# Ensuring a Right of Access to the Courts for Bias Crime Victims: A Section 5 Defense of the Matthew Shepard Act

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*Congress recently invoked its power under the Commerce Clause to pass the Local Law Enforcement Hate Crimes Prevention Act of 2007 (The Matthew Shepard Act). On December 6, 2007, Congressional Democrats dropped the Matthew Shepard Act from the U.S. Department of Defense authorization bill. With Democrats now in control of Congress and the election of President Barack Obama, there is renewed hope that the Matthew Shepard Act will be passed and enacted during a subsequent session.*

*Section 5 of the Fourteenth Amendment gives Congress the authority to enforce the substantive provisions of the Fourteenth Amendment through federal legislation. Although Congress invoked its commerce power to pass the Matthew Shepard Act, it did not invoke its enforcement power under Section 5 of the Fourteenth Amendment. This Article provides the first comprehensive defense of the Matthew Shepard Act under Section 5 of the Fourteenth Amendment. I contend that Congress has the authority to adopt the Matthew Shepard Act by invoking its Section 5 enforcement power and that Section 5 is a stronger constitutional basis to adopt the Act than the Commerce Clause.*

*In* Tennessee v. Lane*, the U.S. Supreme Court affirmed Congress' authority to invoke its Section 5 enforcement power in order to ensure that individuals with disabilities have equal access to the courts. Similarly, I argue that the Matthew Shepard Act is a valid enactment of Congress' Section 5 enforcement power in order to ensure a right of access to the courts for bias crime victims targeted because of sexual orientation, gender identity, gender, and disability. I contend that discrimination and resource constraints prevent these groups of bias crime victims from reporting their crimes to the police, influence police officers not to categorize or investigate their crimes as bias crimes, and prevent prosecutors from prosecuting their crimes as bias crimes. The Matthew Shepard Act is a*

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*critical piece of legislation because it provides a federal remedy when state and local laws exclude or inadequately address bias crimes on the basis of sexual orientation, gender identity, gender, and disability. The Matthew Shepard Act also allocates federal resources to ensure that resource constraints will not prevent state and local governments from investigating and prosecuting bias crimes.*

## INTRODUCTION

Despite numerous unsuccessful attempts to expand federal bias crime legislation,[1] Congress recently invoked its power under the Commerce Clause[2] to pass the Local Law Enforcement Hate Crimes Prevention Act of 2007 (The Matthew Shepard Act).[3] The Matthew Shepard Act expands the definition of federal bias crimes to include actual and perceived sexual orientation, gender identity, gender, and disability as protected characteristics.[4] Under certain conditions, the Act also provides federal assistance to state and local authorities in investigating and prosecuting bias crimes even if the victims were not engaged in federally protected activities when the crimes occurred.[5]

On December 6, 2007, Congressional Democrats dropped the Matthew Shepard Act from the U.S. Department of Defense authorization bill.[6] Proponents of the Act described the decision as a "major disappointment to Congressional advocates of the bias crimes expansion and to civil rights activists who believed that the new Democrat-led Congress provided the best opportunity for approving changes sought since 1998."[7] Immediately after the Matthew Shepard Act was dropped from the

1 A summary of the unsuccessful attempts to expand federal bias crime legislation is provided *infra* Part I.D.

2 U.S. CONST. art. I., § 8, cl. 3 ("Congress shall have power . . . to regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes.").

3 H.R. REP. NO. 110-113, at 14 (2007).

4 The Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6 (2007) (proposing changes to 18 U.S.C. § 249(a)(2)); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 7 (2007) (same).

5 H.R. 1592 at § 6 (proposing changes to § 249(b)); S. 1105 at § 7 (same). Currently, federal bias crime legislation only allows the federal government to become involved in the investigation and prosecution of bias crimes if the victims were engaged in certain federally protected activities when the crimes were committed. 18 U.S.C. § 245 (2000). These federally protected activities are: (1) applying or enrolling for admission to a public school or college; (2) participating in benefit or service programs and facilities administered by state and local governments; (3) applying for private or state employment; (4) serving in a jury; (5) traveling in or using a facility of interstate commerce or common carrier; and (6) using a public accommodation or place of exhibition or entertainment, including hotels, motels, restaurants, lunchrooms, bars, gas stations, theaters, concert halls, sports arenas, or stadiums. *Id*.

6 Carl Hulse, *Congressional Maneuvering Dooms Hate Crime Measure*, N.Y. TIMES, Dec. 7, 2007, at A26, *available at* http://www.nytimes.com/2007/12/07/washington/07hate.html (last visited Nov. 9, 2008). After the Senate passed the Matthew Shepard Act, it went to conference where the U.S. House of Representatives and U.S. Senate versions of the bill needed to be harmonized for a final vote. *See id*.

7 *Id*.

defense authorization legislation, House Speaker Nancy Pelosi affirmed publicly that she was "strongly committed" to the Act.[8] With Democrats now in control of Congress and the election of President Barack Obama, there is renewed hope that the Matthew Shepard Act will be passed and enacted during the next four years.[9]

In criticizing the Matthew Shepard Act, scholars and politicians have argued that the Act is an improper exercise of Congress' commerce power after *United States v. Morrison*.[10] In *Morrison*, the U.S. Supreme Court invalidated a provision of the Violence Against Women Act (VAWA)[11] which provided a federal civil remedy to victims of gender-motivated violence.[12] To justify enacting VAWA, Congress invoked its powers under the Commerce Clause and Section 5 of the Fourteenth Amendment.[13] The *Morrison* Court held that VAWA's civil remedy was an improper exercise of both Congress' commerce and Section 5 enforcement powers.[14]

Since the Matthew Shepard Act contains a provision providing for the federal punishment of bias crimes motivated by gender, it is unclear

8 *Measure Aimed at Crimes Against Gays Dropped*, L.A. TIMES, Dec. 7, 2007, at A30, *available at* http://articles.latimes.com/2007/dec/07/nation/na-hatecrimes7.

9 President Barack Obama was an original cosponsor of the Matthew Shepard Act and is an avid supporter of federal bias crime legislation. While he was a Senator for the state of Illinois, Obama released a public statement criticizing Congress' decision to drop the Act from the defense authorization bill. *See Obama Statement on House-Senate Failure to Strengthen Hate Crimes Laws, Guarantee Equality*, Dec. 6, 2007, http://web.archive.org/web/20080109103124/obama.senate.gov/press/071206-obama_statement_106/print.php (last visited Jan. 20, 2009).

10 529 U.S. 598 (2000); *see* John S. Baker, *United States v. Morrison and Other Arguments Against Federal "Hate Crime" Legislation*, 80 B.U. L. REV. 1191, 1217–19 (2000); 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, 355–56 (2001); Alexander Dombrowsky, Comment, *Whether the Constitutionality of the Violence Against Women Act Will Further Federal Protection from Sexual Orientation Crimes*, 54 U. MIAMI L. REV. 587, 588 (2000); Dan Hasenstab, Comment, *Is Hate A Form of Commerce? The Questionable Constitutionality of Federal "Hate Crime" Legislation*, 45 ST. LOUIS U. L.J. 973, 1016 (2001); Anthony E. Varona & Kevin Layton, *Anchoring Justice: The Constitutionality of the Local Law Enforcement Enhancement Act in United States v. Morrison's Shifting Seas*, 12 STAN. L. & POL'Y REV. 9 (2001). Before *Morrison*, scholars also criticized previous attempts to expand federal bias crime legislation to include sexual orientation, gender, and disability as an improper exercise of Congress' commerce power. *See*, *e.g.*, *Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government: Hearing on S. 622 Before the Senate Comm. on the Judiciary*, 106th Cong. 49 (1999) (statement of Akhil Reed Amar); *see also Hate Crimes Prevention Act of 1998, Testimony on H.R. 3081 Before the House Comm. on the Judiciary*, 105th Cong. (1998) (testimony of John C. Harrison).

11 *Morrison*, 529 U.S. at 613–15 (invalidating 42 U.S.C. § 13981). Section 13981 provided:

> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief, and such other relief as a court may deep appropriate.

12 *Morrison*, 529 U.S. at 601–02.

13 *Id.* at 607. Section 5 of the Fourteenth Amendment gives Congress the power to enforce, through legislation, the substantive provisions of the Fourteenth Amendment. Section 5 of the Fourteenth Amendment reads: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

14 *Morrison*, 529 U.S. at 627.

whether the Act can be sustained as a valid exercise of Congress' commerce and Section 5 enforcement powers after *Morrison*.[15] This uncertainty is further complicated by the fact that Congress invoked its Section 5 enforcement power to adopt VAWA,[16] but only invoked its commerce power to adopt the Matthew Shepard Act.[17]

This Article provides the first comprehensive defense of the Matthew Shepard Act under Section 5 of the Fourteenth Amendment. By distinguishing the Matthew Shepard Act from VAWA, I not only argue that Congress has the authority to adopt the Act by invoking its Section 5 enforcement power, but I also argue that Section 5 is a stronger constitutional basis to adopt the Act than the Commerce Clause.[18] Therefore, when reconsidering the Act in subsequent sessions, Congress should specifically invoke its Section 5 enforcement power.

Advocating a Section 5 defense of the Matthew Shepard Act may seem peculiar in light of the Supreme Court's recent restrictive Section 5 jurisprudential approach.[19] During the 1960s, the Court granted Congress increasing deference to pass laws by invoking its Section 5 enforcement power.[20] This approach lasted until 1997, when the Court in *City of Boerne*

15 *See supra* note 10 and accompanying text.

16 *Morrison*, 529 U.S. at 619–27 (discussing Congress' reliance upon Section 5 enforcement power to adopt VAWA's federal civil remedy and the history of the Section 5 enforcement power).

17 *See supra* note 3.

18 I contend that *Morrison* changes the relative strengths of these two justifications, and after *Morrison* Section 5 is a stronger constitutional justification for the expansion of federal bias crime legislation than the Commerce Clause. When legislation to expand federal bias crime laws was first introduced during the 1990s, some scholars, including Cass R. Sunstein, identified the Commerce Clause and Section 5 of the Fourteenth Amendment as permissible grounds to enact such legislation, but argued that the Commerce Clause was the stronger of the two foundations. *See*, *e.g.*, *Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government: Hearing on S. 622 Before the Senate Comm. on the Judiciary*, 105th Cong. 106 (1998) (statement of Cass Sunstein). Sunstein gave his testimony on this issue to the Committee on the Judiciary prior to the Supreme Court's decision in *Morrison*. According to Sunstein:

> The first—and most secure—possibility is that the commerce clause could be used, with appropriate findings, to support this assertion of national power. It is obvious that private violence may well interfere with interstate movement of both people and goods. The current findings are quite good in this regard.

*Id*.

19 Some scholars believe that the Court's recent Section 5 approach warrants criticism. This Article does not provide such critique. Rather, I accept this approach for descriptive purposes and attempt to develop progressive constitutional arguments within a framework that seems resistant to them. For a few critiques of the Court's recent Section 5 approach see David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31; Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743 (1998); Michael A. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997); Robert C. Post & Reva B. Siegal, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

20 William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 520–21 (2005) ("Nearly forty years ago, the seminal cases of South Carolina v. Katzenbach and Katzenbach v. Morgan granted Congress broad authority to enforce the Reconstruction Amendments . . . ."); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1945 (2003).

*v*. *Flores*[21] cut back this vast deference.[22] After *City of Boerne*, the Court has struck down Section 5 legislation in four cases, illustrating that *City of Boerne* ushered a new era of Section 5 jurisprudence.[23]

Even though this current climate is hostile to Section 5 legislation, *Tennessee v*. *Lane*[24] affirmed Congress' authority to invoke its Section 5 enforcement power to enact Title II of the Americans with Disabilities Act (ADA)—ensuring equal access to the courts for individuals with disabilities.[25] Based on this legitimate goal of ensuring equal access to the judiciary, I argue that the Matthew Shepard Act is a valid enactment of Congress' Section 5 power. I contend that discrimination and resource constraints in the U.S. law enforcement and judicial systems prevent bias crime victims targeted because of sexual orientation, gender identity, gender, and disability from having equal access to the courts. More specifically, these factors influence bias crime victims not to report bias crimes to the police, cause police officers not to categorize or to investigate their crimes as bias crimes, and prevent prosecutors from prosecuting their crimes as bias crimes. The Matthew Shepard Act is a critical piece of legislation because it provides a federal remedy when state and local laws exclude or inadequately address bias crimes on the basis of sexual orientation, gender identity, gender, and disability. The Act also allocates federal resources to ensure that resource constraints will not prevent state and local governments from investigating and prosecuting bias crimes.

Part I provides background on existing federal and state bias crime laws and unsuccessful attempts to expand federal bias crime law protections. Part II summarizes the pertinent provisions and congressional findings of the Matthew Shepard Act. Part III explains why the Matthew

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21 521 U.S. 507 (1997).

22 *See* William D. Araiza, *ENDA before it Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1, 11 (2002) ("Starting with *City of Boerne*, the Court began to cut back on the deference it had previously given to Congress' decisions to use its Section 5 power."); Araiza, *supra* note 20, at 521 ("More recently, since 1997, the United States Supreme Court has made cutbacks on Congress' power under Section 5 of the Fourteenth Amendment, an important part of its states-rights agenda, striking down parts of four statutes as exceeding Section 5's grant of authority to Congress."). As stated by Post & Siegal:

> The Rehnquist Court has increasingly come to regard Section 5 legislation as challenging the Court's ultimate authority to interpret the Fourteenth Amendment. In a series of cases that began with *City of Boerne v*. *Flores* in 1997 . . . the Court has imposed ever more restrictive conditions on Congress' ability to exercise its Section 5 power.

Post & Siegal, *supra* note 19, at 2.

23 *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); and Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

24 541 U.S. 509 (2004).

25 *See id*. at 533–34. It is important to note that some scholars interpret *Tennessee v*. *Lane* and *Nevada Department of Human Resources v*. *Hibbs*, 538 U.S. 721 (2003), another case in which the Court upheld Congress' ability to invoke its Section 5 enforcement power, as a "loosening of the stringent review the Court had previously applied to Section 5 legislation." William D. Araiza, *The Section 5 Power After Tennessee v*. *Lane*, 32 PEPP. L. REV. 39, 83–84 (2004).

Shepard Act is susceptible to attack as an invalid exercise of Congress' commerce power after *Morrison*. I do not dispute that arguments exist for sustaining the Matthew Shepard Act under the Commerce Clause,[26] nor do I argue that Congress' reliance upon its commerce power to enact the Act is normatively wrong. Rather, my argument is predominately descriptive and demonstrates why this reliance is potentially suspect under the Court's current jurisprudence. Consequently, Congress should refrain from relying exclusively upon its commerce power to enact the Matthew Shepard Act.

Part IV shifts the discussion to Section 5 of the Fourteenth Amendment. This Part provides my own interpretation of the Supreme Court's current Section 5 jurisprudential approach and provides a synthesis explaining the current requirements that Congress must meet to enact legislation through its Section 5 enforcement power. Part V applies this synthesis to defend the Matthew Shepard Act as a valid exercise of Congress' Section 5 enforcement power. Consequently, I propose that to strengthen constitutional support for Matthew Shepard Act, Congress should invoke its Section 5 enforcement power when it reintroduces the bill in a subsequent session.

## I. BACKGROUND ON BIAS CRIME LAW

For contextual purposes, this Part provides an overview of existing bias crime law in the United States. Part I.A discusses 18 U.S.C. section 245, the first piece of federal bias crime legislation passed in 1968. Part I.B provides background on more recent federal bias crime legislation that was proposed and enacted during the 1990s. Part I.C provides an overview of existing state bias crime laws and their inadequacies. Part I.D discusses the unsuccessful attempts to expand federal bias crime law prior to the Matthew Shepard Act.

### A. Early Federal Bias Crime Laws

It was not until the second half of the twentieth century that legislation was created to specifically address the problem of bias crimes. In 1968, Congress passed 18 U.S.C. section 245, the first piece of federal bias crime legislation.[27] This statute grants federal officers the authority to investigate and to prosecute crimes motivated by race, religion, color, and national origin—four characteristics commonly targeted by white supremacist organizations, such as the Ku Klux Klan.[28] Section 245 also permits the federal government to investigate and to prosecute bias crimes if the victims were engaged in certain federally protected activities when the

26 In fact, I have put forth one possible argument in Jordan Blair Woods, *Reconceptualizing Anti-LGBT Hate Crimes as Burdening Expression and Association: A Case for Expanding Federal Hate Crime Legislation to Include Gender Identity and Sexual Orientation*, 6 J. HATE STUDIES 81, 97–101 (2008).

27 18 U.S.C. § 245 (2000).

28 *Id*. § 245(b).

crimes occurred. These activities include using public accommodations, traveling across state lines, and applying for employment.[29]

Widespread violence aimed at preventing racial and ethnic minorities from exercising their civil rights prompted Congress to enact Section 245.[30] The legislative history indicates that racially-motivated violence had often gone unpunished and deterred American citizens from freely exercising their constitutional and statutory rights.[31] In explaining the need for the bill, the Senate Committee on the Judiciary posited that many local and state law enforcement agencies were unable or simply unwilling to address violence intended to prevent racial minorities from exercising their civil rights.[32] The Committee also explained that it was the obligation of the federal government to address criminal acts that burdened affirmative federal rights.[33]

## B. Federal Bias Crime Laws Enacted After 18 U.S.C. section 245

The Hate Crime Statistics Act of 1990[34] (HCSA) was the first piece of federal bias crime legislation enacted after 18 U.S.C. section 245. HCSA mandates the Attorney General to gather data about bias crimes on the basis of race, religion, sexual orientation, and religion.[35] The bill also requires the Attorney General to "establish guidelines for the collection of

29 *Id*. See *supra* note 5 for a list of the federally protected activities included under 18 U.S.C. § 245.

30 18 U.S.C. § 245 emerged from three waves of hate-motivated violence that served to prevent racial and ethnic minorities from exercising their constitutional and federal statutory rights during the Reconstruction Era, World War I, and the 1960s Civil Rights Movement respectively. During the Reconstruction Era, many local law enforcement agencies in the South refused to prosecute whites who committed crimes against African Americans. JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 36 (1998). Many local law enforcement and government officials also directly inhibited newly freed slaves from exercising their constitutional rights under the Thirteenth, Fourteenth, and Fifteenth Amendments. *Id*. An immigration surge during World War I inspired a second wave of hate-motivated violence. Richard T. Schaefer, *The Ku Klux Klan: Continuity and Change*, 32 PHYLON 143, 147–49 (1971). White supremacist organizations not only targeted African Americans, but also violently attacked Catholics, Jews, and new immigrants. Brian Levin, *The Vindication of Hate Violence Victims Via Criminal and Civil Adjudications*, 1 J. HATE STUD. 133, 142 (2002). The 1960s Civil Rights Movement inspired a third wave of racial and ethnic violence. Many demonstrators were subjected to violence for openly advocating equal civil rights. *Id*. at 143 ("With the advent of the Civil Rights Era in the 1950s and 1960s white supremacists increasingly turned to violence to prevent blacks from exercising the newly protected rights granted to them by the Courts and the legislatures.").

31 S. REP. NO. 90-721, 3–4 (1967).

32 *Id*. at 4.

33 *Id*. at 4–5 ("Federal legislation against racial violence is not required solely because of the sometimes inadequate workings of State or local criminal processes. Too often in recent years, racial violence has been used to deny affirmative Federal rights; this action reflects a purpose to flout the clearly expressed will of the Congress . . . Such lawless acts are distinctly Federal crimes and it is, therefore, appropriate that responsibility for vindication of the rights infringed should be committed to the Federal courts.").

34 Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 (2000)). Congress reauthorized HCSA in 1996. Church Arson Prevention Act of 1996, Pub. L. No. 104-155, § 7, 110 Stat. 1392, 1394 (1996) (codified at 28 U.S.C. § 534).

35 Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990).

such data including the necessary evidence and criteria . . . for a finding of manifest prejudice."[36] Since its enactment, the U.S. Federal Bureau of Investigation (FBI) has gathered and published bias crime statistics every year since 1992.[37] Although scholars embrace Congress' intentions for passing HCSA, some have highlighted the need for more sophisticated and comprehensive bias crime statistical gathering methods than those required by HSCA.[38]

In 1994, Congress also enacted the Hate Crimes Sentencing Enhancement Act[39] (HCSEA). HCSEA requires the United States Sentencing Commission to increase the penalties for crimes committed on the basis of actual or perceived race, color, religion, national origin, ethnicity, gender, disability or sexual orientation.[40] HCSEA only applies to cases tried in federal courts where federal jurisdiction is proper.[41] This jurisdictional requirement has raised difficulties because 18 U.S.C. section 245 only encompasses groups targeted on the basis of race, religion, color, and national origin; it does not grant jurisdiction for the federal government to prosecute crimes motivated by a victim's sexual orientation, gender identity, gender, or disability.[42] Therefore, HCSEA has not been applied meaningfully to bias crime victims targeted on the basis of these characteristics.

### C. Enacted State Bias Crime Legislation

In the 1980s, state legislatures responded to bias-motivated violence by enacting penalty-enhancement statutes, which increase the punishment of criminal offenses if they are motivated by bias.[43] California was the first

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36 *Id*.

37 The FBI's bias crime statistics reports from 1995 to 2007 are available online. *See* FBI.gov - Civil Rights - Hate Crime, *Hate Crime Statistics*, http://www.fbi.gov/hq/cid/civilrights/hate.htm.

38 Jeanine C. Cogan, *Hate Crime as a Crime Category Worthy of Policy Attention*, 46 AM. BEHAV. SCI. 173, 174 (2002):

> Although this law was highly important in that it helped recognize hate crimes as a phenomenon that needs federal attention, to date, it has been imperfect in providing meaningful data. This is partly because police agencies were not required to report hate crime data for their jurisdictions but rather did so voluntarily. As a result, many police departments did not offer any hate crime data for the first few years.

For another critical analysis of bias crime statistical methods and findings by the FBI see William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213 (2004).

39 Hate Crime Sentencing Enhancement Act of 1994 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994). In 1995, the United States Sentencing Commission enacted a three-level sentencing guideline for hate crimes. *See* 28 U.S.C. § 994 (2000).

40 Hate Crime Sentencing Enhancement Act of 1994 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003(a), 108 Stat. 1796, 2096 (1994).

41 Andrew M. Gilbert & Eric D. Marchand, *Splitting the Atom or Splitting Hairs—The Hate Crimes Prevention Act of 1999,* 30 ST. MARY'S L.J. 931, 958 (1999).

42 *Id*. (noting that this limitation forces prosecutors to obtain federal jurisdiction in other manners); *id*. at 978–79.

43 JACOBS & POTTER, *supra* note 30, at 42. Characteristics included in bias crime penalty-

state to criminalize bias-motivated intimidation and violence.[44] Besides enhancing the punishment for bias crimes, many state laws also allocate resources to collect bias crime data and to train law enforcement personnel to properly handle bias-motivated violence.[45] Today, nearly every state has a bias crime law that either enhances the punishment for bias crimes or allocates resources to gather and release bias crime statistics.[46]

As of April 2008, eleven states and the District of Columbia include both sexual orientation and gender identity in their bias crime laws.[47] Twenty states include only sexual orientation in their bias crime laws.[48] Of the states that have bias crime laws, fourteen states do not include either sexual orientation or gender identity as protected characteristics.[49] Twenty-six states and the District of Columbia include gender in their bias crime laws.[50] Thirty states and the District of Columbia include disability.[51]

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enhancement statutes vary among states and localities. For a comprehensive list of characteristics included in state statutes, see Anti-Defamation League, State Hate Crimes Statutory Provisions, http://www.adl.org/learn/hate_crimes_laws/map_frameset.html. *See also* Cogan, *supra* note 38, at 174 (describing how hate crimes became institutionalized as a legal category during the 1980s). It is also important to note that states do not agree on the meaning of "bias" for when applying bias crime penalty enhancements. While some states require bias crimes to be motivated by actual group animus, other states only require that perpetrators intentionally select their victims on the basis of particular protected characteristics, regardless of whether this intentional selection was motivated by group animus. For an overview of the different models of bias crime legislation see generally, Jordan Blair Woods, Comment, *Taking the "Hate" Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes*, 56 UCLA L. REV. 489, 495–501 (2008).

44 Cogan, *supra* note 38, at 173.

45 *Id*. at 176; *see also* Anti-Defamation League, State Hate Crime Statutory Provisions, http://www.adl.org/learn/hate_crimes_laws/map_frameset.html, for a current list of states that allocate resources for data collection and training for law enforcement personnel.

46 *See* PartnersAgainstHate.org, Hate Crime Laws Around the Country, http://www.partnersagainsthate.org/hate_response_database/laws.html.

47 The states that include sexual orientation and gender identity in their bias crime laws are California, Colorado, Connecticut, Hawaii, Maryland, Minnesota, Missouri, New Jersey, New Mexico, Oregon, and Vermont. Nat'l Gay and Lesbian Task Force, Hate Crime Laws Map, http://www.thetaskforce.org/reports_and_research/hate_crimes_laws.

48 The states that include only sexual orientation in their bias crime laws are Arizona, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New York, Rhode Island, Tennessee, Texas, Washington, Wisconsin. *Id*. Indiana and Michigan's bias crime data collection laws include sexual orientation, but their bias crime penalty-enhancement statutes do not. *Id*.

49 The states that have bias crime laws that exclude either sexual orientation or gender identity are Alabama, Alaska, Idaho, Mississippi, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, and West Virginia. *Id*. Utah's bias crime law addresses only offenses committed with the intent to "intimidate or terrorize" and with the intent to interfere with a state, federal, or constitutional right. *Id*.

50 The states that include gender in their bias crime laws are Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Rhode Island, Tennessee, Texas, Vermont, Washington, and West Virginia. Anti-Defamation League, State Hate Crime Statutory Provisions, http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf (last visited Sept. 2, 2008).

51 The states that include disability in their bias crime laws are Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Washington, and Wisconsin. *Id*.

Since many states do not have bias crime laws that include sexual orientation, gender identity, gender, or disability as protected characteristics, this exclusion invariably leaves many victims unable to prosecute their crimes as bias crimes. This was exemplified by the highly publicized murder of Matthew Shepard, a twenty-one-year-old gay college student who was murdered in an antigay bias crime in Wyoming, a state that does not have bias crime legislation.[52] However, even in states with bias crime laws that include these characteristics, many state and local enforcement agencies do not have the resources to investigate and prosecute bias crimes.[53] Moreover, many state and local prosecutors and investigators are deterred from categorizing crimes as bias crimes because bias crimes have a high evidentiary showing and require substantial resources to investigate and to prosecute.[54] Finally, regardless of the inclusiveness of bias crime laws, discriminatory stereotypes and beliefs against bias crime victims may prevent state and local authorities from categorizing a crime as a bias crime.[55] For these reasons, advocates argue that expanding federal bias crime law to include sexual orientation, gender identity, gender, and disability is necessary to rectify the current inadequacies of existing state bias crime legislation.

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52 After the brutal murder of Matthew Shepard, advocates focused on the need for federal bias crime legislation in light of the fact that Wyoming was one of the states that did not have a bias crimes law. *See* Senators Robert Torricelli, Edward Kennedy, Barbara Boxer, and Ron Wyden, Editorial, *Why America Needs Federal Legislation Against Hate Crimes*, AUSTIN AM.-STATESMAN, Oct. 26, 1998, at A11; *see also* Cogan, *supra* note 38, at 176 ("Over the years, it became clear that certain hate crimes were not properly addressed by local police agencies, and the federal government had no authority to intervene."). For a description of how a federal bias crime law would affect state jurisdiction in prosecuting bias crimes, see HUMAN RIGHTS CAMPAIGN, QUESTIONS AND ANSWERS: THE LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT, 4, http://www.matthewshepard.org/site/DocServer/HRC-LLEHCPA-FAQ1-17-07.pdf?docID=463.

53 *See*, *e.g.*, Elizabeth A. Boyd et al., *"Motivated by Hatred or Prejudice": Categorization of Hate-motivated Crimes in Two Police Divisions*, 30 LAW & SOC'Y REV. 819, 826 (1996) ("Many officers reported concerns that their time would soon be overwhelmed by persons complaining of 'trivial' crimes, compromising their ability to respond promptly to more 'serious' crimes.") (commenting on officers' responses to a new policy requiring police officers to investigate and classify bias crimes); James J. Nolan & Yoshio Akiyama, *An Analysis of Factors that Affect Law Enforcement Participation in Hate Crime Reporting*, 15 J. CONTEMPORARY CRIM. JUST. 111, 119–20 (1999) (finding that resource allocation is a common factor influencing whether law enforcement reports bias crimes).

54 *See*, *e.g.*, Karen Franklin, *Good Intentions: The Enforcement of Hate Crime Penalty-Enhancement Statutes*, 46 AM. BEHAV. SCIENTIST 154, 157 (2002) ("One of the major constraints faced by district attorneys—and one that it is sometimes hard for the lay public to understand—is the inherent difficulty in proving hatred or bias as a primary motivation.").

55 *See id*. at 156 ("Three other studies support the notion that local implementation of hate crime laws is highly variable and contingent on numerous subjective factors, including the attitudes, beliefs, and practices of individual officers, the perceived tractability of the problem, police funding and training, and public opposition to hate crime policies."); *see also* Boyd et al., *supra* note 53, at 826 ("Departmental response to the new policy was mixed at best, reflecting not only some officers' dislike of new orders requiring additional paperwork . . . but also a commonly held view on the legitimacy of hate crimes as a special crime category and of the social significance of hate crimes in general."); Beverly A. McPhail & Diana M. DiNitto, *Prosecutorial Perspectives on Gender-Bias Hate Crimes*, 11 VIOLENCE AGAINST WOMEN 1162, 1176 (2005) ("Some prosecutors' opposition to the gender category may be because of their overall skeptical view of the utility of hate crime legislation, which might influence their view of the gender component.").

D. Unsuccessful Attempts to Expand Federal Bias Crime Law Prior to the Matthew Shepard Act

From 1997 to 1999, congressional representatives attempted to expand the scope of federal bias crime legislation by introducing the Hate Crimes Prevention Act (HCPA).[56] HCPA amended the federal criminal code to punish bias crimes committed on the basis of gender, sexual orientation, or disability.[57] The Act also authorized appropriations to increase the number of personnel to prevent and to respond to bias crimes that interfered with federally protected activities under 18 U.S.C. section 245.[58] Although the House of Representatives and the Senate eventually passed the HCPA, it was later dropped from the Department of Defense appropriations bill in the Senate Conference Committee at the request of Republican leaders and was thus never enacted.[59]

Congressional representatives later attempted to expand federal bias crime legislation to include sexual orientation, gender, and disability by introducing the Local Law Enforcement Enhancement Act (LLEEA) of 2000[60] and the Local Law Enforcement Hate Crime Prevention Acts (LLEHCPA) of 2001[61] and 2004.[62] While the LLEEA and LLEHCPA expanded the federal government's authority to become involved in the investigation and prosecution of bias crimes, each required the federal state and local government to evaluate the propriety of federal involvement.[63] Despite these limiting conditions, these pieces of legislation never passed in Congress.

Representatives again tried to expand federal bias crime legislation with the Local Law Enforcement Hate Crimes Prevention Act (LLEHCPA) of 2005, which also included gender identity as a protected characteristic in the House of Representative's version of the bill.[64] The LLEHCPA imposed the same limiting conditions upon the federal government initial involvement in bias crime investigations and prosecutions as the LLEEA of

56 Hate Crimes Prevention Act of 1997, H.R. 3081, 105th Cong. (1997); Hate Crimes Prevention Act of 1998, S. 1529, 105th Cong. (1998); Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999); Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999).

57 Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999).

58 *Id*. § 6(b).

59 *See* Hasenstab, *supra* note 10, at 975.

60 Local Law Enforcement Enhancement Act of 2000, H.R. 4205, 106th Cong. § 1507(a) (2000). The Hate Crimes Prevention Act of 1999 (S. 622) was renamed the Local Law Enforcement Act as an amendment to a Department of Defense authorization bill. *See generally* 146 Cong. Rec. S10072–73 (daily ed. Oct. 6, 2000) (Senator Leahy discussing the deletion of the Act in conference committee).

61 Local Law Enforcement Hate Crimes Prevention Act of 2001, H.R. 1343, 107th Cong. (2001).

62 Local Law Enforcement Hate Crimes Prevention Act of 2004, H.R. 4204, 108th Cong. (2004).

63 *Id*.; *see also* H.R. 4204 § 249(a)(2), H.R. 1343 § 249(b)(2).

64 Local Law Enforcement Hate Crimes Prevention Act of 2005, H.R. 2662, 109th Cong. § 2 (2005) (protecting gender identity). The Senate's version of the bill did not include gender identity. *See* Local Law Enforcement Enhancement Act of 2005, S. 1145, 109th Cong. § 2 (2005) (protecting sexual orientation but not gender identity).

2000 and the LLEHCPA of 2001 and 2004.[65] Although the House of Representatives successfully passed the LLEHCPA of 2005, the Senate never voted on the bill after it was introduced.[66]

## II. THE LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT OF 2007 (THE MATTHEW SHEPARD ACT)

Recently, the U.S. House of Representatives and the U.S. Senate passed the Matthew Shepard Act,[67] which was the latest attempt by Congress to expand federal bias crimes legislation.[68] This Part provides an overview of the Matthew Shepard Act. Part II.A summarizes the pertinent provisions of the Act. Part II.B summarizes Congress' constitutional findings supporting the legislation.

### A. Statutory Provisions

The Matthew Shepard Act expands federal bias crime law to include actual or perceived sexual orientation, gender, gender identity, or disability of the victim.[69] Similar to the previous unsuccessful initiatives to expand federal bias crime legislation, the Matthew Shepard Act provides financial and personnel assistance to state and local governments to investigate and to prosecute bias crimes.[70] Moreover, the bill expands the federal government's authority to prosecute bias crimes to include bias crimes even when the victims are not engaging in federally protected activities.[71]

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65 H.R. 2662; S. 1145.

66 The Whip Pack, *Bill Text and Background for the Week of April 30, 2007*, http://democraticwhip.house.gov/whip_pack/2007/04/30/whip_pack.pdf (last visited Dec. 8, 2007):

> On September 14, 2005, the House of Representatives passed H.R. 2662, the Local Law Enforcement Hate Crimes Prevention Act of 2005 by a vote of 223 to 199. The bill was passed as an amendment, offered by Representative John Conyers to H.R. 3132, the Children's Safety Act of 2005, which would have strengthened the monitoring of, and increase the penalties for child sex offenders. Although Senator Kennedy had introduced a comparable proposal in the Senate (S. 1145), no further legislative action occurred in 109th Congress.

67 The Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6 (2007) (proposing changes to 18 U.S.C. § 249(a)(2)); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 7 (2007) (same).

68 On May 3, 2007, the U.S. House of Representatives passed the Local Law Enforcement Hate Crimes Prevention Act of 2007 ("Matthew Shepard Act"), H.R. 1592, 110th Cong. (2007) by a vote of 237 to 180. *See* Derrick C. Jackson, Opinion, *Optimism in the Hate Crimes Debate*, BOSTON GLOBE, May 26, 2007, at 11A. On September 27, 2007, the U.S. Senate passed its version of the Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, by a 60 to 39 majority. *See* The Matthew Shepard Foundation, *Matthew Shepard Foundation Applauds U.S. Senate Today for Passing Hate Crimes Legislation*, http://www.matthewshepard.org/site/PageServer?pagename=Press_Media_Senate_Passage_MSA.

69 Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6 (2007) (proposing changes to 18 U.S.C. § 249(a)(2)); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 4(1)(C) (2007) (same).

70 H.R. 1592, § 4–5 (referring to S. Comm. after being received from H., May 7, 2007); S. 1105, § 5–6.

71 H.R. 1592, § 6; S. 1105, § 7.

The Matthew Shepard Act also contains numerous conditions that limit the federal government's ability to become involved in the investigation and prosecution of bias crimes. First, federal officers must have "reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability"[72] of the victim was "a motivating factor underlying"[73] the offense. Second, federal officers are required to consult with state or local law officials regarding the specific bias crime to determine whether the federal government's involvement is desirable and appropriate. The federal government may only become involved if: (1) "the State [or local government] does not have jurisdiction or does not intend to exercise jurisdiction;" (2) "the State has requested that the Federal Government assume jurisdiction;" (3) "the State does not object to the Federal Government assuming jurisdiction;" or (4) "the verdict or sentence obtained pursuant to State charges" was insufficient to eradicate the federal government's interest in eradicating bias-motivated violence.[74] These limitations address federalism concerns and ensure that "[s]tate and local authorities currently investigate and prosecute the overwhelming majority of hate crimes and will continue to do so."[75]

B. Congressional Findings

Upon enacting the Violence Against Women Act (VAWA) for victims of gender-motivated violence, Congress invoked its powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment.[76] To support invoking its Section 5 power, Congress presented extensive evidence documenting the disadvantages that victims of gender-motivated violence face in law enforcement and judicial systems due to discriminatory stereotypes.[77] Despite recognizing that current limitations of federal bias crime law have similarly "led to acquittals in several of the cases in which the Department of Justice has determined a need to assert federal jurisdiction,"[78] Congress invoked only its power under the Commerce Clause to enact the Matthew Shepard Act.[79] It did not invoke its Section 5 enforcement power.

Consequently, an overwhelming majority of the Act's congressional findings focus on how bias crimes affect interstate commerce.[80] For example, Congress noted that bias crimes impede the movement of targeted

72 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(1)); S. 1105, § 7 (same).

73 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(1)); S. 1105, § 7 (same).

74 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(2)); S. 1105, § 7 (same).

75 H.R. REP. NO. 110-113, at 7 (2007).

76 S. REP. NO. 102-197, at 52 (1991) ("Congress' power to enact title III is firmly based in the Commerce Clause and section 5 of the 14th amendment [sic].").

77 *Id*. at 41–44.

78 H.R. REP. NO. 110-113, at 6 (2007).

79 *Id*. at 14–15.

80 *See generally id*.

groups and even force them to move across state lines to escape being subjected to violence.[81] Congress also concluded that perpetrators move across state lines to commit bias crimes and use channels, facilities, and instrumentalities of interstate commerce to commit such violence.[82] Moreover, "[m]embers of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activit[ies]."[83] Since Congress did not invoke its Section 5 power to enact the Matthew Shepard Act, none of the Act's constitutional findings are intentionally tailored to support invoking this enforcement power. As demonstrated in Part V *infra*, however, some of the Matthew Shepard Act's congressional findings support the notion that the Act is a valid piece of Section 5 legislation.

## III. THE MATTHEW SHEPARD ACT UNDER THE COMMERCE CLAUSE AFTER *MORRISON*

Article I, Section 8 of the U.S. Constitution provides that "Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[84] The Supreme Court's view on the scope of Congress' commerce power has changed over time,[85] and Congress has invoked its commerce power to adopt a wide range of federal legislation from criminal to environmental laws.[86] In *Gibbons v. Ogden*[87], the Court initially took an expansive approach to

81 *Id*. at 2.

82 *Id*.

83 *Id*.

84 U.S. CONST. art I, § 8.

85 See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§5-4 to 5-8, at 305–17 (Foundation Press 2d ed. 1988) (explaining the changing perspectives of the Supreme Court towards Congress' commerce power).

86 Rosalie Berger Levinson, *Will the New Federalism Be the Legacy of the Rehnquist Court?*, 40 VAL. U. L. REV. 589, 592 (2006):

> [M]any civil rights laws, including some criminal provisions, were enacted under the theory that Congress' Commerce Clause power was plenary. Laws prohibiting race discrimination in public accommodations, restaurants, and hotels, as well as laws prohibiting race, gender, and religious discrimination by private employers were enacted under the theory that discrimination adversely affects interstate commerce and thus may be proscribed.

*See also* Theodore R. Posner & Timothy M. Reif, *Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalization*, 24 FORDHAM INT'L L.J. 481, 500 (2000):

> The Court's new, expansive interpretation of the Commerce Clause enabled Congress to enact laws in areas that, under the Court's previous approach, would have been ruled well beyond Congress's reach, including civil rights laws, labor laws, environmental laws, and criminal laws. Challenges to these new exercises of power, most notably in the civil rights area, generally were defeated.

87 22 U.S. 1 (1824); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 415 (1997) ("In *Ogden* the Court accepted the notion Congress should enjoy far-reaching power under the Commerce Clause—that Congress could legislate regarding all commerce which concerns more than one state, and that its power would be plenary, limited only by the Constitution's affirmative prohibitions on the exercise of federal power."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 246 (Aspen 3d Ed. 2006).

define the scope Congress' commerce power. However, between 1887 and 1937, the Court adopted a much narrower view of Congress' commerce power.[88] From 1937 to 1995, the Court revisited its expansive approach to Congress' commerce power by applying a very lenient rational basis test to assess the constitutionality of federal legislation passed under the Commerce Clause.[89]

In 1995, the Court decided *United States v. Lopez*[90] and fundamentally changed its Commerce Clause jurisprudence.[91] *Lopez* invalidated the Gun-Free School Zones Act[92] of 1990 and substantially restricted the amount of activity that Congress could regulate under its commerce power. In its analysis, the Court articulated three categories of activities that Congress could regulate under its commerce power. First, Congress could "regulate the use of the channels of interstate commerce."[93] Second, Congress could legislate "to regulato [sic] and protect the instrumentalities of interstate commerce."[94] Third, Congress could legislate to "regulate those activities having a substantial relation to interstate commerce."[95] The Court invalidated the Gun-Free School Zones Act by concluding that the presence of a gun near a school did not involve a channel or instrumentality of interstate commerce,[96] nor did it substantially affect interstate commerce.[97]

In *United States v. Morrison*,[98] the Court placed further restrictions on the third category of activities that Congress could regulate under *Lopez*[99] and addressed whether a federal civil remedy for victims of gender-motivated violence under the Violence Against Women Act (VAWA) was constitutional.[100] The plaintiff argued that violence against women had a substantial effect on the U.S. national economy.[101] The *Morrison* Court considered three factors to determine whether Congress could enact the federal civil remedy on the grounds that gender-motivated violence

88 *See* CHEMERINSKY, *supra* note 87, at 247–48; *see also* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 131–32 (Praeger 1987).

89 *See* Bradford C. Mank, *Can Congress Regulate Intrastate Endangered Species Under the Commerce Clause? The Split in the Circuits Over Whether the Regulated Activity is Private Commercial Development or the Taking of Protected Species*, 69 BROOK. L. REV. 923, 923 & n.3 (2004).

90 514 U.S. 549 (1995).

91 *See generally* Alan T. Dickey, *United States v. Lopez: The Supreme Court Reasserts the Commerce Clause as a Limit on the Powers of Congress*, 70 TUL. L. REV. 1207 (1996).

92 The Gun-Free School Zones Act of 1990 made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A) (Supp. IV. 1992).

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

94 *Id*.

95 *Id*. at 558–59.

96 *Id*. at 559.

97 *Id*. at 567.

98 529 U.S. 598 (2000).

99 The petitioners in *Morrison* did not contend that the Violence Against Women Act regulated a channel or instrumentality of interstate commerce. *Morrison*, 529 U.S. at 609.

100 42 U.S.C. § 13981 (1994).

101 *Morrison*, 529 U.S. at 598.

substantially affected interstate commerce. First, the Court considered whether the activity was economic in nature.[102] The Court held that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[103] Second, the Court considered whether the text of the statute contained a jurisdictional element establishing that the statute was enacted in pursuance of Congress' power to regulate interstate commerce.[104] The federal civil remedy contained no such jurisdictional element. Consequently, the Court viewed the provision as granting Congress too much authority to regulate criminal activity, which is traditionally regulated by the states.[105] Third, the Court considered whether Congress presented findings indicating that gender-motivated violence had a substantial effect on interstate commerce.[106] Congress presented congressional findings that gender-motivated violence costs the American economy billions of dollars a year and is a substantial constraint to freedom of travel by women throughout the country.[107] Although the Court agreed Congress' findings were more than extensive, it held that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation,"[108] and rejected the federal government's authority to regulate noneconomic violent criminal conduct based on its cumulative effects on interstate commerce.[109] The Court maintained that to rule otherwise would eliminate boundaries between truly local and federal affairs.[110]

Since the Matthew Shepard Act contains a provision providing for the federal punishment of crimes motivated by gender, scholars argue that it is an unconstitutional exercise of Congress' commerce power after *Morrison*.[111] If legally challenged, it is highly unlikely that the Court will conclude that the Matthew Shepard Act regulates channels or instrumentalities of interstate commerce. While the Act targets activity that involves channels and instrumentalities of interstate commerce, it does not regulate those channels or instrumentalities themselves.[112] Therefore, if the Act is legally challenged, the Court will likely focus on the third category of activity under *Lopez* and assess whether bias crimes motivated by sexual orientation, gender identity, gender, and disability substantially affect interstate commerce. The three-factor *Morrison* framework will likely

102 *Id*. at 610.
103 *Id*. at 613.
104 *Id*.
105 *Id*.
106 *Id*. at 614.
107 *See* H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.) *reprinted in 1994* U.S.C.C.A.N. 1803, 1853; S. REP. NO. 103-138, at 41 (1990); S. REP. NO. 101-545, at 33 (1990).
108 *Morrison*, 529 U.S. at 614.
109 *Id*. at 617.
110 *Id*. at 617–18.
111 *See supra* note 10 and accompanying text.
112 *See* Hasenstab, *supra* note 10, at 1006–07.

guide its analysis.[113]

First, the Court will assess whether the activity targeted by the Matthew Shepard Act is economic in nature. In *Morrison*, the Court stated:

> Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.[114]

Thus, it is unlikely that the Court may conclude that bias crimes motivated by sexual orientation, gender identity, gender, and disability are economic in nature given that it previously rejected in *Morrison* that gender-motivated crimes are economic activities. Furthermore, since the Court was hesitant to create new law on this issue in *Morrison*,[115] it is also unlikely to change its position on whether Congress has the authority to regulate noneconomic activity under the Commerce Clause.

Second, the Court may consider whether the text of the Matthew Shepard Act contains a jurisdictional element establishing that the bill was passed in pursuance of Congress' power to regulate interstate commerce.[116] Unlike the civil remedy of the VAWA, the Matthew Shepard Act contains jurisdictional elements establishing a nexus between interstate commerce and bias crimes on the basis of sexual orientation, gender identity, gender, and disability. The Act contains jurisdictional elements that reference crossing state lines; using a channel, facility, or instrument of interstate commerce; using a weapon that has traveled in interstate commerce; interfering with commercial or other economic activity; and otherwise affecting interstate or foreign commerce.[117] Therefore, the jurisdictional element is likely to weigh in favor of upholding the Matthew Shepard Act. Although the *Morrison* Court stated that "a jurisdictional element may establish that the enactment is in pursuance of Congress's regulation of interstate commerce,"[118] it did not conclude that the presence of a jurisdictional element is legally dispositive.

Third, the Court may consider the adequacy of the Matthew Shepard Act's congressional findings. In passing the Act, Congress presented findings establishing that bias crimes substantially affect interstate

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113 *Id*. at 1007; *see also* Varona & Layton, *supra* note 10, at 12–14 (evaluating the constitutionality of the Local Law Enforcement Act of 2000 in light of *Morrison*).

114 *Morrison*, 529 U.S. at 613.

115 *Id*. at 615–16.

116 Some scholars emphasize this factor to defend previous attempts to expand federal bias crime law to include sexual orientation, gender identity, gender, and disability. *See*, *e.g*., Varona & Layton, *supra* note 113, at 12–14.

117 Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 7(a) (2007) (proposing changes to 18 U.S.C. § 249(a)(2)(B)); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 7(a) (2007) (same).

118 *Morrison*, 529 U.S. at 612.

commerce.[119] Congress highlighted that bias crimes impede the movement of targeted groups and force members of such groups to move across state lines to avoid being subjected to bias crimes.[120] Congress also found that bias crimes prevent members of targeted groups from "purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity."[121] Moreover, perpetrators move across state lines, use articles that have traveled in interstate commerce, and use channels, facilities, and instrumentalities of interstate commerce to commit bias crimes.[122] But even if the Court concludes that these findings are adequate, *Morrison* affirms that a valid exercise of Congress' commerce power cannot be exclusively grounded by congressional findings.[123]

In summary, of the three factors considered by the *Morrison* Court, the second and the third factors will most likely weigh in favor of the Matthew Shepard Act. The *Morrison* Court, however, did not adopt a balancing test that gives equal weight to each of the three factors. Despite agreeing with the adequacy of the congressional findings, the Court rejected the federal government's authority to regulate noneconomic violent criminal conduct based on its cumulative effects on interstate commerce.[124] Instead, it gave priority to the first of the three factors when determining whether an activity substantially affected interstate commerce. Consequently, even if the Court concludes that the Matthew Shepard Act contains sufficient jurisdictional hooks and congressional findings, the Act can still be invalidated as unconstitutional under *Morrison*. There also is no indication that the Court will change its position to adopt a rule permitting Congress to regulate noneconomic activity, when in the aggregate, it substantially affects interstate commerce. As such, Congress' position that it has the authority to expand federal bias crime legislation based on its commerce power is constitutionally suspect under existing jurisprudence. For that reason, Congress should not rely exclusively on its commerce power when reintroducing the Matthew Shepard Act in subsequent sessions.

## IV. THE SUPREME COURT'S CURRENT SECTION 5 JURISPRUDENCE

Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive provisions of the Fourteenth Amendment.[125] The Court's approach to Section 5 has been a matter of constant evolution. In the early years of the Fourteenth Amendment, the Court was skeptical of

119 H.R. REP. NO. 110-113, at 2 (2007).
120 *Id*.
121 *Id*.
122 *Id*.
123 *Morrison*, 529 U.S. at 614.
124 *Id*. at 617.
125 U.S. CONST. amend. XIV, § 5.

Congress' Section 5 enforcement power.[126] However, during the 1960s the Court granted Congress more deference to pass Section 5 legislation due to the aftermath of the New Deal.[127] This deferential approach lasted until 1997, when the Court revoked this deference in *City of Boerne v. Flores*.[128] Part IV.A provides a brief summary of *City of Boerne* and the constitutional principles that originate from it. Part IV.B focuses on the Section 5 cases after *City of Boerne* and provides a synthesis of what Congress must prove in order to invoke its Section 5 enforcement power under the current Section 5 jurisprudence.

### A. City of Boerne v. Flores

*City of Boerne v. Flores*[129] is the foundational case in the Supreme Court's current Section 5 jurisprudence. In *City of Boerne*, the Court held that Congress exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment when it enacted the Religious Freedom Restoration Act (RFRA).[130] RFRA allowed Congress to invalidate any law that imposed a substantial burden on religious practice unless it was justified by a compelling interest and was the least restrictive means of accomplishing that interest.[131]

The Court agreed that under Section 5, Congress had the ability to enforce the constitutional right of free exercise of religion.[132] However, the Court held that Congress only has the right to "enforce" the law in a remedial sense;[133] it cannot substantively change the law.[134] The Court acknowledged that the line between a remedial and substantive change is not clear.[135] Therefore, to discern remedial and substantive changes, the Court adopted the "congruence and proportionality" test.[136] Under this test, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[137] The Court

126 Post & Siegel, *supra* note 20, at 1945 ("In the early years of the Fourteenth Amendment the Court was quite hostile to Section 5 power, fearing that it might 'authorize Congress to create a code of municipal law for the regulation of private rights' that would displace "the domain of State legislation.") (quoting The Civil Rights Cases, 109 U.S. 3, 11 (1883)).

127 *Id*.

128 521 U.S. 507 (1997); *id*. at 536*; see also* Araiza, *supra* note 23, at 11 ("Starting with *City of Boerne*, the Court began to cut back on the deference it had previously given to Congress' decisions to use its Section 5 power.").

129 521 U.S. 507 (1997).

130 *Id*. at 536.

131 Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

132 *City of Boerne*, 521 U.S. at 519 ("We agree with respondent, of course, that Congress can enact legislation under § 5 enforcing the constitutional right to free exercise of religion.").

133 *Id*.

134 *Id*. ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

135 *Id*. at 519–20.

136 *Id*. at 520.

137 *Id*.

concluded that legislation is substantive in operation and effect without such a connection.[138]

In applying the congruence and proportionality test to strike down RFRA, the Court considered three factors. First, the Court evaluated RFRA's legislative record, finding that the "legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry."[139] The Court thus concluded that in passing RFRA, Congress seemed to be concerned with the incidental burdens that state laws had upon the exercise of religious freedom, and not whether the laws were enforced because of animus.[140]

Second, the Court looked to the scope of RFRA and found it to be too sweeping.[141] The Court distinguished the scope of RFRA from voting rights legislation upheld under Section 5 in *South Carolina v. Katzenbach*.[142] Unlike RFRA, the statutory provisions at issue in *Katzenbach* were confined to those regions of the country where voting discrimination was the most flagrant and affected a discrete case of laws—state voting laws.[143] Moreover, the Court held that to reduce the possibility of overbreadth and to ensure that the reach of the voting rights legislation was limited to those cases in which constitutional violations were the most likely, *Katzenbach* terminated voting legislation "at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years."[144] RFRA did not contain this limitation.

Finally, the Court looked to the costs of RFRA. The Court emphasized that RFRA imposed a heavy litigation burden and curtailed the states' traditional regulatory powers.[145] The Court concluded that these costs were too great and "far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause."[146]

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138 *Id*.

139 *Id*. at 530

140 *Id*. at 531.

141 *Id*. at 532 (citations omitted):

> RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

142 383 U.S. 301, 315–16 (1966).

143 *City of Boerne*, 521 U.S. at 532–33.

144 *Id*. at 533 (citations omitted).

145 *Id*. at 534–35 ("[RFRA] is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. . . . [T]he Act imposes in every case a least restrictive means requirement . . . that was not used pre-*Smith* jurisprudence . . . .").

146 *Id*. at 534.

B. Section 5 Cases after *City of Boerne*

Since *City of Boerne*, the Supreme Court has decided six cases addressing whether an enacted federal statute was a valid exercise of Congress' Section 5 enforcement power.[147] In every case, the Court has applied the congruence and proportionality test and has generally performed a two-step analysis. First, the Court has identified whether a constitutional rights violation existed. Second, the Court has assessed the scope of the federal statute. The Court has deemed federal legislation as a valid exercise of Congress' Section 5 power only when the scope of the legislation was tailored specifically to rectify an existing constitutional rights violation.[148]

1. Identifying the Constitutional Rights Violation

In identifying a pattern of constitutional rights violations, the Court has considered two factors: (1) the level of scrutiny that a group classification or right receives[149] and (2) the adequacy of the congressional findings supporting the existence of a constitutional rights violation.[150]

i. Standard of Review

Generally, the Court has concluded that the higher the level of scrutiny that a group classification or a right receives, the easier it is for Congress to identify a pattern of constitutional rights violations by means of congressional findings.[151] For instance, in *Kimel v. Florida Board of*

147 These six cases are *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 541 U.S. 509 (2004).

148 *See Hibbs*, 538 U.S. at 739–40 (upholding the Family and Medical Leave Act of 1993 (FLMA) as valid Section 5 legislation); *Lane*, 541 U.S. at 530–31 (upholding Title II of the Americans with Disabilities Act (ADA) as valid Section 5 legislation).

149 *Kimel*, 528 U.S. at 83 (applying rational basis review for age classifications); *Garrett*, 531 U.S. at 367–68 (applying rational basis review for disability classifications); *Hibbs*, 538 U.S. at 735–36 (applying intermediate scrutiny for gender classifications); *Lane*, 541 U.S. at 522–23 (applying heightened scrutiny for burdening the right of access to the courts).

150 *City of Boerne*, 521 U.S. at 530–32; *Florida Prepaid*, 527 U.S. at 640; *Garrett*, 531 U.S. at 374; *Morrison*, 529 U.S. at 626–27.

151 The Court has contextualized congressional findings in terms of the level of scrutiny that a group classification or right receives. *See*, *e.g.*, *Kimel*, 528 U.S. at 86 ("Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." (quoting *City of Boerne*, 521 U.S. at 532) (internal quotations omitted)); *Garrett*, 531 U.S. at 365 ("The first step in applying these now familiar principles is to identify with some precision the scope of the constitutional right at issue. Here, that inquiry requires us to examine the limitations § 1 of the Fourteenth Amendment places upon States' treatment of the disabled."); *Hibbs*, 538 U.S. at 736 ("Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations."); *Lane*, 541 U.S. at 522–23 ("Title II . . . also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review.").

*Regents*,[152] the Court evaluated whether Congress exceeded the scope of its Section 5 enforcement power by enacting the Age Discrimination in Employment Act of 1967 (ADEA).[153] The Court noted that unlike race or gender, "[o]lder persons . . . have not been subjected to a history of purposeful unequal treatment."[154] Nor does "old age . . . define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it."[155] Thus, for equal protection purposes, the Court believed that all age classifications are "presumptively rational"[156] unless Congress could establish that age discrimination is not supported by a rational basis.[157] Since Congress could not meet this burden, the Court held that the ADEA's enactment was an unconstitutional exercise of Congress' Section 5 enforcement power.[158] In *Board of Trustees of the University of Alabama v. Garrett*,[159] the Court engaged in a similar equal protection analysis to invalidate portions of the Americans with Disabilities Act (ADA).[160]

Conversely, in *Nevada Department of Human Resources v. Hibbs*,[161] the Supreme Court held that Congress did not exceed the scope of its Section 5 enforcement power when it gave a private right of action for individuals to seek equitable relief and money damages against any state or federal employer who restrains their rights under the Family and Medical Leave Act of 1993 (FLMA).[162] The Court distinguished the case from *Garrett* and *Kimel* by arguing that discrimination based on gender, unlike disability, is subject to a heightened standard of review under the Fourteenth Amendment.[163] The Court stated explicitly that "[b]ecause the

152 528 U.S. 62, 91 (2000).

153 *Id*. at 86. The ADEA made it unlawful for an employer, including the state, to "fail or refuse to hire or discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1).

154 *Kimel*, 528 U.S. at 83 (internal citations omitted).

155 *Id*.

156 *Id*. at 84.

157 *Id*. at 83 ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.").

158 *Id*. at 86.

159 531 U.S. 356 (2001).

160 Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111-12117 (2000) (allowing state employees to recover money damages if the state failed to comply with the ADA by not making reasonable accommodations for employers with disabilities); *see also Garrett*, 531 U.S. at 367–68. As in *Kimel*, before applying the congruence and proportionality test, the Court revisited precedent affirming that states are not required to make special accommodations for individuals with disabilities under the Fourteenth Amendment if the failure to provide accommodations was supported by a rational basis. *Garrett*, 531 U.S. at 367. The Court then assessed the legislative history in the context of this equal protection analysis to determine whether the legislative history of the ADA supported a pattern of unconstitutional employment discrimination by the states against individuals with disabilities. *Id*.

161 538 U.S. 721, 734–35 (2003).

162 29 U.S.C. § 2612(a)(1)(C) (entitling employees to take up to twelve work weeks of unpaid leave annually for any set of reasons, including the onset of a serious health condition in an employee's spouse, child, or parent.); *see also Hibbs*, 538 U.S. at 728 n.2 (noting Congress intended for the FLMA to protect the right of employees to be free from gender-based discrimination in the workplace and viewed the responsibility of caretaking to disproportionately burden women).

163 *Hibbs*, 538 U.S. at 735–36.

standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations."[164]

Similarly, in *Tennessee v. Lane*,[165] the Supreme Court held that Congress did not exceed the scope of its Section 5 enforcement power when it enacted Title II of the Americans with Disabilities Act (ADA).[166] The specific question presented to the Court was limited to whether Congress could invoke its Section 5 enforcement power to ensure the rights of access to the courts.[167] Congress posited that many individuals with disabilities in states throughout the country were being excluded from courthouses and court proceedings by reason of their disabilities.[168] The Court believed that heightened scrutiny applied because Title II not only served to redress irrational disability discrimination, but also to enforce "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review."[169]

Thus, Section 5 cases after *City of Boerne* reveal that Congress' burden to identify by congressional findings a pattern of constitutional rights violations is lessened when a group classification or a burdened right receives heightened scrutiny.

ii. Congressional Findings

In *City of Boerne*, the Court concluded that the congressional findings of RFRA were inadequate to identify a constitutional rights violation because they lacked examples demonstrating that states had violated free exercise of religion rights.[170] In *Florida Prepaid Postsecondary Education Expense Board v. College Savings*[171]—the first Section 5 decision after *City of Boerne*—the Court employed an even higher threshold requiring Congress not only to identify examples of unconstitutional behavior, but also to identify a pattern of constitutional rights infringements by the

164 *Id*. at 736. To satisfy rational basis review, Congress must only show that a group classification or burdening of a right is rationally related to a legitimate state interest. *Kimel*, 528 U.S. at 83. However, to satisfy intermediate scrutiny—the standard of review applied to gender classifications—Congress must show that the classification serves important governmental objectives and is substantially related to the achievement of those objectives. *Hibbs*, 538 U.S. at 736.

165 541 U.S. 509, 533–34 (2004).

166 Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131–65 (providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity").

167 *Lane*, 541 U.S. at 530–31.

168 *Id*. at 527.

169 *Id*. at 522–23.

170 City of Boerne v. Flores, 521 U.S. 507, 530 (1997) ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.").

171 527 U.S. 627 (1999).

states.[172] In cases after *Florida Prepaid*, the Court has required Congress to establish a pattern of constitutional rights violations, making it a basic requirement of the Court's current Section 5 framework.[173]

The Court has not provided further explicit guidance on what Congress must show in order to establish a pattern of constitutional rights violations. However, a few points from Section 5 decisions after *Florida Prepaid* are instructive. In *Board of Trustees of the University of Alabama v. Garrett*,[174] the Court concluded that Congress did not meet its burden to establish a pattern of unconstitutional employment discrimination by the states against the disabled upon enacting 42 U.S.C. sections 12111–17 of Title I of the American Disabilities Act (ADA).[175] The Court held that with the exceptions of a few examples involving state behavior, Congress only proffered general evidence that people with disabilities have been discriminated against and socially ostracized.[176] Therefore, after *Garrett*, findings of general discrimination not tailored to the alleged state misbehavior are insufficient to establish a pattern of unconstitutional state discrimination.

Furthermore, after *United States v. Morrison*[177], constitutional findings demonstrating a pattern of constitutional rights violations will not necessarily render an invocation of Congress' enforcement power valid. In *Morrison*, the Supreme Court held that Congress exceeded the scope of its Section 5 enforcement power by enacting VAWA.[178] Congress found that gender stereotypes "often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence."[179] Despite the sufficiency of the findings, the Court invalided the law because it was too sweeping.[180] Therefore, *Morrison* highlights that extensive congressional findings are not necessarily sufficient to prove

172 In light of this higher threshold, the congressional findings in *Florida Prepaid* were inadequate to identify a pattern of constitutional rights violations by the states. *Id*. at 640 ("The House Report acknowledged that many states comply with patent law and could provide only two examples of patent infringement suits against the States. . . . The Federal Circuit in its opinion identified only eight patent-infringement suits prosecuted against the States in the 110 years between 1880 and 1990.") (internal citations omitted).

173 *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000) ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) ('Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled.").

174 531 U.S. 356 (2001).

175 *Id*. at 374.

176 *Id*. at 369.

177 529 U.S. 598 (2000).

178 *Id*. at 627.

179 *Id*.

180 *Id*. at 626–27.

that an exercise of Congress' Section 5 power is valid.

2. Assessing the Scope of the Federal Statute

Regardless of whether congressional findings support a pattern of constitutional rights violations, the federal statute must not be too sweeping. Although not firmly established in precedent, the Court seems to balance the following three factors to determine whether a federal statute is tailored proportionally to redress a pattern of constitutional rights violations: (1) the extent to which the law is limited to situations involving unconstitutional behavior;[181] (2) whether state remedies are adequate and present throughout the states;[182] and (3) whether the law targets the behavior of government or private actors.[183]

i. The Federal Statute's Focus on Unconstitutional Behavior

In evaluating whether a federal statute is tailored specifically to redress unconstitutional behavior, the Court has considered the following: (1) the specific question presented for review;[184] (2) whether the statute's application is limited to geographic areas where unconstitutional behavior is known or likely to occur;[185] and (3) whether the federal statute's application is limited to a range of activity where unconstitutional behavior is known or likely to occur.[186]

The Court's holding in *Tennessee v. Lane*,[187] the last Section 5 case to be decided by the Court, supports the notion that when a federal statute targets an activity, the Court may frame its assessment of the statute's scope to the specific question presented for judicial review. In *Lane*, the petitioner urged the Court to examine the broad range of Title II's applications and argued that it was not tailored to serve its objectives because it applied not only to public education and voting-booth access, but also to seating at state-owned hockey rinks.[188] The Court rejected that it had to evaluate Title II's wide variety of applications when the specific question presented for review only dealt with whether the Act was an appropriate exercise of Congress' Section 5 enforcement power to remedy the inaccessibility of judicial services for individuals with disabilities.[189]

181 *See Fla. Prepaid*, 527 U.S. at 646–47; *Morrison*, 529 U.S. at 626–27; *Garrett*, 531 U.S. at 372; Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 733–34 (2003); Tenn. v. Lane, 541 U.S. 509, 530–31 (2004).

182 *Florida Prepaid*, 527 U.S. at 644; *Kimel*, 528 U.S. at 91–92; *Garrett*, 531 U.S. at 374 n.9; *Hibbs*, 538 U.S. at 733–34.

183 United States v. Harris, 106 U.S. 629, 637 (1883); *Civil Rights Cases*, 109 U.S. 3, 21 (1883); *Morrison*, 529 U.S. at 626–27.

184 *See Lane*, 541 U.S. at 530–31.

185 *Florida Prepaid*, 527 U.S. at 646–47; *Morrison*, 529 U.S. at 626–27.

186 *Garrett*, 531 U.S. at 372; *Hibbs*, 538 U.S. at 733–34.

187 541 U.S. 509 (2004).

188 *Id.* at 530.

189 *Id.* at 530–31.

To determine whether a federal statute is limited to addressing unconstitutional behavior, the Court has also considered whether the statute's application is limited to geographic areas where unconstitutional behavior is known or likely to occur. In *Florida Prepaid*, the Court found that the coverage of the Patent Remedy Act was too sweeping because it made all states amenable to suit for any type of patent infringement for an infinite duration.[190] Moreover, Congress did nothing to limit the Act's scope to cases involving constitutional violations nor did it limit its application to states where there were high incidences of unconstitutional patent violations.[191] Similarly, in *Morrison*, the Court held that VAWA's federal civil remedy was too sweeping because it applied uniformly to all states throughout the nation even though the congressional findings did not indicate that the problem of discrimination against victims of gender-motivated violence occurred in all or even most states.[192] The *Morrison* Court distinguished the case from *Katzenbach v. Morgan*[193] and *South Carolina v. Katzenbach*,[194] two Section 5 cases prior to *City of Boerne* in which the federal "remedy was directed only to those States in which Congress found that there had been discrimination."[195] Therefore, the Court favors federal remedies that make geographic differentiations among states where constitutional rights violations are the most likely to occur or are most pervasive.

The Court has also evaluated whether a federal statute's application is limited to an area of activity where unconstitutional behavior is known or likely to occur. For instance, the *Garrett* Court concluded that the scope of Title I of the ADA was too sweeping because it forced state employers to make reasonable accommodations in situations where it was reasonable for them to conserve scarce resources by hiring employees who were able to use the existing nonaccommodating facilities.[196] Consequently, the statute forced state employers to provide reasonable accommodations despite the fact that disability classifications passed rational basis review.[197] Conversely, in *Hibbs*, the Court upheld the provision of the FMLA because it did not apply broadly to every aspect of a state employer's operations.[198]

190 *Florida Prepaid*, 527 U.S. at 646–47:

> Despite subjecting States to this expansive liability, Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed. Nor did it make any attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy; or providing for suits only against States with questionable remedies or a high incidence of infringement.

191 *Id*.

192 United States v. Morrison, 529 U.S. 598, 626–27 (2000).

193 384 U.S. 641 (1966).

194 383 U.S. 301 (1966).

195 *Morrison*, 529 U.S. at 626–27.

196 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001).

197 *Id*. at 366.

198 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003).

Rather, the provision was narrowly targeted "at the faultline between work and family"[199] which was the precise area where "sex-based overgeneralization has been and remains strongest."[200]

ii. Adequacy of State Remedies

To determine whether a federal statute is too sweeping, the Court has also considered the adequacy of existing state remedies to address the identified pattern of constitutional violations. In *Florida Prepaid*, the Court rejected Congress' rationale for enacting the Patent Remedy Act because expert testimony only established that the available state remedies were less convenient than the federal remedies, not that the state remedies were constitutionally inadequate.[201] Moreover, in *Kimel*, the Court found that the ADEA was unnecessary because state employees were protected by state age discrimination statutes and could recover damages from their state employers in almost every state.[202] Similarly, in *Garrett*, the Court highlighted that state laws existed to provide employed persons with disabilities an avenue of relief.[203] However, in *Hibbs*, the Court upheld the disputed provision of the FLMA after concluding that state law remedies were inadequate to address the identified pattern of constitutional rights violations.[204] The *Hibbs* Court particularly emphasized the state remedies' exclusiveness and their lack of coverage.[205]

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199 *Id*. at 738.

200 *Id*.

201 Fla. Prepaid Postsecondary Educ. Bd. v. College Sav. Bank, 527 U.S. 627, 644 (1999):

> The primary point made by these witnesses . . . was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent law. . . . Congress itself said nothing about the existence or adequacy of state remedies in the statute or in the Senate Report, and made only a few fleeting references to state remedies in the House Report, essentially repeating the testimony of the witnesses.

202 Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91–92 (2000) ("State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision.").

203 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001) ("[S]tate laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.").

204 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 733–34 (2003).

205 *Id*. The *Hibbs* Court reasoned:

> Furthermore, the dissent's statement that some States "had adopted some form of family-care leave" before the FMLA's enactment . . . glosses over important shortcomings of some state policies. First, seven States had childcare leave provisions that applied to women only. Indeed, Massachusetts required that notice of its leave provisions be posted only in "establishment[s] in which females are employed." These laws reinforced the very stereotypes that Congress sought to remedy through the FMLA. Second, 12 States provided their employees no family leave, beyond an initial childbirth or adoption, to care for a seriously ill child or family member. Third, many States provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs. Three States left the amount of leave time primarily in employers' hands. Congress could reasonably conclude that such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees that

iii. Targeting Government versus Private Behavior

Finally, the Court has considered whether a federal statute targets government or private conduct when assessing the statute's scope. Federal statutes that target private behavior exclusively are too sweeping under existing doctrine. For instance, in *Morrison*, the Court invalidated VAWA's federal civil remedy because it was aimed at private individuals who committed the criminal acts, not the discrimination by state officials that the Court agreed violated the Fourteenth Amendment.[206] To invalidate VAWA's federal civil remedy, the Court revisited *United States v. Harris*[207] and the *Civil Rights Cases*,[208] early Section 5 cases prior to *City of Boerne*, in which the Court invalidated federal laws on the grounds that they were directed exclusively against the actions of private persons.[209]

## V. THE SECTION 5 CONSTITUTIONAL DEFENSE OF THE MATTHEW SHEPARD ACT

This Part demonstrates that Congress has the constitutional authority under Section 5 of the Fourteenth Amendment to enact the Matthew Shepard Act. In *Tennessee v. Lane*, the Supreme Court affirmed Congress' authority to invoke its Section 5 enforcement power to pass federal legislation ensuring equal access to the courts for individuals with disabilities.[210] Based on this principle, I posit that it is legitimate for Congress to invoke its Section 5 power to expand federal bias crime legislation in order to ensure equal access to the courts for bias crime victims targeted because of sexual orientation, gender identity, gender, and disability. Therefore, Congress should invoke its Section 5 enforcement power when reintroducing the Act in subsequent sessions.

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> Congress sought to eliminate. Finally, four States provided leave only through administrative regulations or personnel policies, which Congress could reasonably conclude offered significantly less firm protection than a federal law. Against the above backdrop of limited state leave policies, no matter how generous petitioners' own may have been . . . Congress was justified in enacting the FMLA as remedial legislation." (internal citations omitted).

*Id*.

206 United States v. Morrison, 529 U.S. 598, 626 (2000) ("Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.").

207 106 U.S. 629 (1883). The *Morrison* Court stated:

> In *Harris*, the Court considered a challenge to § 2 of the Civil Rights Act of 1871. . . . We concluded that this law exceeded Congress' § 5 power because the law was directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers.

*Morrison*, 529 U.S. at 621 (quoting *Harris*, 106 U.S. at 640) (quotations omitted).

208 109 U.S. 3 (1883). The *Morrison* Court noted that "[w]e reached a similar conclusion in the *Civil Rights Cases*. . . . [W]e held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the § 5 enforcement power." *Morrison*, 529 U.S. at 621.

209 *Morrison*, 529 U.S. at 621–22.

210 541 U.S. 509, 533–34 (2004).

Part V.A focuses on the pattern of constitutional rights violations and posits that discriminatory stereotypes, resource constraints, and social skepticism of bias crime laws prevent bias crimes on the basis of sexual orientation, gender identity, gender, and disability from being investigated and prosecuted adequately. These factors consistently prevent bias crime cases from reaching the courts, and thus inhibit bias crime victims from receiving compensation for their crimes and permit bias crime perpetrators to get away with their crimes. Part V.B shows that the Court should not consider the Matthew Shepard Act as too sweeping because multiple provisions of the Act limit its scope to address situations where bias crime victims' rights of access to the courts are being deprived.

### A. The Pattern of Constitutional Rights Violations: Unequal Access to Courts

In *Kimel, Garrett*, *Hibbs*, and *Lane*, the Supreme Court affirmed that the standard of review attached to a classification or right influences the amount of findings that Congress must present to show a pattern of constitutional rights violations.[211] My Section 5 argument is based on the standard of review attached to the right of access to the courts, as opposed to the level of scrutiny afforded to sexual orientation, gender identity, gender, and disability classifications.[212] In *Lane*, the Court held that a right of access to the courts is a "basic constitutional guarantee"[213] and is afforded "more searching judicial review"[214] when infringed. Therefore, when evaluating whether a pattern of constitutional rights violations exists, the Court should give greater deference to congressional findings establishing that the right of access to the courts is burdened.

The following analysis demonstrates that if Congress invokes its Section 5 enforcement power to enact the Matthew Shepard Act, then it will be able to present extensive congressional findings demonstrating that bias crime victims targeted because of sexual orientation, gender identity, gender, and disability are deprived of their rights of access to the courts. Discriminatory stereotypes, resource constraints, and social skepticism

211 *See supra* note 151 and accompanying text.

212 Currently, sexual orientation, gender identity, and disability classifications only receive rational basis review. *See* Romer v. Evans, 517 U.S. 620, 635 (1996) (concluding that a Colorado constitutional amendment that banned sexual orientation antidiscrimination laws within the state failed rational basis review); Erik K. Ludwig, *Protecting Laws Designed to Remedy Anti-Gay Discrimination from Equal Protection Challenges: The Desirability of Rational Basis Scrutiny*, 8 U. PA. J. CONST. L. 513, 538 n. 145 (2006) (concluding that "[d]espite the fact that gender identity would arguably constitute sex and therefore make it a quasi-suspect classification subject to intermediate scrutiny, the courts that have considered transsexuality have applied rational basis review."); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (applying rational basis review to invalidate a municipality's denial of a permit to a home for people with mental disabilities). The standard of review for gender classifications is intermediate scrutiny. *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996).

213 Tennessee v. Lane, 541 U.S. 509, 522 (2004).

214 *Id*. at 522-23.

towards bias crime laws prevent bias crimes on the basis of sexual orientation, gender identity, gender, and disability from being adequately addressed. These factors prevent bias crime victims from reporting their crimes to the police, prevent police officers from classifying and reporting these crimes to prosecutors as bias crimes, and prevent prosecutors from prosecuting these crimes as bias crimes. Therefore, Congress will be able to satisfy its initial burden to identify a pattern of constitutional rights violations under the Court's current Section 5 jurisprudence.

1. Fear to Report Bias Crimes

Before police officers can become involved in a bias crime investigation, the victim must report the crime. Bias crimes are severely underreported.[215] One significant factor affecting underreporting is victims' fears that police officers will be unresponsive to the incident because they are biased against the groups to which they belong.[216]

Fears of police insensitivity are especially pertinent in cases involving bias crimes motivated by sexual orientation, gender identity, gender, and disability. The most frequently cited reason among victims of anti-LGBT violence is fear that reporting the incident will result in secondary victimization by the police.[217] Discriminatory stereotypes also prevent victims of gender-motivated violence from reporting bias crimes to the police.[218] Upon passing the Violence Against Women Act (VAWA), the Senate reported that "any person would think twice before reporting and prosecuting a crime if the police responded by demanding a polygraph exam, the prosecutor suggested that the victim had not complained promptly enough . . . and the judge announced to the jury at the end of the trial that the victim's testimony under oath should be viewed with suspicion."[219] Disability bias crimes are also severely underreported. Researchers posit that one reason influencing underreporting is a

215 Rubenstein, *supra* note 38, at 1219 ("There are a variety of reasons that hate crime victims might not report."); Cogan, *supra* note 38 at 179 ("[S]ocial science research shows that hate crimes are less likely to be reported to the police than random crimes."); FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 23 (Harvard Univ. Press 1999) (noting that many victims fail to report hate crimes "due to factors such as [the victim's entrenched] distrust of the police, language barriers, the fear of retaliation by the offender, and the fear of courting exposure").

216 *See*, *e.g.*, Steven Bennett Weisburd & Brian Levin, *"On the Basis of Sex": Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL'Y REV. 21, 26 (1994) (finding that reasons for failing to report bias crimes include shame, fear, distrust, embarrassment, belief that authorities are unsympathetic, and fear of "secondary trauma" from the legal system); *see also* Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L.L. L. REV. 387, 413–14 (1994) (citing as one reason why gays and lesbians are hesitant to report hate crimes is the resulting stigma that would result from exposing their sexual orientations).

217 Nolan & Akiyama, *supra* note 53 at 114; *see also* Winer, *supra* note 216, at 413–14 (positing that one reason why gays and lesbians are reluctant to report bias crimes is the stigma that would result from exposing their sexual orientations).

218 Weisburd & Levin, *supra* note 216, at 26 (listing the reasons for failing to report bias crimes as include shame, fear, distrust, embarrassment, the belief that authorities are unsympathetic, and fear of further victimization).

219 S. REP. NO. 103-138, at 44–45 (1993).

widespread perception among individuals with disabilities that reporting their crimes will be useless.[220] This perception is perpetuated by the fact that only one case has been successfully prosecuted as a disability bias crime in the United States.[221]

The Matthew Shepard Act will not eliminate all of the factors that cause bias crimes to be underreported. It is even possible that the Matthew Shepard Act will not influence victims to report their crimes. However, the Act has the potential to make two substantial improvements. First, the Matthew Shepard Act provides local and state authorities with financial and personnel assistance to help train officers to sensitively respond to all bias crime victims, and especially victims targeted because of sexual orientation, gender identity, gender, and disability.[222] Greater sensitivity training may increase the likelihood that bias crime victims will feel comfortable reporting their crimes. Second, the Matthew Shepard Act contains a provision allowing the federal government to become involved in bias crime investigations and prosecutions if "the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence."[223] Although state and local governments will continue to investigate and prosecute the majority of bias crimes under the Matthew Shepard Act,[224] this provision may increase the likelihood that bias crime victims will report their crimes

220 Daniel D. Sorensen, *Invisible Victims,* Aug. 9, 2002, http://www.aspires-relationships.com/the_invisible_victims.pdf:

> [T]here is evidence that crimes against people with substantial disabilities are often not reported (result in a crime report). . . . I estimate that less than 4.5% of serious crimes committed against people with disabilities in California have been reported compared to 44% for the general population. This is based on an analysis of California's Adult Protective System data compared to National Crime Victimization Survey data.

*See also* Press Release, Univ. of Cal. Berkeley, Kathleen Maclay, Flawed FBI reporting system undercounts disability hate crimes, (Dec. 18, 2002), *available at* http://www.berkeley.edu/news/media/releases/2002/12/18_crimes.html (last visited Sept. 4, 2008) ("It's no surprise that hate crimes are underreported, but the disparity between reporting disability hate crimes and other crimes is staggering.") (quoting Jack Glaser, Assistant Professor, Univ. of Cal. Berkeley Goldman School of Pub. Pol'y).

221 Mark Sherry, *Don't Ask, Tell or Respond: Silent Acceptance of Disability Hate Crimes*, Jan. 8, 2003, http://dawn.thot.net/disability_hate_crimes.html. According to the article:

> There is a notoriously low rate of prosecution and conviction for hate crimes. In fact, only one disability hate crime has ever been successfully prosecuted. . . . . On January 30, 1999, Eric Krochmaluk, a cognitively disabled man from Middletown NJ [sic], was kidnapped, choked, beaten, burned with cigarettes, taped to a chair, his eyebrows were shaved, and he was then abandoned in a forest. Eight people were subsequently indicted for this hate crime; the first prosecution of a disability hate crime in America.

222 Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. §§ 3(b), 4, 5 (2007); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. §§ 4(b), 5, 6 (2007). A detailed analysis of the insensitivity that bias crime victims experience from law enforcement officials and prosecutors is provided in Part III(A)(ii)–(iii).

223 H.R. 1592, 110th Cong. § 6 (2007) (proposing amendments to 18 U.S.C. § 249(b)(2)(D)); S. 1105, 110th Cong. § 7 (2007) (same).

224 H.R. REP. 110-113, at 7 (2007) ("It is important to emphasize that State and local authorities currently investigate and prosecute the overwhelming majority of hate crimes and will continue to do so under this legislation.").

because unresponsive state and local enforcement actions and judicial decisions will not go unchecked.

2. Failure to Classify Crimes as Bias Crimes

The mere existence of state and local bias crime laws does not ensure that the laws will be adequately implemented. Enforcement officers play important roles in responding to bias crime incidents because they control evidence collection and initially interact with victims, witnesses, and perpetrators.[225] Enforcement officers are also responsible for referring bias crime cases to prosecutors.[226] Even in California, the first state to enact a state bias crime law,[227] police officials refer substantially fewer bias crime cases to prosecutors than are reported. In 2006, only 363 bias crimes were referred to prosecutors out of 1,306 total reported bias crimes in California.[228] The ratio of cases referred to prosecutors by police officials to the number of reported bias crimes in California was similar from 2000 through 2005.[229] Researchers have broadly concluded that the implementation of bias crime laws depend on subjective factors, such as "the attitudes, beliefs, and practices of individual officers, the perceived tractability of the problem, police funding and training, and public opposition to hate crime policies."[230]

Personal skepticism towards bias crimes is one factor that has influenced enforcement officers not to classify crimes as bias crimes. Many officers refuse to classify crimes as bias crimes because they do not believe that bias crimes deserve special treatment.[231] Researchers have also found that police officers will not classify less violent crimes, such as simple assault or intimidation, as bias crimes because they believe that the incidents "can become so high-profile that they would have preferred not to

225 AM. PROSECUTOR'S RESEARCH INST., A LOCAL PROSECUTOR'S GUIDE FOR RESPONDING TO HATE CRIMES 15 (2000), *available at* http://www.ndaa.org/pdf/hate_crimes.pdf (last checked Sept. 2, 2008) ("Local law enforcement agencies play a critical role in responses to hate crimes. As the responding agency to allegations of bias-motivated crimes, their officers and victim/witness personnel can document overt signs of hate motivation and set the tone with victims and witness that can impact their cooperation.").

226 Franklin, *supra* note 54, at 155 ("In terms of effective enforcement, probably the most important decisions are those made at the outset by investigating officers, who decide whether to categorize a crime as bias driven."). *See generally* Nolan & Akiyama, *supra* note 53.

227 Cogan, *supra* note 38, at 173.

228 Cal. Dep't Just., Hate Crime in California, 14 (2006), *available at* http://ag.ca.gov/cjsc/publications/hatecrimes/hc06/preface06.pdf.

229 *See*, *generally*, Publications, California Department of Justice - Criminal Justice Statistics Center, HATE CRIMES IN CALIFORNIA, *available at* http://ag.ca.gov/cjsc/pubs.php#hate (collecting reports from 1995 through 2007).

230 Franklin, *supra* note 54, at 156.

231 Boyd et al., *supra* note 53, at 827 ("A few officers expressed the belief that hate crimes should not be considered crimes at all. They are just 'human nature' or the normal expression of hostility among people living in crowded conditions."); Nolan & Akiyama, *supra* note 53, at 114 ("Other officers have indicated that they personally do not believe that it is appropriate to treat hate crimes as something special.").

have made such a distinction."[232] Many officers have reported that they would be overwhelmed by "trivial" complaints if less serious crimes were classified as bias crimes, which would compromise their ability to respond to more "serious" crimes.[233] These attitudes have led to only a narrow subset of bias crimes to be pursued as bias crimes, perpetuating the erroneous belief that bias crimes occur infrequently.[234]

Resource constraints have also influenced enforcement officers to avoid classifying and reporting crimes as bias crimes. Bias crimes are incredibly burdensome to investigate[235] because of the high evidentiary burden to prove a bias motive.[236] These investigative difficulties cause officers to only investigate underlying crimes, such as assault or murder, but not the parallel bias crimes. Moreover, many enforcement agencies that claim to have special units focusing on bias crime investigations do not provide officers with specialized training.[237] Consequently, police officers may lack the skills to recognize that a particular crime is a bias crime. Ambiguities may also arise during investigations that make it difficult for officers to discern whether crimes are bias crimes.[238] For example, evidence of provocation might complicate whether a crime should be classified as a bias crime.[239]

Public opposition to bias crime laws also deters police officers from classifying or reporting a crime as a bias crime.[240] Community norms

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232 Nolan & Akiyama, *supra* note 53, at 114.

233 Boyd et al., *supra* note 53, at 826.

234 *Id*. at 827.

235 *Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government: Hearing on S. 622 Before the Senate Comm. on the Judiciary*, 106th Cong. 44 (1999) (statement of Burt Neuborne) (acknowledging that inadequate local resources can "make it difficult, if not impossible, to deploy the substantial resources needed to investigate, arrest and prosecute a serious hate crime.").

236 Boyd et al., *supra* note 53, at 839:

> On several occasions, the detective expressed reluctance to file cases with the city attorney (CA) or the district attorney (DA) unless the case was "a good one." . . . [T]he detective indicated that he considered filing ambiguous or questionable cases a "waste of time" because of the CA/DA's orientation to them. Thus, his emphasis on the more "visible" characteristics of motive may reflect his desire to file only cases which he believes stand a chance of success in the courts.

*See also* Nolan & Akiyama, *supra* note 53, at 114 ("[S]ome law enforcement agencies have attributed their lack of participation [in federal hate crime data collection efforts] to insufficient resources.").

237 Franklin, *supra* note 54, at 156.

238 Boyd et al., *supra* note 53, at 831 ("[A] hate crime, by virtue of its definition . . . places additional interpretive "burdens" on the investigating detective: Its special definitional character, centered on the motive of the perpetrator, seemingly requires the detective to assume an active role in determining the perpetrator's motive for acting.").

239 Susan E. Martin, "*A Cross-Burning is Not Just An Arson": Police Social Construction of Hate Crimes in Baltimore County*." 33 CRIMINOLOGY 303, 320 (1995).

240 Franklin, *supra* note 54, at 155 (positing that local politics is one factor that influences local law enforcement's decision to categorize bias crimes); *id*. at 156 (positing that "public opposition to hate crime policies" is one factor which influences the local implementation of hate crime laws); Nolan & Akiyama, *supra* note 53, at 115 (noting that the factors that encourage participation in local law enforcement bias crime reporting include social forces within the local law enforcement organization—resources, policies, and organizational culture—and forces outside the organization including the

against bias crime laws can influence witnesses of bias crimes to refuse to come forward.[241] Moreover, public opposition can influence police officers not to investigate the case as thoroughly, or can entirely prevent officers from investigating incidents as bias crime cases.

Police officers' personal skepticism, discrimination, resource constraints, and public opposition to bias crime laws has especially affected state and local enforcement agencies' treatments of crimes motivated by sexual orientation, gender identity, gender, and disability. Lesbian, gay, bisexual, and transgender (LGBT) bias crime victims often avoid reporting their crimes to the police in fear of secondary victimization by homophobic officers.[242] Some LGBT victims are able to obtain additional support from LGBT nonprofit organizations to help them interact with police personnel though the investigation process.[243] However, these organizations provide limited support and are often located only in urban areas[244] that have reputations for being better culturally equipped to respond sensitively to anti-LGBT bias crime incidents.

In passing the Violence Against Women Act (VAWA), Congress presented numerous findings supporting that discriminatory stereotypes against victims of gender-motivated violence affect the investigations of gender-motivated crimes.[245] Congress noted that police may refuse to take reports, and even if reports are filed, only 40 percent of those cases will result in an arrest.[246] Moreover, police officers often question victims' credibility. The police officers may require women to

> have physical injuries; to tell a consistent story; to be willing to take a lie detector test, to not have waited for more than 48 hours before reporting the incident, to not have engaged in premarital or extramarital sex, to have had no

political climate, local laws, or social norms.

241 Sherry, *supra* note 221:

> Community resistance may mean that witnesses are not prepared to provide supportive evidence and the case cannot be substantiated. The literature on racist and anti-gay hate crimes is replete with examples of community resistance to police investigations. . . Where communities support the victimization process, witnesses can refuse to come forward and can sabotage the investigative process.

242 *See supra* note 217 and accompanying text.

243 For example, Gay & Lesbian Advocates & Defenders, the main LGBT legal advocacy organization in New England, has a legal infoline that provides legal assistance to victims of anti-LGBT violence or harassment. Gay & Lesbian Advocates & Defenders, Glad's Legal Infoline- *How Can We Help?*, http://www.glad.org/infoline (last visited Sept. 2, 2008).

244 For example, the Los Angeles Gay & Lesbian Center's Anti-Violence project provides support to LGBT bias crime victims to report a bias crime or obtain victim assistance. L.A. Gay & Lesbian Center, Services and Programs, Hate Crime Victim Assistance, http://www.lagaycenter.org/site/PageServer?pagename=Anti_Violence_Project (last visited Sept. 2, 2008). Other examples of urban anti-violence projects include the New York City Gay & Lesbian Anti-Violence Project, http://www.avp.org/avpmenu.htm (last visited Sept. 2, 2008) and Chicago's Anti-Violence Project, http://www.centeronhalsted.org/prog_av.html (last visited Sept. 2, 2008).

245 *See generally* S. REP. NO. 103-138, at 44–47 (1993).

246 *Id*. at 42.

> previous social contact with her assailant, and not to have reached the location of the rape voluntarily.[247]

If the officers find the victims to be incredible, their crimes will not be investigated or reported as bias crimes.

Although more research needs to be performed, it is also possible that police officers are not categorizing gender-motivated bias crimes as bias crimes given the relatively new status of gender as a protected category in bias crime law. Studies show that prosecutors are insufficiently informed about gender bias crimes and often attribute violence against women to motivations other than bias.[248] If these perceptions are held by prosecutors, then it is highly probable that they are also held by enforcement officers who investigate bias crimes.

Unique difficulties also arise during the investigations of disability bias crimes. Many police officers underreport and fail to investigate disability bias crimes because they believe that people with disabilities are attacked because of vulnerability, which these officers view as different from bias. Many police officers also lack special training to interact sensitively and adequately with disability bias crime victims.[249] Moreover, the communicative and cognitive difficulties of many disability bias crime victims have perpetuated the unfounded assumption among enforcement agencies that disability bias crime victims are categorically incompetent witnesses.[250] Finally, inconsistent definitions of "disability" may also affect whether police officers classify and report crimes to prosecutors as disability bias crimes.[251]

The Matthew Shepard Act can substantially eliminate state and local failures to classify and to investigate bias crimes because of resource constraints. Currently, the federal government is authorized to become involved in the investigation of bias crimes only if the victims were engaged in federally protected activities when the crimes occurred.[252] The Matthew Shepard Act changes this requirement and permits the federal government to provide financial and personnel assistance to state and local

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247 *Id*. at 45–46.

248 McPhail & DiNitto, *supra* note 55, at 1162.

249 Ryken Grattet & Valerie Jenness, *Examining the Boundaries of Hate Crime Law: Disabilities and the "Dilemma of Difference,"* 91 J. CRIM. L. & CRIMINOLOGY, 653, 678 (2001) ("[P]olice training publications and curriculum at federal, state, and local level tend to discuss disability-based hate crime only infrequently, if at all. . . . [D]isability-based hate crime remains largely invisible to front-line law enforcers, who tend to focus mostly on race, religion, sexual orientation, and nationality."); Sherry, *supra* note 221 ("Not all impairments are visible, and the officers investigating an incidents may not have high levels of disability awareness, so they may not be able to recognise [sic] certain invisible impairments and may not fully investigate some possible cases of disability discrimination."); Sorensen, *supra* note 220, at 5.

250 Sorensen, *supra* note 220, at 5.

251 Sherry, *supra* note 221 (acknowledging that "because of the fact that there is no consistency in the definitions of disability used, the reporting of disability may be inconsistent.").

252 18 U.S.C. § 245 (2000). For a list of the six federally protected activities see text accompanying *supra* note 5.

authorities regardless of whether the victim was engaged in a federally protected activity.[253] The Act also allows for the federal government to become involved in bias crime investigations if state or local authorities consent or seek the federal government's aid to investigate bias crimes because of resource constraints.[254] Finally, the Act authorizes the allocation of funds to award grants to state and local governments to institute programs designed to combat bias crimes, including programs designed to train officers in identifying, investigating, and preventing bias crimes.[255]

It is less clear whether the Matthew Shepard Act will have a substantial affect on state and local officers' personal skepticism towards bias crimes. But the Act is a step in the right direction. By allocating funds and personnel to help train state and local authorities to identify, investigate, and prevent bias crimes,[256] the Act may counteract officers' misconceptions and complete ignorance of bias crimes and their effects. Moreover, the Act's provision permitting the federal government to become involved if state and local charges clearly fail to satisfy the federal government's interest in eradicating bias-motivated violence makes it possible for bias crime victims to obtain legal compensation despite local and state authorities' personal biases.[257]

3. Failure to Prosecute Bias Crimes

Even when victims report bias crimes, and enforcement officers investigate and refer the crimes to prosecutors, many prosecutors decide not to prosecute them as bias crimes. One reason influencing prosecutors' decisions is the high evidentiary burden to prove a bias motive.[258] Evidentiary ambiguities also prevent prosecutors from prosecuting crimes as bias crimes. For instance, if the only evidence to prove bias motive is a racist, homophobic, or sexist epithet, then the prosecutor may conclude or believe that a jury or judge will conclude that the incident was motivated by reasons other than bias towards the victim because of race, sexual orientation, gender identity, or gender.[259] Evidentiary ambiguities and the high burden to prove a bias motive especially deter prosecutors from prosecuting bias crimes given the pressure imposed upon them to lighten their heavy case loads.[260] Although more research needs to be done, some

253 Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 4(a) (2007); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act, S. 1105, 110th Cong. § 4(a) (2007).

254 H.R. 1592, § 6 (proposing changes to 18 U.S.C. 249(b)(2)(B)); S. 1105, § 7 (same).

255 H.R. 1592, § 4(a); S. 1105, § 5(a).

256 *See* H.R. 1592, § 4(a); S. 1105, § 5(a).

257 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(2)(D); S. 1105, § 7 (same).

258 Franklin, *supra* note 54, at 157 ("One of the major constraints faced by district attorneys . . .is the inherent difficulty in proving hatred or bias as a primary motivation.").

259 *Id*.

260 Boyd et al., *supra* note 53, at 839:

> On several occasions, the detective expressed reluctance to file cases with the city attorney

researchers have found that prosecutors' personal skepticism towards bias crime laws may also influence their decisions not to prosecute bias crimes.[261]

To date, no study has comprehensively addressed the factors that influence prosecutors not to charge crimes motivated by sexual orientation or gender identity as bias crimes in the United States. More research needs to be performed on this issue. In passing the Violence Against Women Act (VAWA), however, Congress presented significant findings supporting the idea that prosecutors' victim-blaming attitudes and credibility doubts often result in the inadequate prosecution of gender-motivated bias crimes.[262] Congress also noted that "[j]udges and juries expect more corroboration in sexual assault cases than in other cases of a similar class even when there is no such legal requirement."[263] This high burden may deter prosecutors from prosecuting a crime as a gender-motivated bias crime. Finally, studies indicate that prosecutors are insufficiently informed about gender-motivated bias crimes and often attribute violence against women to motivations of power and control rather than bias.[264] These misconceptions affect whether prosecutors view gender-motivated crimes as bias crimes.

Disability bias crime prosecutions are disproportionately low. Even though an average of approximately seventy-three disability bias crimes were reported to the FBI from 2004 through 2006,[265] only one case in history has successfully been tried as a disability bias crime.[266] Possible explanations for this disparity include prosecutors' views that disability bias crime victims are targeted because of their vulnerability and not because of bias.[267] Moreover, unwarranted assumptions that disability bias

> (CA) or the district attorney (DA) unless the case was "a good one." . . . [T]he detective indicated that he considered filing ambiguous or questionable cases a "waste of time" because of the CA/DAs' orientation to them. Thus, his emphasis on the more "visible" characteristics of motive may reflect his desire to file only cases which he believes stand a chance of success in the courts. *Id*.

261 For an example of how personal perspectives influence prosecutors' decisions to prosecute gender-motivated crimes as bias crimes, see generally McPhail & DiNitto, *supra* note 55.

262 S. REP. NO. 103-138, at 44–47 (1993).

263 *Id*. at 45.

264 McPhail & DiNitto, *supra* note 55, at 1172.

265 In 2004, seventy-one disability bias crimes were reported to the FBI. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION: HATE CRIME STATISTICS 2004, http://www.fbi.gov/ucr/hc2004/section1.htm (last visited Aug. 20, 2008). In 2005, fifty-three disability bias crimes were reported to the FBI. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION: HATE CRIME STATISTICS 2005, http://www.fbi.gov/ucr/hc2005/incidentsoffenses.htm (last visited Aug. 20, 2008). In 2006, ninety-four disability bias crimes were reported to the FBI. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION: HATE CRIME STATISTICS 2006, http://www.fbi.gov/ucr/hc2006/incidents.html (last visited Aug. 20, 2008).

266 *See supra* note 221 and accompanying text.

267 Sherry, *supra* note 221, at 15 (citing that one of the reasons that influences prosecutors' decisions not to prosecute disability bias crimes as bias crimes is the mislabeling of disability bias crimes as abuse).

crime victims are categorically incompetent witnesses may also affect prosecutors' decision to prosecute disability bias crimes.[268]

Although the Matthew Shepard Act will not eliminate state and local prosecutorial biases, it is a substantial improvement from the status quo. First, the Act provides for a grant program to train state and local officials to prosecute bias crimes.[269] The Act also permits states and local prosecutors to seek or consent to the federal government's prosecutorial assistance when burdened by resource constraints.[270] Moreover, the Act's provision permitting the federal government to become involved if state and local charges clearly do not satisfy the Federal interest in eradicating bias-motivated violence makes it possible for bias crime victims to obtain legal compensation in extreme cases, despite state and local prosecutors' personal biases.[271]

### B. The Limited Scope of the Matthew Shepard Act

To be considered valid Section 5 legislation, *Morrison* affirms that a federal law must not be too sweeping in scope, even if congressional findings establish an existing of a pattern of constitutional rights violations.[272] Part IV.B.2 presented three factors that the Court balances to evaluate whether a law is too sweeping.[273] First, the Court evaluates the extent to which the law is limited to situations involving unconstitutional behavior. Second, the Court evaluates whether state remedies are adequate and present throughout the States. Third, the Court evaluates whether the law targets the actions of states or private actors. These factors guide the following analysis, which establishes that the Matthew Shepard Act is not too sweeping and is thus a valid piece of Section 5 legislation.

#### 1. The Matthew Shepard Act's Limited Focus on Unconstitutional Behavior

Unlike the sweeping laws at issue in *Florida Prepaid* and *Morrison*, the Matthew Shepard Act focuses on addressing resource limitations and discriminatory biases that unjustly prevent bias crime victims targeted because of sexual orientation, gender identity, gender, and disability from having access to the courts.[274] Section 4 of the Act allows the federal government to aid state and local governments in investigating and prosecuting bias crimes when local and state governments specifically

268 Sorensen, *supra* note 220, at 5.

269 Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 3(b) (2007); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 4(b) (2007).

270 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(2)(B)–(C)); S. 1105, § 7 (same).

271 H.R. 1592, § 6 (proposing changes to 249(b)(2)(D)); S. 1105, § 7 (same).

272 United States v. Morrison, 529 U.S. 598, 614 (2000).

273 *See* discussion *supra* Part V.B.2.

274 The textual citations in this section refer to the Senate's version of the Matthew Shepard Act, and are accompanied by a parallel citation to the House's version of the Act.

request assistance.[275] Section 4 also allocates federal funds for state and local governments to compensate for the extraordinary expenses associated with the investigation and prosecution of bias crimes.[276] Moreover, Section 6 authorizes the federal government to grant additional personnel to assist state and local governments to investigate and to prosecute bias crimes.[277] Because these provisions merely provide assistance when requested by state and local governments, they do not substantively change state or local law guarantees and are thus not invalid under the Supreme Court's current Section 5 framework.

Section 249 of the Matthew Shepard Act is more constitutionally suspect. This section expands the protected characteristics of federal bias crime legislation to include sexual orientation, gender identity, gender, and disability.[278] Section 249 also amends 18 U.S.C. section 245 by allowing the federal government to become involved in bias crime investigations and prosecutions even if the victims are not engaged in federally protected activities at the time of the incidents.[279]

Congressional representatives opposing the Matthew Shepard Act argue that the bill does not adequately target unconstitutional behavior because it "open[s] the door to criminal investigations of an offender's thoughts and beliefs about his or her victims."[280] These dissenting statements are rooted in the belief that punishing bias crimes is inconsistent with First Amendment principles. This view ignores the Court's holding in *Wisconsin v. Mitchell*,[281] which affirmed that bias crime penalty-enhancement statutes are consistent with the First Amendment because these statutes target conduct and not expression.[282]

Congressional representatives also argue that the Matthew Shepard Act "raises significant federalism concerns"[283] because the law "criminalizes acts that have long been regulated primarily by the states."[284] More specifically, they posit that the Act is too sweeping because it opens the floodgates to allow the federal government to become involved in all bias crime investigations and prosecutions. These federalism concerns are also invalid. Section 249(b) contains a "certification requirement" that substantially limits the scope of cases that the federal government is permitted to investigate or to prosecute.[285] Before the federal government

275 H.R. 1592, § 3; S. 1105, § 4.
276 H.R. 1592, § 3; S. 1105, § 4.
277 H.R. 1592, § 5; S. 1105, § 6.
278 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(a)(2)); S. 1105, § 7 (same).
279 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(a)(2)); S. 1105, § 7 (same).
280 H.R. REP. NO. 110-113, at 39 (2007).
281 Wisconsin v. Mitchell, 508 U.S. 476 (1993).
282 *Id*. at 484 ("a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.").
283 H.R. REP. NO. 110-113, at 41 (2007).
284 *Id*.
285 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)), S. 1105, § 7 (same).

may become involved, it must have "reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person was a motivating factor underlying the alleged conduct of the defendant."[286] A certified individual from the federal government must then consult with a state or local law enforcement official to determine whether the federal government's involvement is warranted.[287] The federal government may only become involved if (1) "the State does not have jurisdiction or does not intend to exercise jurisdiction;" (2) "the State has requested that the Federal Government assume jurisdiction;" (3) "the State does not object to the Federal Government assuming jurisdiction;" or (4) "the verdict or sentence obtained pursuant to State charges" did not sufficiently address the federal interest in preventing bias-motivated violence.[288]

These four criteria are narrowly tailored to the scenarios where bias crime victims would be deprived of their right of access to the courts if the federal government was unable to become involved in bias crime investigations and prosecutions. In fact, upon passing the Matthew Shepard Act, the House of Representatives explicitly conceded that "[s]tate and local authorities currently investigate and prosecute the overwhelming majority of [bias] crimes and will continue to do so under this legislation."[289] Like the legislation narrowly targeted "at the faultline between work and family" in *Hibbs*,[290] the Matthew Shepard Act should not be deemed as too sweeping for targeting constitutional behavior.

2. The Inadequacy of State Bias Crime Laws

In *Kimel*[291] and *Garrett*,[292] the Court held that the enacted federal laws were too sweeping because state remedies were adequate and present throughout the states to address state unconstitutional behavior. Conversely, in *Hibbs*,[293] the Court held that the inadequacy and lack of state remedies supported the notion that federal law was necessary, and thus not overly sweeping.

Virtually every state has some form of bias crime law.[294] Critics of the Matthew Shepard Act have highlighted that the existence of state bias laws renders the bill unnecessary. For instance, Congressional dissenters of the Act noted that "[h]ate-crime laws are unnecessary: [T]he underlying offense is already fully and aggressively prosecuted in almost all

286 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(1)); S. 1105, § 7 (same).
287 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(2)); S. 1105, § 7 (same).
288 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(2)); S. 1105, § 7 (same).
289 H.R. REP. NO. 110-113, at 7 (2007).
290 Nev. Dep't Human Res. v. Hibbs, 538 U.S. 721, 738–39 (2003). This is the precise area where state unconstitutional behavior "has been and remains [the] strongest." *Id*. at 738.
291 Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).
292 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
293 *Hibbs*, 538 U.S. 721 (2003).
294 *See supra* note 46 and accompanying text.

[s]tates."[295] The dissenters further contended that there was "zero evidence that States are not fully prosecuting violent crimes involving hate."[296] In light of the Court's current Section 5 framework, critics could posit that the existence of state bias crime laws in all states supports that the Matthew Shepard Act is too sweeping.

However, these dissenters focus on the overall number of state bias crime laws without considering the differences in the groups that are afforded protection under these laws. The Matthew Shepard Act specifically amends and expands federal bias crime law to include sexual orientation, gender identity, gender, and disability. Many states do not include these characteristics in their bias crime laws.[297] Consequently, many bias crime victims who are targeted on the basis of sexual orientation, gender identity, gender, or disability cannot receive compensation, nor can their perpetrators be punished for committing bias crimes. Therefore, the inadequacy of state laws to protect against bias crimes motivated specifically by sexual orientation, gender identity, gender, and disability demonstrates that the Matthew Shepard Act is necessary and not overly sweeping.

3. The Matthew Shepard Act's Focus on State Action

In *Morrison*, the Court invalidated the civil remedy provision of the VAWA because it targeted the behavior of private rather than state actors.[298] Given that the Matthew Shepard Act provides for the increased punishment of bias crime perpetrators, and does not exclusively punish states and localities for failing to investigate and prosecute bias crimes, legislative opponents of the Matthew Shepard Act contend that the Act is an invalid exercise of Congress' Section 5 enforcement power.[299]

However, unlike the civil remedy of VAWA, Sections 4 through 6 of the Matthew Shepard Act focus on assisting states and localities to investigate and prosecute bias crimes only when they seek the federal government's assistance.[300] The purpose of these provisions is to aid states and localities, not to punish private behavior. Therefore, these provisions are not invalid under *Morrison* for targeting private behavior.

The only portion of the Matthew Shepard Act that is constitutionally suspect for targeting private behavior is Section 249, which expands the

295 H.R. REP. NO. 110-113, at 45 (2007).

296 *Id*. (internal quotations omitted).

297 *See supra* notes 47-51 and accompanying text.

298 United States v. Morrison, 529 U.S. 598, 626 (2000).

299 The Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6 (2007) (proposing changes to 18 U.S.C. § 249(a)(2)) (dissenting views) ("The 14th amendment prohibits the States from denying equal protection of the law, due process or the privileges and immunities of U.S. citizenship…[The Fourteenth Amendment] extends only to state action and do[es] not encompass the actions of private persons. Hate Crimes by private persons are outside the scope of these amendments.").

300 H.R. 1592, § 3–5; S. 1105, § 3–5.

federal government's authority to become involved in investigating and prosecuting bias crimes motivated by sexual orientation, gender identity, gender, or disability regardless of whether the victims were engaged in a federally protected activity at the time of the crime.[301] Section 249 specifically punishes individuals for committing bias crimes, not state and local authorities for failing to investigate or to prosecute bias crimes.[302] Therefore, bias crime law proponents may have difficulty establishing that Section 249 does not impermissibly target private behavior.

However, a close reading of *Morrison* highlights an important distinction between Section 249 and VAWA's civil remedy. In *Morrison*, Congress did not limit the civil provision's application to areas of behavior or localities where state unconstitutional behavior was at issue.[303] The provision allowed the federal government to become involved regardless of whether a particular state was adequately punishing gender-motivated violence.[304] The Court infered from the broad scope of the provision that "it [was] directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."[305]

In contrast, the Matthew Shepard Act's proposed changes to the punishments in Section 249(a) can only be imposed when the "certification requirement" of Section 249(b) is met.[306] In its congressional findings, the House of Representatives stated explicitly that the Matthew Shepard Act should only be applied "[i]n limited circumstances . . . for example, where the State does not have an appropriate statute, or otherwise declines to investigate or prosecute; where the State requests that the Federal Government assume jurisdiction; or where actions by State and local law enforcement officials leave demonstratively unvindicated the Federal interest in eradicating bias-motivated violence."[307] Therefore, when Sections 249(a) and (b) are read in conjunction, the expanded punishments in Section 249(a) should not be interpreted as targeting the criminal acts of private individuals. Rather, these punishments target the unconstitutional behaviors of states and localities that prevent bias crime victims from having equal access to the courts.

## CONCLUSION

Congressional Democrats' recent move to drop the Matthew Shepard Act from the Department of Defense authorization bill was unfortunate. But with Democrats now in control of Congress and the election of President Barack Obama, there is renewed hope that the Matthew Shepard

301 H.R. 1592, § 6 (proposing changes to 18 U.S.C § 249); S. 1105, § 7 (same).
302 H.R. 1592, § 6 (proposing changes to 18 U.S.C § 249); S. 1105, § 7 (same).
303 *Morrison*, 529 U.S. at 626–27 (2000).
304 *Id*.
305 *Id*. at 626.
306 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)); S. 1105, § 7 (same).
307 H.R. REP. NO. 110-113, at 7 (2007).

Act will be enacted during the next four years. The enactment of the Matthew Shepard Act will be a historic point in the bias crime law movement, but this important piece of legislation will not go unchallenged.

The Matthew Shepard Act's previous congressional defeat gives Congress a new opportunity to explore and to put forth alternative constitutional justifications for the Act when it is introduced in a subsequent session. Congress must take advantage of this opportunity in order to prevent the Matthew Shepard Act from being defeated legally. In this Article, I have advocated that one alternative constitutional justification for the Matthew Shepard Act is Section 5 of the Fourteenth Amendment. Bias crime victims who are targeted on the basis of sexual orientation, gender identity, gender, and disability face unique difficulties in law enforcement and judicial systems that prevent them from having access to the courts. Congress recognized similar difficulties for victims of gender-motivated violence when it exercised its Section 5 enforcement power to enact VAWA's federal civil remedy, and the Supreme Court has recognized that ensuring equal access to the courts is a legitimate goal of Section 5 legislation. Therefore, in addition to its commerce power, I urge Congress to expand its current constitutional justification for the Matthew Shepard Act by invoking its Section 5 enforcement power under the Fourteenth Amendment.