.* at 195 (internal quotations omitted).

33. *Id.* at 194.

34. *Id.*

35. *Id.* at 195, 210.

36. *See id.*

37. *Id.* at 204 ("[W]hereas the *Lopez* and *Morrison* Courts found it significant that the statutes at issue had no interstate-commerce jurisdictional element, the provision in the Hate Crimes Act under which the jury convicted Defendant expressly includes such an element. That element requires that, to convict a defendant under the Hate Crimes Act, both a court and a fact-finder must determine, in each case, that the defendant's conduct 'interfere[d] with commercial or other economic activity in which the victim is engaged at the time of the conduct.' Notably, Defendant has not identified any case—nor have we found any such case—in which a federal criminal statute including an interstate commerce jurisdictional element has been held to exceed Congress's authority under the Commerce Clause." (quoting 18 U.S.C. § 249(a)(2)(B)(iv)(I) (2018)) (citing United States v. Coleman, 675 F.3d 615, 620 (6th Cir. 2012))).

38. 514 U.S. 549 (1995).

## II. BACK TO BASICS: THE RELEVANT COMMERCE CLAUSE CASES

In *Lopez*, the Supreme Court sought to articulate the "few and defined" powers delegated to Congress under the Commerce Clause.[39] There, when evaluating the constitutionality of the Gun Free School Zones Act,[40] the Court identified "three broad categories of activity that Congress may regulate under its commerce power."[41] The first category allows regulation of "the use of the channels of interstate commerce."[42] This category includes regulation of roads and other infrastructure used in interstate commerce.[43] The second category outlined in *Lopez* allows the regulation of "the instrumentalities of interstate commerce, or persons or things in interstate commerce."[44] This category includes vehicles as well as objects in commerce.[45] Finally, and most generally, the third category allows Congressional regulation of "activities having a substantial relation to interstate commerce."[46] This third category includes intrastate "activities that substantially affect interstate commerce."[47]

Importantly, the *Lopez* Court held that the Gun Free School Zones Act, which criminalized possession of a firearm in a school zone, was an unconstitutional use of the Commerce Clause since the statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[48] Additionally, the Court determined that "[the statutory provision] contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[49] In essence, the Court found that the lack of a "jurisdictional hook" cut against the State's case that possession of a firearm in a school zone was sufficiently tied to commerce. Notably, however, the Court did not indicate that the mere inclusion of a jurisdictional element would have rendered the statutory provision constitutional.[50]

39. *Id.* at 558.

40. Pub. L. No. 101-647, § 1701, 104 Stat. 4944, *invalidated by Lopez*, 514 U.S. 549, *and amended by* Treasury Department Appropriation Act of 1997, Pub. L. No. 104-208, div. A, tit. 6, § 657, 110 Stat. 3009-369, 3009-369 to 3009-371 (codified as amended at 18 U.S.C. § 922(q) (2018)).

41. *Lopez*, 514 U.S. at 558.

42. *Id.*

43. *See*, *e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255–56 (1964) (holding that the Commerce Clause could be used to regulate an intrastate motel because it qualified as a channel of interstate commerce); Caminetti v. United States, 242 U.S. 470, 491 (1917) (holding that the Commerce Clause could be used to regulate "immoral" criminal activity utilizing interstate roadways).

44. *Lopez*, 514 U.S. at 558.

45. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 90–91 (1824) (holding that vehicles are integral to and thus regulable as commerce).

46. *Lopez*, 514 U.S. at 558–59.

47. *Id.*

48. *Id.* at 561.

49. *Id.*

50. *Id.* This idea is confirmed in *United States v. Morrison*, 529 U.S. 598 (2000). *See infra* note 56 and accompanying text.

The second major case relevant to the Fourth Circuit's analysis is *United States v. Morrison*.[51] In *Morrison*, the Supreme Court evaluated the constitutionality of a provision of the Violence Against Women Act ("VAWA")[52] that provided a civil remedy for gender-motivated violence.[53] There, the Court reaffirmed the three *Lopez* categories of activity regulable by the Commerce Clause while also addressing the question of bias-motivated violent crimes by holding that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[54] In finding the VAWA civil remedy provision unconstitutional, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[55] The Court also confirmed that a jurisdictional hook is probative but not determinative, finding that "a jurisdictional element *may* establish that the enactment is in pursuance of Congress's regulation of interstate commerce."[56]

The Fourth Circuit also turned to *Gonzales v. Raich*[57] to support its holding in *Hill*.[58] In *Gonzalez*, the plaintiffs sought injunctive relief prohibiting the enforcement of the Controlled Substances Act[59] as applied to their personal growth and consumption of marijuana for medical use.[60] In evaluating Congress's power to regulate the marijuana market under the third *Lopez* category,[61] the Court held that precedent "establishes Congress's power to regulate purely local activities that are a part of an economic 'class of activities' that have a substantial effect on interstate commerce."[62] Though the growth of marijuana for personal use was not economic per se, Congress is permitted to regulate it as a class of activity that "would undercut the regulation of the interstate market in that commodity."[63]

With the constitutional table set, we now turn to *Hill*.

51. 529 U.S. 598 (2000).

52. Pub. L. No. 103-322, tit. IV, § 40302, 108 Stat. 1902, 1941–42 (1994) (codified as amended at 42 U.S.C. § 13981 (2000)), *invalidated by Morrison*, 529 U.S. 598.

53. *Morrison*, 529 U.S. at 601–02.

54. *Id.* at 613.

55. *Id.* at 617.

56. *Id.* at 612 (emphasis added).

57. 545 U.S. 1 (2005).

58. United States v. Hill, 927 F.3d 188, 198 (4th Cir. 2019).

59. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 841(a)(1), 844(a) (2018)).

60. *Raich*, 545 U.S. at 8.

61. This third category is the power to regulate activities that "substantially affect interstate commerce." United States v. Lopez, 514 U.S. 549, 558–59 (1995).

62. *Raich*, 545 U.S. at 17 (first quoting Perez v. United States, 402 U.S. 146, 150 (1971); and then quoting Wickard v. Filburn, 317 U.S. 111, 128–29 (1942)).

63. *Id.* at 18.

## III. WHAT THE *HILL*?

The Fourth Circuit assures us that Congress paid close attention to the scope of its authority under the Commerce Clause when adopting the HCPA.[64] Unfortunately, the same close attention does not appear in the Fourth Circuit's *Hill* decision. As the court correctly notes, "[w]hether the Hate Crimes Act may be constitutionally applied to an unarmed assault of a victim engaged in commercial activity at his place of work appears to be an issue of first impression in this Circuit or any other."[65] As such, the court was left only with the foundational Commerce Clause cases as well as disparate analogous case law to decide the question. However, given the court's reasoning, a reader would be forgiven for believing that one such analogous case, *Taylor v. United States*,[66] was directly on point. That treatment proves problematic.

### A. *The* Hill *Majority's Interpretation and Application of* Taylor *Is Misguided*

In *Taylor*, the Supreme Court evaluated the constitutionality of a prosecution under the Hobbs Act,[67] which "ma[de] it a crime for a person to affect commerce, or attempt to do so by robbery or extortion."[68] There, the defendant and other gang members broke into the homes of marijuana dealers and demanded the location of drugs and money.[69] In their analysis, the Supreme Court found that since the *Raich* decision upheld congressional authority to regulate marijuana, and since the Hobbs Act criminalized robbery interfering with commerce over which the United States has jurisdiction, the prosecution was within the bounds of the Commerce Clause.[70] In the Fourth Circuit's interpretation, "*Taylor*, therefore, establishes that, pursuant to its power under the Commerce Clause, Congress may proscribe violent conduct when such conduct interferes with or otherwise affects commerce over which Congress has jurisdiction."[71]

The Fourth Circuit's reading of *Taylor* in *Hill* is exceedingly and conveniently broad. Close reading of the *Taylor* opinion leaves one struggling to determine where, if at all, the Supreme Court "establishes" this Commerce Clause power as the Fourth Circuit claims. In fact, what is notable about the Fourth Circuit's analysis is not what it says about *Taylor* but what it does not. The Fourth Circuit disregards crucial pieces of *Taylor* in its analysis: the most egregious exclusion being the Supreme Court's insistence that "[their] *holding*

64. United States v. Hill, 927 F.3d 188, 196–97 (4th Cir. 2019).
65. *Id.* at 198.
66. 136 S. Ct. 2074 (2016).
67. Pub. L. No. 80-772, 62 Stat. 793 (1948) (codified as amended at 18 U.S.C. § 1951 (2018)).
68. *Id.* at 2084 (quoting 18 U.S.C. § 1951(a) (2018)).
69. *Id.* at 2078.
70. *Id.* at 2080.
71. *Hill*, 927 F.3d at 199.

*today is limited* to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds."[72] It would appear that the Supreme Court, careful so as not to disturb established Commerce Clause precedent, expressly sought to withhold the very grant of authority on which the Fourth Circuit relies.

Moreover, the *Taylor* Court concluded that "[b]ecause Congress may regulate these intrastate [drug] activities based on their aggregate effect on interstate commerce, it follows that Congress may also regulate intrastate drug *theft*."[73] Note the emphasis contained in the opinion on the specific crime targeted by the Hobbs Act rather than extrapolation to "violent conduct" generally. This distinction between specific and general crime was emphasized by the *Taylor* Court when it focused on the profit-motivated language used by the defendant who asked the victim "where the money was at, where the weed was at."[74] The Supreme Court's focus on the economic nature of the crime at issue in *Taylor* does not appear to support the Fourth Circuit's conclusion that the Commerce Clause applies to "violent conduct" in general. This derails the Fourth Circuit's attempt to use *Taylor* as controlling precedent in *Hill* given the fundamentally different nature of the crimes at issue.

The Fourth Circuit attempts to reconcile this economic versus violent crime distinction, yet its analysis falls short. In justifying its use of *Taylor* despite the obvious difference in the nature of the respective crime (robbery in the case of *Taylor* and assault in *Hill*), the Fourth Circuit claims that the "economic nature" argument in *Taylor* "rests on the incorrect premise that the *actus reus* proscribed by a federal criminal statute must be 'inherently economic' in order for the statute to comply with the Commerce Clause."[75] In other words, the Fourth Circuit strains to use *Taylor* while rejecting its central holding—that "[a]s long as Congress may regulate the purely intrastate possession and sale of illegal drugs, Congress may criminalize the *theft or attempted theft* of those same drugs."[76]

This dissonance is especially confusing given that the Fourth Circuit itself recognizes that precedent weighs in favor of regulating crimes with an economic actus reus. In fact, the Fourth Circuit argues that "the Hate Crimes Act's interstate commerce element ensures that the statute regulates only *economic*, violent criminal conduct, not the type of 'noneconomic, violent criminal conduct' at issue in *Morrison*."[77] In sum, the Fourth Circuit states that an

72. *Taylor*, 136 S. Ct. at 2082 (emphasis added).
73. *Id.* at 2076.
74. *Id.* at 2080.
75. *Hill*, 927 F.3d at 205, 207.
76. *Taylor*, 136 S. Ct. at 2081 (emphasis added).
77. *Hill*, 927 F.3d at 204 (quoting United States v. Morrison, 529 U.S. 598, 617 (2000)).

economic actus reus is irrelevant[78] while simultaneously relying on cases that make a clear distinction between economic and non-economic criminal conduct.[79]

To accomplish this, the Fourth Circuit analogizes the HCPA to the Hobbs Act at issue in *Taylor*, telling us that "[t]he Hobbs Act . . . compl[ies] with the Commerce Clause . . . *not* because robbery . . . [is] 'inherently economic,' but rather because [it] contain[s] [a] jurisdictional element[] that limit[s] the statute['s] reach to those robberies . . . that interfere with or affect interstate commerce."[80] The Fourth Circuit treats the specific crimes the Hobbs Act addresses as if they are somehow ancillary and not the target of a legislature that likely considered its power under the Commerce Clause and made decisions not only about the jurisdictional element but also the regulated crimes themselves. In fact, the history of the Hobbs Act reveals that it originated as an amendment to the Federal Anti-Racketeering Act[81] to weaken exceptions that the Federal Anti-Racketeering Act provided to *labor union* activity.[82] Therefore, even assuming that robbery is not inherently economic (as unintuitive an assumption as it seems), the robbery initially contemplated and targeted by the Hobbs Act dealt with *labor unions* resorting to violence in order to exact *wages*.[83] This stands in stark contrast to the violent conduct implicated by the HCPA—bias-motivated assault.

Furthermore, the Fourth Circuit's discussion ignores the Hobbs Act's statutory requirement that any violence that was not "robbery or extortion" be "in furtherance of a plan or purpose to do anything in violation of this section."[84] The statutory language in the Hobbs Act makes clear that Congress knew of and made a distinction between economic and noneconomic crimes. Independent of any jurisdictional hook, the Hobbs Act required that these noneconomic crimes be in furtherance of the economic crimes[85] for liability to attach.[86] Similar language is plainly absent from the HCPA. This cuts strongly

78. *Id.* at 205 ("[W]hether the application of a federal statute proscribing violent crime complies with the Commerce Clause does not turn on whether the act proscribed by the statute is 'economic' or 'non-economic.'").

79. *See* discussion *infra* pp. 111–12.

80. *Hill*, 927 F.3d at 205–06. The court also discusses a federal arson statute upheld on similar grounds. Arson, of course, is a crime against *property*, rendering it "economic" not only in its nature but *by* its nature. As the Hobbs Act more specifically addresses crimes against persons, this Recent Development will not address the simpler arson example.

81. Pub. L. No. 73-376, 48 Stat. 979 (1934) (codified as amended at 18 U.S.C. § 1951 (2018)).

82. In fact, the language in the Act would punish members of a labor union attempting to exact wages through force and violence or threats thereof, which the Teamsters' Union did in New York. William B. Aycock, *The Hobbs Act–An Amendment to the Federal Anti-Racketeering Act*, 25 N.C. L. REV. 58, 58–60 (1946).

83. *Id.* at 58.

84. 18 U.S.C. § 1951(a) (2018).

85. Recall that the Hobbs Act targets "robbery or extortion" explicitly. *Id.*

86. *Id.*

against the Fourth Circuit's claim that *Taylor* applies and that the constitutionality of the Hobbs Act has any bearing on the HCPA.

There is reason to believe that the Fourth Circuit rushed to justify its reliance on *Taylor* to avoid issues raised by *Morrison*. As previously discussed, *Morrison*—one of the Supreme Court's essential Commerce Clause cases—*definitively* determined that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity" and were thus beyond the reach of the Commerce Clause.[87] Compare this to the *Taylor* Court's ruling, which was supported "[b]ecause Congress may regulate these intrastate [drug] activities based on their aggregate effect on interstate commerce."[88] The natural conclusion under *Morrison* would be to simply determine that orientation-motivated crimes of violence are also "not in any sense of the phrase" economic activity. Had the Fourth Circuit not relied on *Taylor*, the prosecution likely would have failed under the standard articulated in *Morrison*.

### B. *The Jurisdictional Hook Is Insufficient To Subject Hill to Criminal Liability Under the Commerce Clause*

Fear not, says the Fourth Circuit, "for several reasons, *Lopez* and *Morrison* are readily distinguishable from Defendant's prosecution under the Hate Crimes Act."[89] The "several reasons" are, for all intents and purposes, one reason: the HCPA features a jurisdictional hook provision that requires an additional showing of relation to commerce.[90] To be fair, the Fourth Circuit is correct in its statement that the precedential cases "found it significant that the statutes at issue [in *Lopez* and *Morrison*] had no interstate-commerce jurisdictional element."[91]

The court is incorrect, however, in abandoning any evaluation under *Lopez* and *Morrison* at the mere presence of a jurisdictional element. While the court noted that the defendant "has not identified any case—nor ha[s] [the Fourth Circuit] found any such case—in which a federal criminal statute including an interstate commerce jurisdictional element has been held to exceed Congress's authority under the Commerce Clause," the court itself failed to identify any binding precedent to conclude that the existence of a jurisdictional hook alone is sufficient for constitutionality.[92] In fact, the court appears to have carefully selected its persuasive authority to avoid confronting that very question, referring to a Sixth Circuit decision that "regard[ed] the presence of such a jurisdictional element [that ensures case-by-case analysis that the violation in

87. United States v. Morrison, 529 U.S. 598, 613 (2000).
88. Taylor v. United States, 136 S. Ct. 2074, 2077 (2016).
89. United States v. Hill, 927 F.3d 188, 204 (4th Cir. 2019).
90. *Id.* at 204–05.
91. *Id.* at 204.
92. *Id.*

question affects interstate commerce] as the touchstone of valid congressional use of its Commerce Clause powers to regulate non-commercial activity."[93] Instead, the Fourth Circuit could have also considered the Third Circuit's opinion in *United States v. Rodia*,[94] which accurately noted that "[holding] that the presence of a jurisdictional element automatically ensures the constitutionality of a statute ignores the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated as to fail to guarantee that the activity regulated has a substantial effect on interstate commerce." [95] Other jurisdictions have similarly reacted skeptically to the argument that inclusion is synonymous with constitutionality.[96]

The Fourth Circuit's lack of analysis beyond recognizing that the HCPA contains a jurisdictional element represents the precise situation the Third Circuit feared.[97] Any analysis of the jurisdictional element at play in Hill's prosecution would reveal at best an attenuated connection to the factors articulated in *Lopez*.

The full jurisdictional element used to charge Hill for Tibbs's assault provided that the assault must "interfere[] with commercial or other economic activity in which the victim is engaged at the time of the conduct."[98] This jurisdictional element is notable when compared to the language of the others. Of the jurisdictional hooks, the first three, as well as subsection II of the fourth, explicitly reflect the categories that the *Lopez* Court held to be within the ambit of the Commerce Clause.[99] The language of these jurisdictional hooks includes "channel, facility, or instrumentality of interstate or foreign commerce," "travel

93. *Id.* (quoting United States v. Coleman, 675 F.3d 615, 620 (6th Cir. 2012)). The Sixth Circuit, however, goes on to provide substantive analysis of those jurisdictional elements rather than holding that their presence alone is sufficient. *Coleman*, 675 F.3d at 620–21 (concluding under *Lopez* that "SORNA bears a rational relationship to Congress's power to regulate the channels of interstate commerce").

94. 194 F.3d 465 (3d Cir. 1999).

95. *Id.* at 472.

96. *See e.g.*, United States v. Ho, 311 F.3d 589, 600 (5th Cir. 2002) ("We therefore have held that a 'jurisdictional element is not alone sufficient to render [a challenged statute] constitutional. That argument . . . has no principled limit.'" (quoting United States v. Kallestad, 236 F.3d 225, 229 (5th Cir. 2000))); United States v. Wilson, 73 F.3d 675, 685 (7th Cir. 1995) ("In discussing the lack of a jurisdictional element in *Lopez*, the Court simply did not state or imply that all criminal statutes must have such an element, or that all statutes with such an element would be constitutional, or that any statute without such an element is per se unconstitutional."); United States v. Bishop, 66 F.3d 569, 585 (3d Cir. 1995) ("The mere presence of a jurisdictional element, however, does not in and of itself insulate a statute from judicial scrutiny under the Commerce Clause, or render it *per se* constitutional.").

97. *Rodia*, 194 F.3d at 472.

98. 18 U.S.C. § 249(a)(2)(B)(iv)(I) (2018).

99. The Commerce Clause permits regulation of "the use of the channels of interstate commerce"; regulation of "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and regulation of activities that substantially affect interstate commerce. United States v. Lopez, 514 U.S. 549, 558 (1995).

. . . across a State line," and affecting "interstate or foreign commerce."[100] The language of subsection I of the HCPA's fourth jurisdictional element, by contrast, does not make reference to any of the categories in *Lopez*.

Initially, the charge against Hill contained both subsections of element four, which would have included a requirement that the prosecution show that the assault "otherwise affected" interstate commerce.[101] The prosecutor eventually dropped this element and solely relied on § 249(a)(2)(B)(iv)(I), requiring only that Hill's conduct "interfere[d] with commercial or other economic activity in which the victim [was] engaged at the time of the conduct."[102] On its face, this subsection is plainly not tied to any of the established categories of Commerce Clause regulation the Supreme Court has recognized. The section does not even *mention* a connection to interstate or foreign commerce. One could even assume that the prosecutor identified weaknesses in showing that Hill's actions "otherwise affect[ed] interstate or foreign commerce," leading them to drop the charge altogether.[103] This weakness seems especially relevant given the court's recognition that Amazon "did not miss any 'critical pull times,' or packaging deadlines, as a result of the incident because other areas of the facility absorbed the work."[104]

Nevertheless, the Fourth Circuit tells us that "the Hate Crimes Act's interstate commerce element[105] ensures that each prosecution under the Hate Crimes Act will bear the necessary relationship to commerce that renders the crime within Congress's purview."[106] And yet the Fourth Circuit never addresses which of Congress's Commerce Clause powers expands that purview to include § 249(a)(2)(B)(iv)(I). As Judge Agee notes in his dissent in *Hill*, "this Circuit's cases examining whether a jurisdictional element has ensured that individual prosecutions fall within Congress's Commerce Clause power—regardless of any other factors that also did so—have all addressed statutory language directly connecting the element to Congress's constitutional

100. 18 U.S.C. § 249(a)(2)(B).

101. United States v. Hill, 927 F.3d 188, 195 (4th Cir. 2019).

102. *Id.* (quoting 18 U.S.C. § 249(a)(2)(B)(iv)(I)).

103. *Id.* (quoting 18 U.S.C. § 249(a)(2)(B)(iv)(I)).

104. *Id.* at 194. The majority argues that Amazon's ability to absorb the interruption is irrelevant since Congress may have determined that "the aggregate effect of assaults on individuals engaged in ongoing economic or commercial activity . . . amounts to a 'substantial effect' on interstate commerce." *Id.* at 202–03. The court fails to reconcile why this aggregation is permissible considering the unambiguous language of *Morrison* where the Supreme Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." United States v. Morrison, 529 U.S. 598, 617 (2000). The "effect on individuals engaged in commerce" language is insufficient to render the assault aggregable economic activity. *See supra* notes 53–56 and accompanying text.

105. This language is especially interesting considering that the phrase "interstate commerce" does not even appear in the statute. *See* 18 U.S.C. § 249(a)(2)(B)(iv)(I).

106. *Hill*, 927 F.3d at 208–09.

authority." [107] For the Fourth Circuit majority, § 249(a)(2)(B)(iv)(I) is constitutional merely because it exists.

Compare the Fourth Circuit's analysis in *Hill* to the Supreme Court's analysis in *Taylor*. In *Taylor*, the statutory language of the Hobbs Act used against the defendant was tied specifically to a realm of activity the Court has found regulable under the Commerce Clause. First, the relevant statutory section specified that a defendant's "robbery or extortion" must "obstruct[], delay[], or affect[] commerce or the movement of an article or commodity in commerce."[108] On its face, this language is not wholly dissimilar to the HCPA's mention of "commercial" activity in the jurisdictional element used to charge Hill. [109] Neither section makes explicit reference to interstate commerce, channels, instrumentalities, or to interstate travel. And yet, the Hobbs Act is further limited by its definition of the word commerce. In the statute's definition section, commerce is defined as

> commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.[110]

This inclusion, specifically the "commerce over which the United States has jurisdiction" language, essentially incorporates the categories of commerce that the Court has upheld. Since the Commerce Clause effectively determines what constitutes "commerce over which the United States has jurisdiction," this definition of commerce prevents the Hobbs Act from regulating commerce beyond the bounds of the Commerce Clause.

This is markedly different from the language of the jurisdictional hook at issue in *Hill*. The HCPA does not define or limit the phrase "commercial or economic activity" for the purposes of § 249(a)(2)(B)(iv)(I). There is no indication that the provision is meant to target only commercial activity with "interstate" effect or activity "over which the United States has jurisdiction." In fact, given the HCPA's broad language, it is hard to imagine what "economic activity" would *not* fall under the provision. Given that little human activity is exempt from ties to commerce, the HCPA's wide net could encapsulate a broad range of tenuous "economic" activity. What if Tibbs was assaulted while walking to the grocery store? Surely human motion with the intent to engage in commerce is "commercial or . . . economic activity." What if Tibbs was on

107. *Id.* at 214 (Agee, J., dissenting).
108. 18 U.S.C. § 1951(a) (2018).
109. *Id.* § 249(a)(2)(B)(iv)(I).
110. *Id.* § 1951(b)(3).

his way to work or was on his way home from work? What if Tibbs was simply standing in an open field using his cell phone—a cell phone he paid for, with a data plan he paid for, using apps he paid for—all generating commoditized data, pinging off of towers owned by massive telecommunications companies who in turn sell that data for marketing purposes? To a surprising (and disturbing) extent, nearly any and all action is in some way commercial or economic.[111]

The Fourth Circuit tosses such worries to the side, writing that the "slippery-slope concern" that would turn the Commerce Clause into "unfettered authority to regulate wholly intrastate conduct traditionally subject to regulation by the States . . . is not present here."[112] Not only is the concern present, it is looming.[113] As Justice Thomas writes in his dissent in *Taylor*, "if these limitations are not respected, Congress will accumulate the general police power that the Constitution withholds."[114]

## IV. OTHER CONSIDERATIONS AND RECOMMENDATIONS

Aside from the constitutional failings, a bevy of policy considerations weigh against the Fourth Circuit's use of the Commerce Clause in *Hill*. First, in allowing expansive prosecutions under the HCPA, states are relieved of any pressure to expand their protected classes for hate crimes. Why would Virginia feel the need to add sexual orientation protections to any of its statutes when the HCPA does the work for them? *Hill* teaches us that reliance on a federal criminal statute is misplaced. For one, hate crime prosecutions, at least those using § 249(a)(2)(B)(iv)(I), will have to rely on flimsy constitutionality that

111. *See, e.g.*, David Nield, *How Location Tracking Actually Works on Your Smartphone*, GIZMODO (Sept. 3, 2018, 10:30 AM), https://gizmodo.com/how-location-tracking-actually-works-on-your-smartphone-1828356441 [https://perma.cc/WB95-3X3R]; Louise Story, *Anywhere the Eye Can See, It's Likely To See an Ad*, N.Y. TIMES (Jan. 15, 2007), https://www.nytimes.com/2007/01/15/business/media/15everywhere.html [https://perma.cc/TZV3-DZ78 (dark archive)]; Zack Whittaker, *US Cell Carriers Are Selling Access to Your Real-Time Phone Location Data*, ZDNET (May 14, 2018, 7:00 PM), https://www.zdnet.com/article/us-cell-carriers-selling-access-to-real-time-location-data/ [https://perma.cc/3Q45-ZBCE].

112. *Hill*, 927 F.3d at 205.

113. For example, federal prosecutors may (as they sometimes do) exercise authority under such federal criminal statutes to second guess local law enforcement decisions since "the [Justice] Department's own express policies reflect that increased federal involvement in local matters is often based on the fact that federal prosecutors disagree with state judgments about the appropriate sentence for criminal conduct and what makes an 'effective' prosecution." Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 576 (2011). At the same time, state and local officials may abuse such federal laws to circumvent the political will of their local communities. *Id.* at 577–78. ("[I]t is not necessarily the case that local officials making [the decision to have federal prosecutors intervene in local prosecutions] reflect the views of the larger electorate in a community. Nor is there any assurance that they are selecting the right cases for this differential sentencing treatment or that allowing cases to be handpicked for harsher treatment comports with notions of due process or federalism. And of course, there remains the substantive issue of whether federal involvement and the higher sentences it brings, on balance, produce better policy.").

114. Taylor v. United States, 136 S. Ct. 2074, 2083 (2016) (Thomas, J., dissenting).

leaves opportunities for appeal and reversal wide open.[115] This concern—the constant threat of defendants challenging the constitutionality of their convictions—was theorized from the very outset of federal hate crime regulation.[116] Hate crime victims deserve more consistent and more stable prosecutions of their offenders.

Prosecutions such as Hill's also invite circuit splits. Should the victims of hate crimes hope the crime against them occurs in a circuit with an expansive view of § 249(a)(2)(B)(iv)(I)? To borrow language from due process scholarship, the provision at issue in *Hill* is both overinclusive and underinclusive. First, it is underinclusive in that there will be an eventual hate crime that the Act does not reach—a case so "un-economic" that no reasonable court would find it has come under the Commerce Clause's power. Second, the provision is overinclusive because it will open the door for an unconstitutional extension of Congressional police power. If a punch is regulable as commerce, what is not? Victims of hate crimes will find themselves trapped between federal law that cannot constitutionally reach their attacker and state law that refuses to do so. That is not to mention the Fourth Circuit's contribution to the growing split between circuits struggling to determine what role the presence of a jurisdictional hook plays in evaluating the constitutionality of Commerce Clause legislation.

### A. *Structural Solution: Constitutionally Influencing State-Level Criminal Justice Reforms*

The simplest solution, at least immediately, would be to strike § 249(a)(2)(B)(iv)(I) from the HCPA. However, there is still the concern that the Act unconstitutionally infringes on state police power generally and violates principles of federalism.[117] Even ruling the Act unconstitutional as a whole and striking it down would not be the end of the matter. Although the Commerce Clause may be unable to reach hate crimes, that does not mean Congress as a body is powerless. If Congress wants to flex its constitutional muscle, it could, for instance, do so under the Spending Clause.[118]

115. Justifiably so.

116. Christopher Chorba, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 355–66 (2001).

117. *See, e.g.*, Steven R. Eatherly, *The "Bergholz Barbers": The Hate Crimes Prevention Act Is Unconstitutional as Exceeding Congress's Power Under the Commerce Clause*, 93 U. DET. MERCY L. REV. 453, 484–85 (2016) (arguing that the HCPA is unconstitutional as it erodes the ability of state and local law enforcement to shape their localities).

118. The Spending Clause of the Constitution provides Congress the enumerated power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

In fact, Congress has used the Spending Clause to exert power over the states that it could not otherwise wield.[119] As Justice Rehnquist explained in *South Dakota v. Dole*,[120] "objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[121] In the legislation challenged in *Dole*, Congress, believing itself to be unable to raise the national drinking age to twenty-one, conditioned the receipt of federal highway funding on individual states doing so.[122] Congress could, in theory, condition federal funding for state and local law enforcement on the broadening of state-level hate crime protections.[123]

There are several benefits to exerting Spending Clause power to address hate crimes. First, prosecution of hate crimes is firmly within state police power.[124] Prosecutors and victims need not worry about inevitable appeals hampering their pursuit of justice. Second, this change has, at least in theory, broad appeal across the political spectrum. For one, it expands the power of local law enforcement and prosecutors, appeasing those with high trust in police (a trust increasingly split along partisan lines).[125] At the same time, it expands upon our growing appreciation of bias, especially against marginalized

119. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 206 (1987) (holding that Congress conditioning receipt of federal highway funds on raising minimum drinking age was within the authority of the Constitution's Spending Clause).

120. 483 U.S. 203 (1987).

121. *Id.* at 207 (quoting United States v. Butler, 297 U.S. 1, 65 (1936)).

122. *Id.* at 205.

123. A similar approach was employed in the Death in Custody Reporting Act of 2013 which reduced federal funding for states that did not provide the DOJ with data concerning deaths of those in state custody. Pub. L. No. 113-242, 128 Stat. 2860 (2014) (codified as amended at 34 U.S.C. § 60105 (2018)). The Center for American Progress has similarly outlined several areas in which Congressional appropriations to the DOJ can impact state-level criminal justice reforms. MIKE CROWLEY & ED CHUNG, CTR. FOR AM. PROGRESS, CONGRESS CAN LEAD ON CRIMINAL JUSTICE REFORM THROUGH FUNDING CHOICES 1 (2017), https://cdn.americanprogress.org/content/uploads/2017/09/07054711/DOJGrant-brief.pdf [https://perma.cc/3CBB-P8GN]. Similar approaches are also proposed as a part of current police reform bills in the wake of the high-profile police killing of George Floyd. Catie Edmonson, *Democrats Unveil Sweeping Bill Targeting Police Misconduct and Racial Bias*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/us/politics/democrats-police-misconduct-bill-protests.html?login=email&auth=login-email [https://perma.cc/WZX4-7GUR (dark archive)] ("[Legislation] would also condition some federal grants on the adoption of anti-discrimination training and practices.").

124. *See* Chi., Burlington & Quincy Ry. Co. v. Illinois, 200 U.S. 561, 592 (1906) (holding that the state's police power embraces regulations that, among other things, promote the public health, morals, or safety).

125. *See generally*, Anna Brown, *Republicans More Likely than Democrats To Have Confidence in Police*, PEW RES. CTR. (Jan. 13, 2017), https://www.pewresearch.org/fact-tank/2017/01/13/republicans-more-likely-than-democrats-to-have-confidence-in-police/ [https://perma.cc/WQ6X-9F3L] (discussing differences in how Republicans and Democrats view the role and performance of police).

communities—including those with disabilities[126] and members of the LGBTQ+ community[127]—not traditionally protected by this type of legislation.

### B. *Policy Considerations: Is Hate Crime Legislation Worth Saving?*

Any progress toward saving the HCPA also depends more fundamentally on whether hate crime legislation is effective in reaching its perceived goals.[128] Growing reevaluation of hate crime legislation has brought its effectiveness and motivation into question. Hate crime legislation may fall into the category of "symbolic politics" as a largely symbolic reassurance to the public, rather than a substantive effort to combat bias.[129] Under the theory of symbolic politics, the true beneficiaries of hate crime legislation are politicians seeking to "obtain the political support of those interested" by providing a mere "pat on the back."[130] At the same time, criticisms abound regarding public misunderstanding of the "typical" hate crime defendant, commonly believed to be a violent hate group member. In reality, "[t]he misconception that hate groups, which include skinheads, neo-Nazis, white nationalists and black separatists groups, cause hate crimes is unfounded."[131] Rather, most charged under hate crime laws are younger males in their teens to early twenties acting together.[132] Less than five percent are members of hate groups.[133] Further, many offenders may not be biased themselves but were "following the lead of a more biased peer."[134]

Research also suggests that "hate" may not even be the driving force behind what most consider hate crimes. A 2011 study found that hate groups

126. *See, e.g.*, Debra McKinney, *The Invisible Hate Crime*, INTELLIGENCE REP. (2018), https://www.splcenter.org/fighting-hate/intelligence-report/2018/invisible-hate-crime#ongoing-fight [https://perma.cc/5S4M-QRYL].

127. The Human Rights Campaign reports that only twenty states address hate or bias crimes based on sexual orientation and gender identity while eleven address crimes based only on sexual orientation. *State Maps of Law & Policies*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/hate-crimes [https://perma.cc/A4EV-L7GM] (last updated Jan. 2, 2020). A 2019 FBI report of hate crimes occurring in 2018 found that one in five were motivated by anti-LGBTQ bias. FED. BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, 2018 HATE CRIME STATISTICS (2019), https://ucr.fbi.gov/hate-crime/2018 [https://perma.cc/C992-4VGZ].

128. *See, e.g.*, James Doubeck, *How Well Do Hate Crime Laws Really Work?*, NPR (June 28, 2015), https://www.npr.org/sections/itsallpolitics/2015/06/28/417231920/how-well-do-hate-crime-laws-really-work [https://perma.cc/L9PJ-PB8D]; Dashka Slater, *The Fire on the 57 Bus in Oakland*, N.Y. TIMES MAG. (Jan. 29, 2015), https://www.nytimes.com/2015/02/01/magazine/the-fire-on-the-57-bus-in-oakland.html [https://perma.cc/5DLR-HR7A (dark archive)]. For a broad criticism of hate crime legislation, see generally Briana Alongi, Note, *The Negative Ramifications of Hate Crime Legislation: It's Time To Reevaluate Whether Hate Crime Laws Are Beneficial to Society*, 37 PACE L. REV. 326 (2017).

129. Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1248 (2000).

130. *Id.* at 1250–51.

131. Alongi, *supra* note 128, at 332.

132. Slater, *supra* note 128.

133. *Id.*

134. *Id.*

had no influence on hate crime levels in the United States between 2002 and 2008.[135] That same study found that economic factors like poverty and unemployment are strongly connected to hate crimes.[136] This suggests that hate crime victims are targeted not for specific protected characteristics but because they generally belong to a social group considered more "vulnerable" than that of the defendant.[137] In this way, "symbolic" hate crime legislation could be viewed as a placation of sorts to avoid the more arduous policy efforts required to address underlying poverty and unemployment inequalities.

Still, there remains the retributive argument that harsher punishment for hate crimes reflects a moral stand in favor of protecting and promoting tolerance for oppressed minorities. Yet, some have criticized increased penalties as depriving hate crime perpetrators of any meaningful way to come to terms with the "bias" that motivated their crime.[138] In some instances, increased penalties may even solidify the offender's bias by contributing to a worldview in which relations between "competing groups" are based upon characteristics like race, gender, religion, or sexual orientation.[139] There are similar doubts about increased penalization and its effect on victims.[140]

## CONCLUSION

Hill's conviction under the HCPA is unconstitutional. The Fourth Circuit's reliance on *Taylor* to circumvent the reality that the foundational Commerce Clause cases weigh against its holding is unpersuasive and misleading. In its analysis, the Fourth Circuit demonstrates the sort of judicial gymnastics required when Congress pushes its power under the Commerce Clause beyond the pale of constitutionality. Further, even if we assume, as the court does, that the inclusion of a jurisdictional hook is sufficient for ensuring constitutional compliance, true analysis of the jurisdictional element used to

135. Matt E. Ryan & Peter T. Leeson, *Hate Groups and Hate Crime*, 31 INT'L REV. L. & ECON. 256, 257–58 (2011) ("There's little evidence that hate groups have an important relationship to hate crime in America.").

136. *Id.* at 260.

137. *Id.* at 256 ("[W]hen people endure economic hardship they get frustrated. They take their frustration out on vulnerable social groups, such as ethnic, sexual and religious minorities.").

138. Scholarship has indicated that a restorative justice approach better emphasizes the perpetrators' need to heal their damaged relationships with the victims, other community members, and themselves by focusing on reparation rather than stigmatization. Mark Walters & Carolyn Hoyle, *Healing Harms and Engendering Tolerance: The Promise of Restorative Justice for Hate Crime*, *in* HATE CRIME: CONCEPTS, POLICY, FUTURE DIRECTIONS 228, 230–31 (Neil Chakraborti ed., 2010).

139. Beverley A. McPhail, *Hating Hate: Policy Implications of Hate Crime Legislation*, 74 SOC. SERV. REV. 635, 646 (2000).

140. *See, e.g.*, Walters & Hoyle, *supra* note 138, at 229 ("[P]unishment enhancements might serve to uphold victims' emotional attachments to 'hate, anger, malice and revenge', [sic] rather than diminish them." (quoting LES MORAN & BEVERLY SKEGGS, SEXUALITY AND THE POLITICS OF VIOLENCE 42 (2004))).

convict Hill demonstrates that it is plainly beyond the established bounds of the Commerce Clause.

No sane individual would condone Hill's actions. And yet in the effort to justify his conviction, the Fourth Circuit has both extended the Commerce Clause and given it new meaning. This raises questions that date back to the very founding of our democracy when James Madison wrote his now ubiquitous maxim that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[141] We would do well to remember it.

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141. THE FEDERALIST NO. 45 (James Madison).

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