Testimony of

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"The Matthew Shepard Hate Crimes Prevention Act of 2009"

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My name is Brian Walsh, and I am Senior Legal Research Fellow in The Heritage Foundation's Center for Legal and Judicial Studies. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

Thank you Chairman Leahy, Ranking Member Sessions, and Members of the Committee for inviting me here today to address the principles and provisions of the Matthew Shepard Hate Crimes Prevention Act of 2009 (S. 909; "HCPA"). Criminal justice reform is a central focus of my research and reform work at the Heritage Foundation. Over the past three years, I have worked with hundreds of individuals and scores of organizations across the political spectrum to build consensus for principled, non-partisan criminal justice reform. My colleagues, allies, and I have gathered substantial evidence that the criminal justice system is in great need of principled reform, particularly at the federal level, and that this reform should not be driven by partisan politics.

Unfortunately, HCPA fails to measure up to this standard and would substantially undermine constitutional federalism and the high regard in which the American public should hold federal criminal law. There are three main problems with the HCPA.

1. The Act's new "hate crimes" offenses are far broader and more amorphous than any properly defined criminal offense should be, and they thus invite prosecutorial abuse, politically motivated prosecutions, and related injustices.

2. The Act's "hate crimes" offenses violate constitutional federalism by asserting federal law-enforcement power to police truly local conduct over which the Constitution has reserved sole authority to the 50 states.

3. The Act's "hate crimes" offenses would be superfluous and likely to be counterproductive, for nearly all states have tough "hate crimes" laws and the violent conduct underlying the Act's "hate crimes" offenses has always been criminalized in all 50 states.

For these reasons, Congress should be exceedingly wary of the unnecessary, dangerously broad, and unconstitutional "hate crimes" offenses in the Matthew Shepard Hate Crimes Prevention Act.

Foundational Principles of Criminal Law

As Harvard law professor Herbert Wechsler observed half a century ago, criminal punishment is the greatest power that government routinely uses against its own citizens. Criminal justice thus is far too important to allow it to fall subject to partisan political interests. Rather, it should be governed and, whenever necessary, reformed according to several sound principles that are widely acknowledged and understood by the American people. Such principles include the following:

? Because criminal punishment represents government's greatest application of power against its own citizens and is therefore especially susceptible to misuse and abuse, its scope and application should be carefully circumscribed.

? Regardless of how displeased or angry some (or even a majority of) Americans might be about certain wrongful conduct, every criminal offense and every authorization of criminal enforcement power should be restricted by the text and plain meaning of the Constitution as well as our long-established criminal-law precedents.

? Legislators and government officials must endeavor to ensure that the criminal law is worthy of the highest respect and avoid enacting laws and bringing cases that will undermine that respect.

? One of the criminal law's fundamental qualities for engendering the respect of the people it governs is fairness; an unfair criminal law, including one that is tailored to favor one set or group of Americans over another, is all but certain to do substantial damage to Americans' respect for criminal law.

Despite Americans' almost universal assent to the principles above and others like them, criminal justice policy has become increasingly politicized over the past few decades, including in Congress. This has been caused by at least three major factors. First, the American people's strongly negative reaction to the increase in crime in the 1960s and 1970s made it politically popular to be "tough on crime," with harsher criminal offenses and greater punishment indicating an elected official's bona fides. On average, candidates for election and reelection who are "tough on crime" can be expected to fare better at the polls than those candidates who are (or who are perceived to be) "soft on crime."

Second, efforts to combat this trend were in the past bogged down in constituent and interest-group politics, with those engaged in criminal-justice reform advocating for offenders who have committed certain categories of crime rather than for even-handed, across-the-board reforms that benefit all Americans. Some reform advocates and their constituents purposefully and consciously allied themselves with political parties.

Third, influential state and local law enforcement officials have increasingly turned to Washington to provide federal funding for local law enforcement operations. This hunt for federal funding skews the priorities of all state and local law enforcement officials and generally results in their placing undue emphasis on those issues and problems that receive national attention, rather than those issues and problems that pose the greatest risks and problems to local communities.

Today, a large coalition is working to reverse this politicization of criminal justice policy. My criminal-justice reform allies and I have found among members of both major political parties at the federal, state, and local levels a growing recognition of the need for reform that is both principled and non-partisan. Before the November election, for example, a coalition of groups spanning the political spectrum and working with key Members of the House of Representatives reached substantial consensus on pursuing hearings and reform proposals for federal criminal justice reform. I am hopeful that the non-partisan spirit in which we worked will establish a foundation for sound, lasting reform as well as for greater trust and cooperation among reform-minded advocates and elected officials.

A Sweeping Scope Invites Abuses

HCPA undermines such efforts. Almost without exception, when discussing efforts over the last three years to work with Members of Congress and advocacy groups across the political and ideological spectrum to redress the federalization of truly local conduct, someone raises proposed federal "hate crimes" legislation as nearly irrefutable evidence that those on the left apparently have no objection to the federalization of crime when it benefits their constituents and political interests. HCPA is precisely the sort of legislation that undermines a principled basis for resisting federal criminalization of crimes that are truly local in nature and scope, including local gang crime, sex crime, and drug offenses.

From a federalism standpoint, the HCPA's "hate crimes" offenses are virtually indistinguishable from the proposed federal "gang-crime" offenses in legislation introduced in recent Congresses that my Heritage colleagues and I have criticized. Member of Congress on both sides of the aisle have communicated that they opposed on constitutional grounds the federalization of truly local crime, such as the conduct covered by the criminal offenses in these gang-crime bills. If passed, the HCPA would lay the foundation for more egregious federalization of local criminal conduct. Those who support or are considering supporting the HCPA must calculate whether they want to set a powerful precedent for the federal criminalization of, for example, truly local street crime (committed by alleged gang members) or possession or sale of relatively small amounts of illicit drugs and other controlled substances the next time the congressional balance of power shifts.

Every decent person abhors violent crimes that are motivated by bias or prejudice. Thus, the case for congressional legislation that would expand existing federal authority already prohibiting and punishing more severely some "hate crimes" may seem compelling.

The HCPA plays off of a powerful truth: Racially motivated violence is especially repugnant. The two new "hate crimes" offenses that the HCPA would create cover violent conduct that should be punished criminally--as indeed it is under the laws of every state. While a central provision of the Fourteenth Amendment ensures that no state denies the equal protection of its laws, yet there is no serious argument that any particular state does not enforce its civil and

criminal laws against violence in an even-handed manner today. Indeed, 45 of the 50 states have enacted "hate crimes" statutes that increase the punishment for crimes of violence and intimidation that are motivated by bias. What the benefits and problems from such motive-based statutes may turn out to be remains an open question, but the overwhelming trend in the states has been to increase such statutes in number and scope.

HCPA sweeps far more broadly than many state "hate crimes" statutes because, to begin with, neither of the two offenses in HCPA would actually require the government to prove that the accused was motivated by bias, prejudice, or hatred. The first new criminal offense in Section 7 of the HCPA merely states that the act must be "because of the actual or perceived race, color, religion, or national origin of any person," and the second similarly states that the act must be "because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person."

This amorphous standard would federalize almost all incidents of violent crime, even those that have nothing to do with bias, prejudice, or animus toward the victim because of his or her membership in a particular group. This approach of eliminating any requirement that the government must prove the defendant was motivated by bias, prejudice, or animus follows the novel approaches to "hate crimes" and bias-motivated crimes that are being promoted by some advocates and academics whose stated goal is "to continue to push to expand the legal conception of bias crime past the limited notions of what is ordinarily associated with the lay phrase hate crime."

Virtually every sexual assault resulting in bodily injury, for example, is committed "because of" the gender of the victim, the gender of the perpetrator, and the perpetrator's gender preferences. Many who commit robbery target women or those with real or perceived disabilities, believing that such victims may offer less resistance. It is even possible that a defendant could be deemed a "hate crimes" offender if he engaged in the violent conduct "because of" his own religion, gender, sexual orientation, or national origin or "because of" the religion, gender, national origin of a third party.

Further, both offenses state that it is a crime to "willfully cause[] ? or attempt[] to cause" bodily injury. The offenses would have been significantly clearer and narrower if they had been defined to punish anyone who, for example, "willfully inflicts bodily injury . . . or attempts to inflict bodily injury." The language actually used in the HCPA calls into question whether a person alleged to have incited - through words or actions - a second person to inflict bodily injury could also be charged under the theory that the first person "caused" the offense. In sum, the extent of application of the HCPA's two "hate crimes" offenses is exceedingly broad and poorly defined. The Act would federalize as "hate crimes" an enormous proportion of local violent crime.

Criminal offenses that are as ill-defined and overbroad as the "hate crimes" offenses in the HCPA invite prosecutorial abuse, politically motivated prosecutions, and similar injustices. Overbroad offenses allow prosecutors to pick and choose their defendants, tempting even well-intentioned prosecutors to succumb to public pressure to target alleged wrongdoers who are the focus of the media's attention and ire. What many law enforcement officials apparently fail to recognize is that when criminal laws are narrowly defined they serve as a public defense against accusations that a prosecution is politically motivated. Broad, vaguely defined offenses that

encompass a wide range of conduct invite - indeed, beg - criticism that charges brought under them are politically motivated. This problem would be greatly exacerbated by HCPA's criminal offenses, for they would be used to provide special protections to favored groups. The unfairness of selective prosecutions benefiting some Americans more than others - whether it is real or merely perceived in any individual case - would greatly undermine the respect and confidence that federal criminal law enforcement should engender among all Americans.

Serious Constitutional Concerns

HCPA's sweeping scope raises even greater constitutional concerns than would legislation that restricted federal criminal jurisdiction to violent conduct motivated by bias, prejudice, or animus. Congress is a body of limited, enumerated powers. Unless the Constitution has granted Congress the power to legislate in an area, it cannot do so. Because the Constitution grants the federal government no general police power, Congress lacks the power to criminalize the vast majority of the violent, non-economic activity covered by the two principal criminal offenses in the HCPA. Despite the HCPA's findings and provisions attempting to accomplish it, the Act fails in its attempt to restrict the scope of the resulting federal criminal jurisdiction to subject matters falling within Congress's enumerated powers.

The constitutional bases offered by HCPA's sponsors are unconvincing. The broader of the two new criminal offense in Section 7 of the HCPA purports to rely on Congress's Commerce Clause power--i.e., the power to "regulate commerce with foreign nations and among the several states." But the offense would apply to anyone who, "willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person." This describes quintessentially violent, non-economic activity that has little or nothing to do with interstate commerce.

To be sure, probably all conduct can be shown to have some indirect or attenuated connection to interstate commerce, but such distant links are insufficient to bring conduct within Congress's commerce power. The Supreme Court has held that violent conduct that does not target economic activity is among the types of crime that have the least connection to Congress's commerce power. Yet it is precisely this sort of violent, non-economic conduct that HCPA would federalize.

In an attempt to insulate this overreaching from constitutional challenge, this offense includes a list of factors, at least one of which must be satisfied. Each of these factors requires the violent conduct, the perpetrator, or the victim to have something to do with commerce or interstate travel; however, the final factor, which permits a conviction if the activity merely "affects interstate commerce" in any attenuated manner, is broader than the constitutional standard and fatally undermines any limitation that this approach might otherwise provide.

Although some activities that would be covered by the offense could indeed involve interstate commerce in a non-trivial manner, this does not distinguish the provision from those the Supreme Court struck down in United States v. Lopez (1995) and United States v. Morrison (2000). If this approach were permissible, Congress could claim to rely on the Commerce Clause and legislate any criminal law it wants. When it comes to criminal law, Congress would no longer be a body of limited, enumerated powers but would have plenary power to criminalize any and all conduct that is already criminalized by the states.

HCPA's other new criminal offense does not specify on which enumerated constitutional power the bills' sponsors rely, but the original "findings" section, as well as some supporters, suggest reliance on the enforcement clauses of one or more of the three Civil War amendments. Of these, the Fourteenth Amendment provides Congress with the greatest power, but even it only prohibits state action, not private conduct unrelated to state action. While Congress clearly does have authority to punish state actors for racially discriminatory conduct and to pass other civil rights statutes to ensure that states do not deny citizens the equal protection of their laws, the Supreme Court held in Morrison that the Fourteenth Amendment does not authorize a federal tort action against private individuals, not acting under color of law, who perpetrate violence against women.

The HCPA's attempt to find its power to criminalize in the Thirteenth Amendment is also unavailing. The scope of the Thirteenth Amendment grant of power to Congress to abolish slavery and involuntary servitude includes power to eliminate "badges, incidents, and relics" of slavery and involuntary servitude. While the Court has not defined the scope of that power, it has never found it to encompass conduct other than involuntary servitude and racial discrimination that denies citizens of some races the rights "enjoyed by white citizens." It is not serious, then, to equate all violence that involves persons belonging to groups to which Congress wants to give preferred protections with a "badge or relic" of slavery. Further, by its very terms the HCPA would apply equally to violence against a white victim if the crime occurred "because of" his race. Whatever the Court might determine is the scope of the power to remove the relics of slavery today (and this power was much easier to conceptualize at the time the Supreme Court first addressed it in 1883 while Congress could still help remove the incidents of slavery from actual freed slaves), it cannot be so broad.

Finally, in a similarly unavailing attempt to insulate the bill from constitutional attack, HCPA would require the Justice Department to "certify" that contemplated prosecutions under its "hate crimes" offenses meet certain conditions, such as that the state in which the conduct occurred does not object to the federal usurpation of the state's constitutional authority and jurisdiction. But the unconstitutionality of a statute cannot be "cured" by a ministerial certification or by state acquiescence to an improper assertion of federal authority. Most states joined briefs supporting the purported need for the provision in the Violence Against Women Act that the Supreme Court properly struck down at the beginning of this decade in the Morrison case. The limits on Congress's powers were designed to protect the individual rights of national citizens, not the states qua states. In short, a state can no more acquiesce to, and thereby cure, a violation of constitutional federalism than the federal courts can sanction a President's violation of the constitutional separation of powers.

Constitutional federalism is no mere theoretical nicety. Like all constitutional limitations on the power of government, constitutional federalism is a vital safeguard for the rights and liberties of the people. James Madison, the leading member of the Constitutional Convention and perhaps the greatest champion of ratification, called constitutional federalism a "double security . . . on the rights of the people." Violating constitutional federalism leads to injustice, including the injustice of circumventing the constitutional right and protection against double jeopardy by trying a citizen twice for the same conduct. This problem was outlined in the April 22 letter from the chairman and three members of the U.S. Civil Rights Commission opposing the "hate

crimes" bill that is the House of Representatives' companion to the HCPA. This is just one of the ways that the HCPA's unconstitutional provisions would put citizens' rights at risk.

Unnecessary and Counterproductive

It cannot be over-emphasized that the fact that the federal Constitution does not authorize Congress to address particular conduct does not mean that such conduct must be left unpunished. In the case of "hate crimes," the underlying violent conduct is punishable as a crime in every state, regardless of the motivation of the perpetrator or identity of the victim. Further, almost every state has adopted criminal offenses that increase the penalty for certain violent crimes deemed to be "hate crimes." Irrespective of whether such enhancements are prudent and beneficial to the overall aims of justice, they do not exceed the states' authority. And they do not undermine the ultimate responsibility and accountability of state and local officials to investigate and prosecute such crime.

Violent crime is always a serious problem, but unnecessary federal criminal offenses such as those in the HCPA detract from effective state-level law enforcement strategies. Congress must tread very carefully when bringing federal criminal law to bear on any problem at the state and local level. Federal criminal law should be used to combat only those problems reserved to the national government in the Constitution. These include offenses against the federal government or its interests, responsibilities the Constitution expressly assigns to the federal government (such as counterfeiting), and commercial crimes with a substantial multi-state or international impact.

Federalizing the exceedingly broad category of truly local conduct that would be criminalized by HCPA's two new offenses is certain to accelerate the ongoing erosion of state and local law enforcement's primary role in combating common street crime. Doing so invites serious unintended consequences, including the dilution of accountability among federal, state, and local law enforcement agencies. The best way to combat violent crime (regardless of to which group or groups its perpetrators and victims belong) is to adhere to federalist principles that respect the proper allocation of responsibilities among national, state, and local governments.

The HCPA perpetuates Congress's dangerous trend of unjustified criminalization of more and more conduct, even conduct that the Constitution assigns to the sole jurisdiction of state and local officials. Seeing as the Department of Justice itself has not been able to number all federal statutory offenses - not to mention the thousands or tens of thousands of criminal offenses in federal regulations - it seems safe to say that no Member of Congress knows all of the conduct that is criminalized. The best scholarly estimate is that as of 2008 there were over 4,450 separate crimes in the federal statute books, and Congress continues to create an average of over one new crime a week.

The dynamic that leads to this proliferation of unnecessary criminal law is primarily political. In its comprehensive 1998 report on the federalization of crime, the ABA noted evidence it had received that "many ? new federal laws are passed not because federal prosecution of these crimes is necessary but because federal crime legislation in general is thought to be politically popular." President Obama observed a similar dynamic when he was a state legislator in Illinois.

While no criminal offense is created without political support, some of the worst result from vocal constituencies leveraging high-profile crimes. The situation today, after multiple high-profile shootings, is not unlike the circumstances in which Congress federalized all carjackings.

Nearly all carjackings happen within a single state, yet the federalization of this crime illustrates the political dynamics influencing members of both major parties and leading to the over-federalization of crime. Suburban wife and mother Pam Basu was dragged to death in 1992 near her home in Maryland. She was trying to ward off carjackers and protect her two-year-old daughter who was still in the car. The heinousness of this crime translated into bipartisan support in both chambers of Congress for new federal criminalization. Legislation federalizing carjacking was introduced by a Democratic Congressman, and it was signed by a Republican president. The public outrage over the crime, fueled by extensive and incendiary media coverage, resulted in bipartisan political pressure for a new federal criminal offense that violates constitutional federalism. Despite the calls for federal criminalization, the carjackers in Basu's case were fully prosecuted and brought to justice under Maryland law that was already on the books at the time of the offense. Both men were convicted and given life sentences.

The HCPA exemplifies these same dynamics. The new offenses in the Act are all based on quintessentially non-economic, violent crime - willfully causing or attempting to cause bodily injury - that is criminalized in every U.S. state and territory. No evidence exists that the states are routinely or systematically failing to enforce their laws against intentionally inflicting bodily injury, even if the victims are members of one of the groups to which the HCPA would grant greater protections and elevated status. No evidence exists that states are routinely or systematically failing to enforce their own "hate crimes" laws. Isolated cases that federal law enforcement, Members of Congress, or certain constituents would have handled differently - and even isolated cases of injustice, as improper and outrageous as they may be - do not and cannot justify ignoring constitutional limitations on Congress's authority to criminalize.

Despite what has recently been suggested in this Committee, it is far from clear that recent events, such as the tragic shooting at the U.S. Holocaust Memorial Museum, provide justification for a federal "hate crimes" statue that federalizes truly local crime. Federal law enforcement's responses to the Holocaust Museum shootings lend substantial support to the view that existing law is sufficient. As news reports and an affidavit supporting the Department of Justice's criminal complaint against the shooter indicate, he targeted persons of Jewish descent and should receive society's greatest moral censure and be prosecuted to the full extent of the law. But there is every reason to believe that the Federal Bureau of Investigation, in cooperation with the D.C. Metropolitan Police Department and U.S. Park Police, will fully investigate the shooting and that the Justice Department will aggressively prosecute the shooter. Indeed, the Justice Department has already filed a criminal complaint against him alleging that he committed murder in the first degree (in violation of 18 U.S.C. § 1111) and that he killed in the course of possessing a firearm in a federal facility (in violation of 18 U.S.C. § 930(b) and 930(c)). If the shooter is convicted of murder in the first degree, he will face a mandatory sentence of either death or life imprisonment.

In short, the offender will be brought to justice without the HCPA and faces the harshest criminal punishments in the American criminal justice system. The Holocaust Museum shooting provides no support for the argument that the new "hate crimes" offenses are necessary or salutary.

Conclusion

To conclude, the Matthew Shepard Hate Crimes Prevention Act of 2009 (S. 909; "HCPA") fails to measure up to the basic standards that describe a criminal law that can command the trust and

respect of all Americans because it is principled, constitutional, and inherently fair. The HCPA would substantially undermine constitutional federalism and the high regard in which the American public should hold the federal criminal justice system. The three main problems with the HCPA's "hate crimes" offenses are that they:

1. Are far broader and more amorphous than any properly defined criminal offense should be, thus inviting prosecutorial abuse, politically motivated prosecutions, and related injustices;

2. Violate constitutional federalism by asserting federal law-enforcement power to police truly local conduct over which the Constitution has reserved sole authority to the 50 states; and

3. Would be superfluous and likely to be counterproductive, for nearly all states have tough "hate crimes" laws and the violent conduct underlying the Act's "hate crimes" offenses has always been criminalized in all 50 states.

Thank you again, Mr. Chairman, Ranking Member Sessions, and Members of the Committee for this opportunity to address the Matthew Shepard Hate Crimes Prevention Act of 2009 (S. 909). I look forward to providing additional information and answering any questions you may have.

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See Herbert Wechsler, The Challenge of a Model Penal Code, 65 HARV. L. REV. 1097, 1098 (1952).
E.g., Written statement of Brian W. Walsh, "Gang Crime Prevention and the Need to Foster Innovative Solutions at the Federal Level," Subcommittee on Crime, Terrorism and Homeland Security of the Committee on the Judiciary of the U.S. House of Representatives on Oct. 2, 2007, available at http://www.heritage.org/Research/Crime/tst112707a.cfm; David B. Muhlhausen & Erica Little, "Gang Crime: Effective and Constitutional Policies to Stop Violent Gangs," The Heritage Foundation Legal Memorandum No. 20, June 6, 2007, available at http://www.heritage.org/Research/Crime/lm20.cfm; Erica Little & Brian W. Walsh, "Federalizing Gang

Crime Remains Counterproductive and Dangerous," The Heritage Foundation Web Memo No. 1486, June 5, 2007, available at http://www.heritage.org/Research/Crime/wm1486.cfm; Erica Little & Brian W. Walsh, "Federalizing Gang Crime is Counterproductive and Dangerous," The Heritage Foundation Web Memo No. 1221, Sept. 22, 2006, available at http://www.heritage.org/Research/Crime/wm1221.cfm.

See, e.g., 18 U.S.C. § 245(b) ("Federally protected activities"); Hate Crime Sentencing Enhancement Act of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796 (1994).

U.S. CONST. amend. XIV, § 1 (Equal Protection Clause).

This first offense would be codified as subsection 249(a)(1) of Title 18 of the United States Code, and the second would be codified as subsection 249(a)(2).

Jordan Blair Woods, 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, 494 (2008); see also generally Lu-in Wang, The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crimes, 71 S. Cal. L. Rev. 47 (1997) (describing the "problems" with restricting the application of "hate crimes" offenses to conduct that actually involves the perpetrator's acting out of hatred toward the victim or victim's group); cf. New York v. Fox, 844 N.Y.S.2d 627, 634-35, 640 (N.Y. Sup. Ct. 2007) (upholding, despite the absence of any allegation that the defendants were motivated by bias, prejudice, or hatred, the validity and constitutionality of a prosecution under a state "hate crimes" statute).

E.g., United States v. Lopez, 514 U.S. 549, 552 (1996).

Matthew Shepard Hate Crimes Prevention Act of 2009, S. 909, 111th Cong. § 7(a) (2009). Under section 7 of the HCPA, this offense would be codified as section 249(a)(2) of Title 18 of the United States Code.

In addition to commerce clause language in the offense itself, the HCPA, as introduced, included statements of congressional "findings" attempting to tie the broad scope of conduct being criminalized to interstate commerce.

HCPA as introduced included "findings" purporting to link the conduct being criminalized to interstate commerce. But as the Court explained in Morrison, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in Lopez, '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" United States v. Morrison, 529 U.S. 598, 614 (2000) (internal quotation marks omitted).

Lopez , 514 U.S. at 559 ("We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").

See United States v. Lopez, 514 U.S. 549, 564-66 (1995) (rejecting the government's claim that its "costs of crime" and "national productivity" rationales, which relied on attenuated economic effects of school gun violence, made the Gun-Free School Zones Act of 1990 a proper exercise of Congress's commerce power); Gonzales v. Raich, 545 U.S. 1, 25 (2005) (reaffirming that, in Lopez, the fundamentally "noneconomic, criminal nature of the conduct at issue was central to our decision" (internal quotation marks omitted)).

Lopez, 514 U.S. at 567-58 (explaining that a holding that attenuated economic effects could serve as a basis for Congress to exercise commerce power "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated...and that

there never will be a distinction between what is truly national and what is truly local" (internal citation omitted)).
Morrison, 529 U.S. at 626; id. at 620-21 ("[T]he Fourteenth Amendment, by its very terms, prohibits only state action.").
Civil Rights Cases, 109 U.S. 3 (1883) (upholding a provision of the Civil Rights Act of 1866 barring racial discrimination in the sale or rental of property).
Id.; cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440, 441 n.78 (1968) (quoting Civil Rights Cases, 109 U.S. at 25; id. at 39 (Harlan, J., dissenting)).
THE FEDERALIST NO. 51, at 291 (James Madison) (Clinton Rossiter ed., 1961).
Letter from Chairman Gerald A. Reynolds et al., U.S. Civil Right Commission to Speaker Nancy Pelosi et al., U.S. House of Representatives, on the Local Law Enforcement Hate Crimes Prevention Act, H.R. 1913 (Apr. 29, 2009) (discussing Supreme Court precedent permitting federal prosecutors to circumvent the Double Jeopardy Clause).
Rachel Brand, "Making It a Federal Case: An Inside View of the Pressures to Federalize Crime," Heritage Foundation Legal Memorandum No. 30, Aug. 29, 2008, p. 5, http://www.heritage.org/research/legalissues/lm30.cfm.
See Clyde Wayne Crews, COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS 2007 13 (2007), available at http://cei.org/pdf/6018.pdf.
See John S. Baker, Jr., "Revisiting the Explosive Growth of Federal Crimes," The Heritage Foundation Legal Memorandum No. 26, June 16, 2008, at 1.
TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, THE REPORT OF THE ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW 2 (1998).
See Chris Sullentrop, The Right Has a Jailhouse Conversion, N.Y. TIMES, Dec. 24, 2006 (quoting then U.S. Senator Barack Obama describing how some members of the Illinois state legislature factored election-year politics into their decisions whether to increase criminal penalties).
See Graciela Sevilla, Basu's Slayer Sentenced to Life Without Parole, WASH. POST, Aug. 19, 1993, at B1.
See Man's Trial Moved in Carjacking Death, WASH. POST, Mar. 23, 1993; see also Sevilla, supra note 26, at B1.
Cam Simpson & Gary Fields, Gunman Kills Holocaust Museum Guard, WALL ST. J. (June 11, 2009); United States v. von Brunn, No. 1:09-mj-00339-AK-1 (D.D.C. June 11, 2009) (criminal complaint and supporting affidavit).
Washington Field Office, Federal Bureau of Investigation, "Press Conference Regarding Shooting Incident at United States Holocaust Memorial Museum: Excerpts from Remarks Prepared for Delivery by FBI Assistant Director in Charge Joseph Persichini," June 11, 2009, http://washingtondc.fbi.gov/pressrel/2009/wfo061109.htm. It should also be noted that despite widespread and nearly hysterical commentary that this shooting is a part of some national network of right-wing terrorists, the public reports to date from the FBI's Washington field office state the contrary. The FBI states that at this point they "have no information that [the shooter] had any accomplices or co-conspirators who assisted him in this act." Id.
See Sen. Barack Obama, Remarks at Howard University Convocation, Washington, D.C. (Sep. 28, 2007), http://www.barackobama.com/2007/09/28/remarks_of_senator_barack_obam_26.php ("As President, I will . . . work every day to ensure that this country has a criminal justice system that inspires trust and confidence in every American, regardless of age, or race, or background.").