
RECENT CASES

CONSTITUTIONAL LAW — HATE CRIMES ACT — FOURTH CIRCUIT UPHOLDS CONVICTION IN AS-APPLIED COMMERCE CLAUSE CHALLENGE. — *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019).

Since 1995, the contours of Congress’s Commerce Clause power have been undergoing a makeover. In *United States v. Lopez*¹ and *United States v. Morrison*,² the Supreme Court — in a departure from sixty years of Commerce Clause jurisprudence³ — struck down federal statutes because the activities regulated by those statutes did not “substantially affect”⁴ interstate commerce.⁵ *Lopez* and *Morrison* suggested that, under the “substantial effects” line of cases, regulations of “economic” activity were more likely to be permissible exercises of the Commerce Clause than were regulations of “noneconomic” activity.⁶ Since then, jurists and academics have struggled to make sense of and consistently apply this distinction.⁷ Recently, in *United States v. Hill*,⁸ the Fourth Circuit upheld the constitutionality of the Hate Crimes Act⁹ as applied to the defendant’s bias-motivated assault of a coworker while they were working at a packaging center.¹⁰ Although the court recognized that the regulated activity — the physical violence — was not itself economic, it relied on the assault’s limited effect on ongoing interstate commerce to justify its holding.¹¹ In so doing, the court took a significant step toward retiring the economic/noneconomic distinction from Commerce Clause jurisprudence.

In May 2015, while working at an Amazon fulfillment center preparing packages for shipment, James Hill III violently attacked his coworker, Curtis Tibbs,¹² causing packages to “fl[y] into the air and onto

¹ 514 U.S. 549 (1995).

² 529 U.S. 598 (2000).

³ Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 959 (1997); cf. Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1203 (2003) (presenting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), as the first case to “inaugurate[] a new approach”).

⁴ Intrastate activities that “substantially affect” interstate commerce are the third of three categories of permissible regulation under the Commerce Clause. *Lopez*, 514 U.S. at 558–59.

⁵ *Id.* at 567–68; *Morrison*, 529 U.S. at 609–13, 617–19.

⁶ See *Lopez*, 514 U.S. at 559–61; *Morrison*, 529 U.S. at 610–11.

⁷ See, e.g., David M. Driesen, *The Economic/Noneconomic Distinction Under the Commerce Clause*, 67 CASE W. RES. L. REV. 337, 353–54 (2016).

⁸ 927 F.3d 188 (4th Cir. 2019).

⁹ 18 U.S.C. § 249 (2018).

¹⁰ *Hill*, 927 F.3d at 193.

¹¹ *Id.* at 208.

¹² *Id.* at 193–94.

the ground.”¹³ Work in the area ceased for thirty to forty-five minutes so that blood could be cleaned off of the floor, and Tibbs missed the remaining hours of his shift.¹⁴ However, because other employees absorbed the extra work, Amazon did not miss any packaging deadlines that day.¹⁵

Later, Hill “boastfully admitted” that he had attacked Tibbs because Tibbs was gay.¹⁶ He was prosecuted¹⁷ under section 249(a)(2) of the Hate Crimes Act.¹⁸ A federal grand jury indicted him for “willfully caus[ing] bodily injury” to someone based on their “actual and perceived sexual orientation,” thereby “interfer[ing] with commercial . . . activity in which [the victim] was engaged at the time.”¹⁹

Hill moved to dismiss the indictment, advancing, *inter alia*, facial and as-applied challenges against § 249(a)(2) as an invalid exercise of Congress’s Commerce Clause power.²⁰ The district court dismissed the indictment solely based on the as-applied challenge.²¹ The Fourth Circuit reversed on appeal, concluding that the indictment was facially valid, and remanded because it was “premature” to address the as-applied challenge prior to the development of the facts at trial.²² On remand, a jury convicted Hill.²³ Hill renewed his as-applied challenge, and the district court granted his motion for a judgment of acquittal.²⁴

On appeal, the Fourth Circuit reversed. Writing for the majority, Judge Wynn²⁵ recognized that applying the Hate Crimes Act to the

¹³ *Id.* at 202.

¹⁴ *Id.* at 194, 202.

¹⁵ *Id.* at 194.

¹⁶ *Id.* at 193.

¹⁷ Hill was originally charged in state court, but the state prosecutor dropped the charges because federal law — unlike Virginia law — allowed for enhanced penalties for crimes involving sexual orientation. *Id.* at 194, 197.

¹⁸ Section 249(a)(2) was enacted pursuant to Congress’s Commerce Clause power. As a result, a conviction under this section requires proof of a jurisdictional element — a connection to interstate commerce — as defined by § 249(a)(2)(B). *See* 18 U.S.C. § 249(a)(2) (2018). Jurisdiction is further limited by a requirement that the U.S. Attorney General or a designee provide written certification that (1) the state lacked jurisdiction; (2) the state requested federal involvement; (3) the state verdict or sentence “left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence”; or (4) federal prosecution is otherwise “in the public interest and necessary to secure substantial justice.” § 249(b)(1).

¹⁹ *Hill*, 927 F.3d at 194.

²⁰ *Id.*

²¹ *United States v. Hill*, 182 F. Supp. 3d 546, 555–56 (E.D. Va. 2016).

²² *United States v. Hill*, 700 F. App’x 235, 237 (4th Cir. 2017). Judge Wynn dissented, arguing that the court was bound to address the constitutional argument prior to trial and that the statute was constitutional. *Id.* at 238, 241–42 (Wynn, J., dissenting from the basis for the judgment).

²³ *Hill*, 927 F.3d at 195.

²⁴ *United States v. Hill*, No. 16-cr-00009, 2018 WL 3872315, at *1, *5 (E.D. Va. Aug. 15, 2018); *see also id.* at *6–10 (finding that at least three of *Morrison*’s four factors weighed against constitutionality: the economic/noneconomic distinction, legislative findings, and connection to interstate commerce).

²⁵ Judge Wynn was joined by Judge Motz.

“unarmed assault of a victim engaged in commercial activity” was “an issue of first impression.”²⁶ After first laying out the “legal backdrop”²⁷ of the Commerce Clause and the Hate Crimes Act,²⁸ the court analogized the Hate Crimes Act to the Hobbs Act²⁹ and the federal arson statute.³⁰ Based on cases in which the Supreme Court upheld convictions under those statutes,³¹ the court in *Hill* concluded that “when Congress may regulate a[] . . . commercial activity, it also may regulate violent conduct that interferes with . . . that activity.”³² Thus, what mattered was not the commercial nature of the conduct *being regulated*, but the commercial nature of the activity *affected* by the regulation.³³

Therefore, the court held that Hill’s conduct fell within Congress’s Commerce Clause powers: shipment of interstate goods — the activity Hill and the victim were involved in at the time of the assault — easily qualified as interstate commerce.³⁴ As such, the court need only find that Congress had a rational basis for concluding that the regulated conduct (in the aggregate³⁵) substantially affected interstate commerce, not that a substantial effect existed in fact.³⁶

Finally, the court distinguished *Lopez* and *Morrison*, which the defendant relied on in challenging the above-described “substantial effects” analysis.³⁷ The court in *Hill* concluded that “whereas the *Lopez* and *Morrison* Courts found it significant that the statutes at issue had no . . . jurisdictional element, [section 249(a)(2) of] the Hate Crimes

²⁶ *Hill*, 927 F.3d at 198.

²⁷ *Id.* at 197.

²⁸ *Id.* at 195–97 (noting that “Congress paid close attention to the scope of its authority . . . when it enacted the Hate Crimes Act,” *id.* at 196, by including legislative findings and jurisdictional elements in the statute and by designing the statute to achieve state-federal collaboration).

²⁹ 18 U.S.C. § 1951(a) (2018).

³⁰ 18 U.S.C. § 844(i) (2018); *see Hill*, 927 F.3d at 198–200.

³¹ *E.g.*, *Taylor v. United States*, 136 S. Ct. 2074, 2080–82 (2016) (upholding conviction under Hobbs Act for robbery of local drug dealers); *Russell v. United States*, 471 U.S. 858, 862 (1985) (upholding conviction under federal arson statute for setting fire to two-unit apartment building).

³² *Hill*, 927 F.3d at 201 (first citing *Taylor*, 136 S. Ct. 2074; then citing *Russell*, 471 U.S. 858).

³³ *See id.* at 198–99, 205–07 (“What renders [these statutes] . . . constitutional is not the economic nature of the act proscribed, but rather Congress’s express requirement that the act . . . affected interstate commerce.” *Id.* at 207.). Nor was it necessary that the regulated conduct be motivated by an economic interest or that the defendant target property, rather than persons. *Id.* at 207–08.

³⁴ *See id.* at 201 (citing *United States v. Darby*, 312 U.S. 100, 113 (1941)). Further, the court stated: “Congress has no less authority to criminalize interference with . . . commercial activity at large enterprises . . . [that] are more easily able to absorb productivity losses.” *Id.* at 202.

³⁵ The Supreme Court has allowed Congress to regulate purely intrastate activities if that class of activities as a whole substantially affects interstate commerce. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).

³⁶ *Hill*, 927 F.3d at 202–03, 203 n.6. For this reason, the court also rejected Hill’s argument that the district court erred in refusing to instruct the jury that it must find that his violence “caused a relatively significant disruption to commerce” in order to convict. *Id.* at 209 (emphasis omitted).

³⁷ *Id.* at 204–05.

Act . . . expressly includes such an element.”³⁸ This element ensures “through case-by-case inquiry”³⁹ that the Hate Crimes Act “authorizes prosecution of only those bias-motivated crimes that interfere with . . . ongoing economic . . . activity”⁴⁰ — without giving Congress a “general license to punish [all] crimes of violence motivated by discriminatory animus.”⁴¹

Judge Agee dissented. He first argued that the jurisdictional element did not sufficiently limit Congress’s power because the element the government relied on did not mention the word “interstate.”⁴² Next, he argued that bias-motivated violence — the activity the Hate Crimes Act prohibited — was not itself economic.⁴³ He took issue with the majority’s conflation of the jurisdictional element and the economic nature of the activity — which he believed should remain separate inquiries.⁴⁴ And he challenged the majority’s analogy to the Hobbs Act because in the main case the majority relied on,⁴⁵ the Supreme Court explicitly limited its holding to the drug market context.⁴⁶ Since the regulated activity was not economic, the effect of the defendant’s activity could not be aggregated to reach the requisite substantial effect.⁴⁷ Because Hill’s attack, standing alone, had “no discernible impact” on the packaging process,⁴⁸ Judge Agee concluded that it was not within Congress’s power to regulate.⁴⁹

In grappling with the Supreme Court’s complicated Commerce Clause jurisprudence, the majority took another step toward retiring the economic/noneconomic distinction. Although this distinction was once deemed “central”⁵⁰ to the Supreme Court’s “substantial effects” test,

³⁸ *Id.* at 204. Like the Hate Crimes Act, the Hobbs Act and federal arson statute contain such jurisdictional elements. *Id.* at 198 (citing 18 U.S.C. § 1951(a) (2018) and 18 U.S.C. § 844(i) (2018)).

³⁹ *Id.* at 205 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

⁴⁰ *Id.* at 204.

⁴¹ *Id.* at 205. The court argued that its conclusion did “not mean that ‘Congress can regulate all workplace conduct.’” *Id.* (quoting Judge Agee).

⁴² *Id.* at 213–16 (Agee, J., dissenting).

⁴³ *Id.* at 217–19.

⁴⁴ *Id.* at 219.

⁴⁵ *Taylor v. United States*, 136 S. Ct. 2074 (2016); see *Hill*, 927 F.3d at 198–99, 201 (majority opinion).

⁴⁶ *Hill*, 927 F.3d at 219–20 (Agee, J., dissenting).

⁴⁷ *Id.* at 221–23. Judge Agee found this categorical rule necessary in this case to constrain Congress’s otherwise limitless power wielded under the guise of the aggregation theory. *Id.* at 221.

⁴⁸ *Id.* at 222.

⁴⁹ *Id.* at 222–23. Judge Agee also discussed constitutional avoidance, federalism, and the rule of lenity in arriving at this conclusion. *Id.* at 225–26. He dismissed the majority’s attempt to “sidestep[]” this federalism concern by mentioning the certification requirement that limits federal prosecutors’ ability to charge defendants under the Hate Crimes Act. *Id.* at 222 n.14 (citing 18 U.S.C. § 249(b)(1) (2018)). Judge Agee also noted that the legislative findings underpinning the Act were insufficient to establish the requisite link to interstate commerce. *Id.* at 223–24.

⁵⁰ *United States v. Morrison*, 529 U.S. 598, 610 (2000).

cases since *Lopez* and *Morrison* have significantly weakened its relevance — first by making an exception for noneconomic activity that is part of a “comprehensive regulatory scheme[],”⁵¹ and then by focusing on the effects rather than the nature of the regulated activity. *Hill* took these cases a step further by focusing on the effect rather than the nature of the regulated activity, even in the absence of a comprehensive regulatory scheme. Although in tension with *Lopez* and *Morrison*, this move was appropriate given that the economic/noneconomic distinction has proven to be unworkable and ineffective.

In *Lopez* and *Morrison*, the Supreme Court distinguished between economic and noneconomic activity in an attempt to place limits on Congress’s Commerce Clause power.⁵² In striking down the Gun-Free School Zones Act⁵³ in *Lopez*, the Court emphasized that the regulated activities “ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”⁵⁴ Building on this analysis, the Court in *Morrison* struck down the damages provision of the Violence Against Women Act⁵⁵ after admonishing: “[W]e need not adopt a categorical rule against aggregating the effects of any non-economic activity . . . , [but] thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activities only where that activity is economic in nature.”⁵⁶ Many — including the dissent in *Hill*⁵⁷ — interpreted the economic nature of the regulated activity to be a prerequisite to aggregation.⁵⁸ The Court did not clarify the underlying rationale behind this distinction⁵⁹ — and many have questioned whether this distinction is doctrinally sound⁶⁰ — but it is

⁵¹ *Gonzales v. Raich*, 545 U.S. 1, 43 (2005) (O’Connor, J., dissenting).

⁵² *United States v. Lopez*, 514 U.S. 549, 559–61 (1995); *Morrison*, 529 U.S. at 610–11.

⁵³ 18 U.S.C. § 922(q) (1994).

⁵⁴ *Lopez*, 514 U.S. at 561. The Court in both *Lopez* and *Morrison* also emphasized the lack of a jurisdictional element, insufficient congressional findings, and the attenuated nature of the effect, if any, on interstate commerce as relevant factors to its analysis, *see id.* at 561–67; *Morrison*, 529 U.S. at 611–16, though the “noneconomic, criminal nature of the conduct at issue was central” to its decisions, *id.* at 610; *see also id.* at 617.

⁵⁵ 42 U.S.C. § 13981 (2012).

⁵⁶ *Morrison*, 529 U.S. at 613.

⁵⁷ *Hill*, 927 F.3d at 221 (Agee, J., dissenting).

⁵⁸ *E.g.*, Jason Everett Goldberg, Note, *Substantial Activity and Non-economic Commerce: Toward a New Theory of the Commerce Clause*, 9 J.L. & POL’Y 563, 571–72 (2001). If this distinction were meaningfully enforced, this rule would prevent most regulation of noneconomic activity. *See id.* at 571. Others, however, understood the distinction to affect the Court’s level of scrutiny when assessing the constitutionality of a statute. *See Driesen, supra* note 7, at 350–51.

⁵⁹ *See* Mitchell N. Berman, Guillen and Gullibility: *Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1501 n.67 (2004) (noting that the Court did not clarify how the distinction interacted with other factors it articulated); Goldberg, *supra* note 58, at 571.

⁶⁰ *See* Driesen, *supra* note 7, at 339, 347–48; Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 839–40 (2005). After all, as one scholar noted, “economic or commercial activity may more often have a substantial effect

widely accepted that the distinction was designed to vindicate the values of federalism by performing some sort of gatekeeper role in the Court's "substantial effects" test.⁶¹

Importantly, for this distinction to have significance, the economic or noneconomic nature of an activity cannot be determined by the activity's effect on commerce. As Professor David Driesen explains: "[T]he role of a finding of noneconomic activity seems to involve biasing the analysis against finding a substantial effect. It would be circular to bring the question of whether a substantial effect exists into the determination of which activities are economic."⁶² More specifically, the distinction separates those activities that can be considered in the aggregate from those that must be evaluated on their own terms.⁶³ Therefore, if merely affecting commerce (but not *substantially* affecting commerce) is sufficient to render an activity "economic," then the economic/noneconomic distinction has no bearing on the "substantial effects" analysis.⁶⁴

Notwithstanding the economic/noneconomic distinction's centrality in *Lopez* and *Morrison*, the Supreme Court sharply limited its significance in *Gonzales v. Raich*⁶⁵ by permitting the regulation of noneconomic conduct as part of a "comprehensive regulatory regime."⁶⁶ In *Raich*, the Court addressed the constitutionality of the Controlled Substances Act⁶⁷ as applied to individuals who locally cultivated or possessed marijuana for their personal medical use.⁶⁸ Despite this activity lacking a clear connection to commerce, let alone *interstate* commerce, the Court held that the cultivation and possession of marijuana was part of an "economic 'class of activities'"⁶⁹ that could be regulated as part of

on interstate commerce than non-economic activity, [but] that plausibility does not increase or decrease the actual effect in particular cases." Allan Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in United States v. Morrison*, 18 CONST. COMMENT. 563, 577 (2001).

⁶¹ See, e.g., LAWRENCE LESSIG, FIDELITY AND CONSTRAINT 186–89 (2019) (describing the Court's motivation in establishing a "principle of enumeration," *id.* at 187).

⁶² Driesen, *supra* note 7, at 364.

⁶³ See, e.g., *United States v. Morrison*, 529 U.S. 598, 613 (2000). Indeed, *Lopez* and *Morrison* rejected the aggregate "costs of crime" analysis when regulating what was considered "noneconomic" activity. *Id.* at 612–13 (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

⁶⁴ For similar reasons, it would seem anomalous for the jurisdictional element to cure constitutional concerns simply by stating that the regulated activity "affected interstate commerce." This is perhaps what the dissent in *Hill* argued in challenging the majority's conflation of the economic/noneconomic distinction and the jurisdictional element, see *Hill*, 927 F.3d at 217–19 (Agee, J., dissenting), though the jurisdictional element at issue in *Hill* was both broader and narrower than simply requiring that the regulated activity "affected interstate commerce": it did not require proof that the conduct affected "interstate" commerce, but it was limited to interferences with "economic activity in which the victim [was] engaged at the time." 18 U.S.C. § 240(a)(2)(B)(iv)(I) (2018).

⁶⁵ 545 U.S. 1 (2005).

⁶⁶ *Id.* at 27.

⁶⁷ 21 U.S.C. §§ 801–904 (2018).

⁶⁸ *Raich*, 545 U.S. at 6–7, 9.

⁶⁹ *Id.* at 17 (quoting *Perez v. United States*, 402 U.S. 146, 152 (1971)).

a comprehensive regulatory scheme — here, the regulation of the interstate drug trade — that substantially affected interstate commerce.⁷⁰ By permitting the regulation of noncommercial intrastate activity as part of a “class” of activities subject to a comprehensive regulatory scheme, *Raich* limited the significance of, but did not formally eliminate,⁷¹ the economic/noneconomic distinction.⁷²

*Taylor v. United States*⁷³ further undermined this distinction by focusing on the regulated activity’s *effect* on commerce, rather than its “nature.” In *Taylor* — which involved the statutory interpretation of the jurisdictional element in the Hobbs Act — the Supreme Court invoked *Raich* in rejecting the defendant’s claim that the statute could not apply to his attempted robbery of drug dealers selling only locally grown marijuana.⁷⁴ The Court emphasized that what mattered was the economic nature of drug dealing generally — the activity *affected* — not the robbery.⁷⁵ *Taylor* departed from *Raich* by focusing on the “class of activities” *affected by* drug robberies, rather than on the nature of the robbery, without attempting to show that the Hobbs Act was part of a “comprehensive” scheme for regulating the drug trade.⁷⁶ Only the decision’s narrow context (the proper interpretation of a jurisdictional element)⁷⁷ and limited holding (which was confined to robberies of drug dealers)⁷⁸ prevented a direct collision with *Lopez* and *Morrison*.

The *Hill* majority’s approach — specifically its emphasis on *Taylor* as a source for its holding⁷⁹ — represents another blow to the economic/noneconomic distinction. First, the majority in *Hill* invoked *Taylor* — a case involving statutory interpretation — to support the proposition that “under the Commerce Clause, Congress may proscribe violent conduct when such conduct interferes with or otherwise affects commerce over which Congress has jurisdiction.”⁸⁰ In so concluding,

⁷⁰ *Id.* at 9, 17, 19. The class of activities was defined as an “essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Id.* at 24 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

⁷¹ *But cf.* LESSIG, *supra* note 61, at 189–91 (“*Raich* was the end of the *Lopez/Morrison* line.” *Id.* at 191.); Driesen, *supra* note 7, at 351 (noting that some commentators have argued that “*Raich* makes the economic activity concept irrelevant”).

⁷² The Court also expanded the definition of “economic” to “the production, distribution, and consumption of commodities.” *See Raich*, 545 U.S. at 25 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

⁷³ 136 S. Ct. 2074 (2016).

⁷⁴ *See id.* at 2078–80.

⁷⁵ *See id.* at 2080 (describing the sale of marijuana as “unquestionably an economic activity”); Michael Munoz, Case Comment, *Taylor v. United States: In Federal Criminal Law, “Commerce Becomes Everything,”* 15 GEO. J.L. & PUB. POL’Y 475, 480 (2017).

⁷⁶ *See Munoz, supra* note 75, at 480–82.

⁷⁷ *See Taylor*, 136 S. Ct. at 2079.

⁷⁸ *Id.* at 2082.

⁷⁹ *See Hill*, 927 F.3d at 198–201.

⁸⁰ *Id.* at 199; *see also id.* at 199–201, 206.

the economic/noneconomic distinction did not drive the majority's analysis; instead, the court focused on the regulated activity's *effect* on a concrete aspect of commerce — the package preparation process.⁸¹ Second, although there is arguably an economic “class of activities” at issue in *Hill* (the interstate shipment of goods),⁸² the *physical assault* is not part of this class of activities. And like the statute at issue in *Taylor*, the Hate Crimes Act is not part of a comprehensive regulatory scheme for this class of activities.⁸³ Finally, by relying on *Taylor* to establish that Congress could regulate activity based on its effect on commerce, the majority was able to argue that the Hate Crimes Act's jurisdictional element — its requirement that Hill's conduct affect “ongoing” commerce — satisfied *Lopez* and *Morrison*,⁸⁴ which essentially read the economic/noneconomic distinction out of its analysis altogether.

The Fourth Circuit's decision to focus on the *effect* of the defendant's activity on commerce, rather than on its nature, is simply another step in retiring a distinction that has proven unworkable. At best, the economic/noneconomic distinction is an imperfect, and inconsistently applied, proxy for limiting federal jurisdiction over activity that is traditionally subject to local control and tenuously connected to interstate commerce.⁸⁵ But a simple comparison between *Raich* — where the Court upheld the conviction of individuals who cultivated or possessed marijuana for personal use as a regulation of “economic” activity⁸⁶ — and *Hill* — where the defendant assaulted a coworker in an interstate packaging facility⁸⁷ — reveals its limitations as a meaningful dividing line “between what is truly national and what is truly local.”⁸⁸ By relying on *Taylor*, rather than on *Lopez* and *Morrison*, the majority ensured that a hate-crime victim was not denied justice on the basis of a largely abandoned distinction.

⁸¹ See *id.* at 205; *id.* at 219 (Agee, J., dissenting).

⁸² See *id.* at 199 n.3 (majority opinion).

⁸³ See *id.* at 219–20 (Agee, J., dissenting). The lack of a distinction between the class of activities and comprehensive regulatory scheme in the majority's analysis would seem to extend the reasoning in *Raich* to virtually any legislation. Cf. *id.* (“*Raich*'s holding . . . is inapplicable to the purely non-economic, stand-alone statute in this case.”).

⁸⁴ *Id.* at 204–05 (majority opinion).

⁸⁵ E.g., Ides, *supra* note 60, at 579; Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1281–87 (2003) (comparing the distinction to the “arbitrary” distinctions of the pre–New Deal era); *id.* at 1277–79 (noting lack of agreement among judges in lower courts and inherent difficulty in line drawing).

⁸⁶ *Gonzales v. Raich*, 545 U.S. 1, 7–9 (2005).

⁸⁷ *Hill*, 927 F.3d at 193.

⁸⁸ *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).