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United States v. Hatch: The Significance of the Thirteenth Amendment in Contemporary American Jurisprudence

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UNITED STATES V. HATCH: THE SIGNIFICANCE OF THE THIRTEENTH AMENDMENT IN CONTEMPORARY AMERICAN JURISPRUDENCE

ABSTRACT

For decades, courts have struggled with the controversy over the appropriate scope of congressional power. The battle between a broad, deferential view and a narrow, limited view is the focus of many cases interpreting grants of congressional authority by the Thirteenth and Fourteenth Amendments. The Thirteenth Amendment is not commonly found in contemporary legal analysis; however, power offered by the Amendment, and the cases interpreting it, has noteworthy potential in our modern society. Because the history and specificity of the Thirteenth Amendment is so different from the Fourteenth Amendment, arguments drawing strict correlation between the two should be scrutinized. Overly restrictive limits on congressional power carry consequences and should be carefully considered. Limitations to the Fourteenth Amendment have brought criticism that must be analyzed when approaching similar action with regard to the Thirteenth Amendment. Learning from, and avoiding repeating, past mistakes is a sign of a sophisticated and evolving society. Such caution must be central to the imminent discussion of congressional authority under the Thirteenth Amendment.

TABLE OF CONTENTS

INTRODUCTION 694
I. BACKGROUND 695
A. Historical Application of the Thirteenth Amendment 696
B. Regeneration of the Badges and Incidents of Slavery 698
C. Hate-Crime Prevention Statutes 700
II. *UNITED STATES V. HATCH* 702
A. Facts 702
B. Procedural Posture 703
C. The Tenth Circuit's Analysis in Hatch 703
III. DISCUSSION 707
A. The Tenth Circuit's Decision 707
B. Hatch's Federalism Arguments 708
C. Jones*'s Rational-Determination Test* 711
D. Should the Thirteenth Amendment Be Subject to the Same Limits as the Fourteenth Amendment? 712
CONCLUSION 713

INTRODUCTION

The Thirteenth Amendment to the Constitution of the United States of America sought to rid the nation of its dark history of slavery and involuntary servitude.[1] Though the Amendment stands for the end of slavery in the United States and a new direction after a brutal war, it is not common to hear legal arguments or opinions today which revolve around the powers inherent in the Thirteenth Amendment.[2] Throughout our nation's legal history, the Thirteenth Amendment's grant of power has been a focal point of the struggle between broad and narrow interpretations of congressional powers.[3] And recently, the Tenth Circuit opened the door for the Supreme Court to step in and answer the question of how far the Thirteenth Amendment's power should extend.[4] Does this portend a revitalization of the Thirteenth Amendment and invite a new avenue for Congress to assert its power in the wake of recent decisions that chip away at it?[5] Is it fodder for the Supreme Court to step in to prevent such a result? Or is it just a unique case about a unique law that will eventually fade away? This Comment examines these possibilities.

The Thirteenth Amendment returned as a source of congressional power to enact the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act[6] (the Hate Crimes Act) when three white men tortured and branded a Navajo man for seemingly no reason other than the fact that he was Navajo.[7] The Hate Crimes Act has recently become a focal point of criticism of Congress's power to regulate private action.[8] Federal

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1. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States."); *see Thirteenth Amendment*, HISTORY, http://www.history.com/topics/thirteenth-amendment (last visited Apr. 16, 2014) ("The [Thirteen]th Amendment to the U.S. Constitution officially abolished slavery in America, and was ratified on December 6, 1865, after the conclusion of the American Civil War.").

2. *See* Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 310 (2004) (explaining that the Thirteenth Amendment, even though ratified in 1865, is only just coming into the light of American jurisprudence).

3. The Court at the end of the nineteenth century initially interpreted the enforcement power broadly—that it included the power to act against any "badges or incidents of slavery." The Civil Rights Cases, 109 U.S. 3, 20 (1883). Then the Court cut back and limited the congressional power to enforce against slavery and involuntary servitude. Hodges v. United States, 203 U.S. 1, 19 (1906), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). More recently, the Court again adopted a more broad interpretation of the Thirteenth Amendment's power to include the power to enforce against the badges and incidents of slavery. *Jones*, 392 U.S. at 439.

4. United States v. Hatch, 722 F.3d 1193, 1205 (10th Cir. 2013). Hatch filed a petition for a writ of certiorari on October 1, 2013. *No. 13-675: William Hatch v. United States*, CERTPOOL, https://certpool.com/dockets/13-6765 (last updated June. 25, 2014). The Supreme Court denied the petition on Mar. 24, 2014. *Id.*

5. Supreme Court decisions in the past two decades have shown a tendency toward tightening congressional powers. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012); United States v. Morrison, 529 U.S. 598, 601–02 (2000); United States v. Lopez, 514 U.S. 549, 552 (1995).

6. Pub. L. No. 111-84, Div. E., 123 Stat. 2838 (2009) (codified in relevant part at 18 U.S.C. § 249 (2012)).

7. United States v. Beebe, 807 F. Supp. 2d 1045, 1047 (D.N.M. 2011), *aff'd sub nom. Hatch*, 722 F.3d 1193.

8. *See Hatch*, 722 F.3d at 1195.

hate-crime statutes serve as a battleground between federal power to protect people targeted because of an aspect of their person and private interests in limiting federal regulation of activities without state action. A conflict arises when laws like hate-crime statutes are enacted but infringe on other perceived protected freedoms.[9]

This Comment presents the recent revitalization of the Thirteenth Amendment in modern jurisprudence and seeks to analyze the conflict inherent in the expansion and retraction of congressional powers. Part I of this Comment presents an overview of statutes prohibiting hate crimes. It then attempts to provide a historical and legal background for the protections guaranteed by the Thirteenth Amendment, as well as the Due Process Clauses of the Fifth and Fourteenth Amendments. Part II of this Comment outlines the Tenth Circuit's approach to the constitutionality of a hate-crime statute and demonstrates the modern analytical approach to revive the Thirteenth Amendment. It also outlines the facts, procedural posture, and analysis used by the Tenth Circuit Court of Appeals in *United States v. Hatch*.[10] Part III of this Comment addresses the battle over the scope of congressional authority granted by enforcement provisions similar to the Thirteenth Amendment's enforcement provision at issue in *Hatch*. Finally, Part III discusses the controversy surrounding the Supreme Court's treatment of the Fourteenth Amendment and argues that extra caution should be taken when the Court is presented with the task of imposing limits on the Thirteenth Amendment.

I. BACKGROUND

To fully understand the history leading to the Tenth Circuit's utilization of the Thirteenth Amendment, it is necessary to look back to the origins of our nation. From there, this Part moves quickly through history to the addition of the Thirteenth Amendment to the Constitution and its historical interpretation and application. Finally, a brief introduction and discussion of hate-crime statutes and presentation of the evolution of the scope of the Thirteenth Amendment are both necessary to show how the Amendment became central to the Tenth Circuit's opinion.

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9. Hate-crime statutes have been challenged as infringements on protected speech and association. *See infra* note 70. These statutes have also been discussed as possible impermissible punishment of thoughts, also protected under the First Amendment. *See* Anne B. Ryan, Comment, *Punishing Thought: A Narrative Deconstructing the Interpretive Dance of Hate Crime Legislation*, 35 J. MARSHALL L. REV. 123, 132–33 (2001). Though these constitutional challenges are important, they have been discussed at length elsewhere. *See, e.g.*, Carter T. Coker, Note, *Hope-Fulfilling or Effectively Chilling? Reconciling the Hate Crimes Prevention Act with the First Amendment*, 64 VAND. L. REV. 271, 283–95 (2011). This Comment, therefore, focuses primarily on the constitutional challenges discussed by the Tenth Circuit, including the Thirteenth Amendment and federalism challenges raised by Hatch. *See Hatch*, 722 F.3d at 1201.

10. 722 F.3d 1193 (10th Cir. 2013).

A. Historical Application of the Thirteenth Amendment

The Declaration of Independence adopted John Locke's idea that all men are endowed with certain inalienable rights.[11] Among these inalienable rights was a guarantee of liberty.[12] After the Declaration, some Americans considered that the Constitution's protection of liberty embodied protections sufficient to rid the nation of slavery.[13] However, it is well-understood that the original Constitution failed to live up to the Declaration's promise of liberty and equality in one major way—its treatment of slavery.[14] It was not until the adoption of the Thirteenth Amendment that the Constitution came more closely in line with the Declaration. With the Thirteenth Amendment, the nation showed a renewed focus on equality, specifically on ending slavery in the United States.[15]

Arising at the culmination of the bloodiest war ever fought on United States soil,[16] the Thirteenth Amendment was the first of the so-called "Reconstruction Amendments" which were aimed specifically at ending an era of slavery in the United States and preventing its return forever.[17] The Thirteenth Amendment states, "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction."[18] It further provides that "Congress shall have power to enforce this article by appropriate legislation."[19] The Thirty-eighth Congress adopted the Thirteenth Amendment to end the long history of slavery in the United States, but the early treatment of the powers of the Thirteenth Amendment by the Supreme Court defined its grant of power narrowly—no more than the abolition of slavery and power to prevent its return.[20]

The decades following the ratification of the Thirteenth Amendment show the unwillingness of the Supreme Court to fully adopt its provi-

11. Tsesis, *supra* note 2, at 315.

12. *Id.* at 316.

13. *See id.* The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

14. *See* Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 362–63 (1993) (explaining that the Founders deliberately left the doctrine of equal rights embodied in the Declaration of Independence out of the Bill of Rights because of fear that it would prevent the institution of slavery).

15. *See* Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1697 (2012).

16. *American Civil War*, HISTORY, http://www.history.com/topics/american-civil-war (last visited Apr. 16, 2014) ("[T]he Civil War proved to be the costliest war ever fought on American soil, with some 620,000 of 2.4 million soldiers killed, millions more injured and the population and territory of the [American] South devastated.").

17. *See* Tsesis, *supra* note 2, at 309 ("The historical context of the Thirteenth Amendment is the abolitionist movement and the nation's decision to throw off its racist past.").

18. U.S. CONST. amend. XIII, § 1.

19. U.S. CONST. amend. XIII, § 2.

20. Tsesis, *supra* note 2, at 328.

sions.[21] The Court's analysis of the Thirteenth Amendment powers in the *Civil Rights Cases*[22] shows the demise of the usefulness of the Amendment as a prohibition against historical infringement of civil rights and liberties.[23] The *Civil Rights Cases* analyzed the Thirteenth Amendment in its discussion of the constitutionality of the Civil Rights Act of 1875.[24] The Supreme Court considered important principles of Thirteenth Amendment jurisprudence; however, it ultimately concluded that the Thirteenth Amendment did not suffice as constitutional grounds for the Civil Rights Act of 1875.[25] Specifically, the Court made special reference to the enforcement provision of the Thirteenth Amendment and noted that "it is assumed that the power vested in Congress to enforce the article by appropriate legislation[] clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United State[s]."[26] The Court, however, restricted the powers of the Thirteenth Amendment by holding that the Amendment did not grant power to Congress to enact the Civil Rights Act.[27] The Court's language regarding the "badges and incidents of slavery" would resurface in later cases as a foundation of powers inherent in the Thirteenth Amendment.[28]

After the turn of the twentieth century, the Supreme Court was again presented with the question of the scope of power under the Thirteenth Amendment in *Hodges v. United States*.[29] The Supreme Court in *Hodges* resolved whether the Thirteenth Amendment provided sufficient

21. *Id.* at 329 ("In the years following Reconstruction, the U.S. Supreme Court undermined the [r]adical ideals of universal freedom and, eventually, interpreted the [Thirteenth] Amendment so narrowly that its holdings came to resemble the reasoning of congressmen who had voted against [it].").

22. 109 U.S. 3 (1883). The *Civil Rights Cases* is a conglomeration of the cases challenging the constitutionality of the Civil Rights Act of 1875. *Id.* The opinion is commonly referenced for its analysis of the Fourteenth Amendment. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 476 (1968). This Comment focuses on the Court's use of the Thirteenth Amendment.

23. Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1000 (2002) (stating that "the *Civil Rights Cases*[] operated as a judicial vice that squeezed the Thirteenth Amendment into a doctrinal sliver." (footnote omitted)).

24. 109 U.S. at 9, 21.

25. *Id.* at 20, 24 (noting that the Thirteenth Amendment "is undoubtedly self-executing without any ancillary legislation" and that "the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery").

26. *Id.* at 20.

27. *Id.* at 25 ("On the whole, we are of opinion that no countenance of authority for the passage of [the Civil Rights Act of 1875] can be found in . . . the Thirteenth . . . Amendment of the Constitution."); *see* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 588–89 (2012) ("[T]he *Civil Rights Cases* marked a critical moment for understanding the scope of Congress's Thirteenth Amendment enforcement power. The majority articulated what has become the authoritative view of the appropriate targets of congressional action[,] . . . however, the *Civil Rights Cases* embraced a view of the 'badges and incidents of slavery' that substantially cabined Congress's Thirteenth Amendment power for the eighty-five years that followed.").

28. *See, e.g.*, United States v. Hatch, 722 F.3d 1193, 1198–99 (10th Cir. 2013).

29. 203 U.S. 1, 6 (1906), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

power to enable Congress to enact legislation preventing, among other things, private threats at victims' places of employment.[30] Focusing its analysis on the powers granted to Congress by the Thirteenth Amendment, the Court noted that "any congressional legislation directed against individual action which was not warranted before the [Thirteenth] Amendment must find authority in it."[31] Examining the language of the Thirteenth Amendment, the Court concluded that the Amendment denounced slavery and involuntary servitude and that Congress was granted the power to denounce both.[32] The Court noted that the expansion of the Thirteenth Amendment beyond the prevention of slavery and involuntary servitude was contrary to how the nation decided to approach emancipation at the close of the Civil War.[33] With that analysis in place, the Court struck down the challenged laws as an unconstitutional use of congressional power and outside the scope of the Thirteenth Amendment, which the Court refused to interpret any further beyond the exact language of the Amendment.[34]

B. Regeneration of the Badges and Incidents of Slavery

The narrow holdings from the *Civil Rights Cases* and *Hodges* held their places until 1968, when, in the wake of evolving social values in the United States,[35] the Supreme Court abandoned its narrow Thirteenth Amendment construction and paved the way for the Thirteenth Amendment powers we see in effect today.[36] The shift in treatment came with the Court's decision in *Jones v. Alfred H. Mayer Co.*[37] There, the Court changed its view and held that Congress's enforcement power under the Thirteenth Amendment extended to eliminate all racial barriers to renting and purchasing property.[38] The *Jones* Court made specific note of the language in the *Civil Rights Cases* regarding Congress's power to legislate to prevent the badges and incidents of slavery.[39] The Court discussed the debate that occurred at the passage of the Civil Rights Act of 1875 and ultimately decided that it was for Congress "rationally to determine what are the badges and the incidents of slavery, and . . . to translate that

30. *See id.* The indictment arose from Sections 1977 and 5508 of the Revised Statutes of the United States. *Id.* at 14.

31. *Id.* at 16.

32. *Id.*

33. *Id.* at 19 (noting that the nation gave the freed slaves the Fourteenth Amendment to make them citizens, the Fifteenth Amendment to allow them to vote, and the Thirteenth Amendment to ensure that slavery and involuntary servitude never existed again within the limits of the land).

34. *Id.* at 20. The Court's approach to the Thirteenth Amendment in *Hodges* represents the height of narrow construction of the powers granted by the Amendment. *See* Mason McAward, *supra* note 27, at 589 ("The Court held that Section 2 [of the Thirteenth Amendment] permitted Congress to legislate regarding the actual condition of slavery, but not its badges and incidents.").

35. *See Civil Rights Movement*, HISTORY, http://www.history.com/topics/civil-rights-movement (last visited Apr. 17, 2014).

36. *See* Mason McAward, *supra* note 27, at 590; Tsesis, *supra* note 2, at 339.

37. 392 U.S. 409 (1968).

38. *Id.* at 444.

39. *Id.* at 439.

determination into effective legislation."[40] This shift toward judicial deference to Congress's determination of what the badges and incidents of slavery actually are is central to the *Jones* decision and ultimately dictated the outcome of the Tenth Circuit's decision in *Hatch*.[41]

The *Jones* Court followed the line of cases flowing from the Supreme Court's decision in *McCulloch v. Maryland*,[42] in which the Court adopted a test for appropriate legislation by holding, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[43] The *Jones* Court found that the Act in question, 42 U.S.C. § 1982,[44] encompassed a legitimate end reached by legitimate means.[45] The Court upheld the law as appropriate legislation under Congress's power to rationally determine the badges and incidents of slavery and to legislate against them.[46] Further, by upholding such an act, the Court in *Jones* expanded the scope of congressional power under the Thirteenth Amendment by holding that Congress's power extended to legislate against purely private action.[47]

Cases that followed upheld the *Jones* interpretation of Thirteenth Amendment power. In *Griffin v. Breckenridge*,[48] the Supreme Court relied on *Jones* to uphold a federal law targeting private action.[49] The Court outlined the *Jones* holding and found that the enforcement provision of the Thirteenth Amendment, when coupled with the holding in *Jones*, gave Congress the power to protect African-American citizens from private racist actions taken against them.[50] More recently, in *United*

40. *Id.* at 440.

41. United States v. Hatch, 722 F.3d 1193, 1195 (10th Cir. 2013).

42. 17 U.S. (4 Wheat.) 316 (1819).

43. *Jones*, 392 U.S. at 443–44 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866)) (internal quotation marks omitted); *see also McCulloch*, 17 U.S. at 421 (providing the original source of the quotation).

44. The Act provided equal access to rental and purchase of property. *Jones*, 392 U.S. at 420–22 (explaining that § 1982 prohibited "all [racial] discrimination . . . in the sale and rental of property—discrimination by private owners as well as . . . public authorities.").

45. *Id.* at 444.

46. *Id.*

47. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 90 (2004).

48. 403 U.S. 88 (1971).

49. *Id.* at 105. The Court upheld the constitutionality of 42 U.S.C. § 1985(3), which, as the Court explained, fully encompassed the conduct of private persons. *Id.* at 96. The Act itself criminalized the conspiracy of two or more individuals who "go in disguise on the highway . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws." *Id.* at 92 (quoting 42 U.S.C. § 1985(3) (2012)) (internal quotation marks omitted).

50. *Id.* at 104–05. In Griffin, Defendants, who were Caucasian, stopped the African-American victims on a highway and detained, assaulted, beat, and injured them. *Id.* at 90–91. The Court determined that the right to travel by way of the interstate highways was a privilege of national citizenship and concluded that Congress was within its power granted by the Thirteenth Amendment when it created "a statutory cause of action for [African-American] citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." *Id.* at 105–06.

States v. Nelson,[51] the Second Circuit Court of Appeals applied a similar analysis in upholding a federal hate-crime statute protecting individuals from private criminal activity targeting victims because of race, color, religion, or natural origin.[52] The Second Circuit presented a detailed history of the evolution of Congress's power to enact laws under Section Two of the Thirteenth Amendment.[53] The court employed the *Jones* test to decide whether Congress could have rationally determined that the acts of violence delineated in the federal statute constituted a badge or incident of slavery.[54] Comparing the case to *Griffin* and *Jones*, the Second Circuit found that the statute in question "stop[ped] well short of creating a general, undifferentiated federal law of criminal assault and instead restricts its attention to acts . . . [involving] discriminatory relationships with the victim."[55] The Second Circuit also found that under *Jones*' badges and incidents language, the law was a constitutional exercise of congressional power under the Thirteenth Amendment due to the narrow application of the law to the discriminatory relationship.[56]

With this modern approach to the badges and incidents of slavery,[57] and with *Jones*'s holding that it is the duty of Congress to rationally determine the badges and incidents, the Thirteenth Amendment has been effectively reinvented in contemporary American jurisprudence as a tool to combat societal inequalities that still linger.

C. Hate-Crime Prevention Statutes

A hate crime is an attack on a person that is motivated by a characteristic of the victim such as race, religion, gender, sexual orientation, or ethnicity.[58] Following findings of increased bias-motivated crimes throughout the country, the federal government enacted multiple statutes aimed at curbing these types of criminal behavior.[59] Hate-crime prevention statutes come in four main forms: institutional vandalism, sentence enhancement, substantive offenses, and data collection.[60] Usually, these statutes seek to punish the motive behind a crime and impose heightened

51. 277 F.3d 164 (2d Cir. 2002).
52. *Id.* at 181–91.
53. *Id.*
54. *Id.* at 185.
55. *Id.* at 189.
56. *Id.* at 191.
57. For additional examples of decisions utilizing the post-*Jones* approach to the Thirteenth Amendment, see, for example, *United States v. Kozminski*, 487 U.S. 931, 961 (1988) (Brennan, J., concurring); *City of Memphis v. Greene*, 451 U.S. 100, 124–29 (1981); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Palmer v. Thompson*, 403 U.S. 217, 226–27 (1971).
58. Ben Gillis, Note, *Understanding Hate Crime Statutes and Building Towards a Better System in Texas*, 40 AM. J. CRIM. L. 197, 199 (2013) (citing Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29, 31 (1995)).
59. *Id.*
60. *Id.* at 201 (providing an in-depth explanation of each type of hate-crime statute).

punishment for the crime.[61] The requirements are generally summed up to mean that hate-crime statutes seek to punish offenders who commit crimes "because of" an animus against the individual victim.[62]

Hate-crime legislation made its first entry into contemporary criminal law following the Civil Rights Act of 1968.[63] The Act punished threats or use of force to intimidate, injure, or interfere with any individual because of a characteristic like race, color, or religion.[64] The next modernization came in the 1990s when Congress passed the Hate Crime Statistics Act[65] and the Hate Crimes Sentencing Enhancement Act,[66] both of which paved the course for the hate-crime statutes in effect today.[67] After the bias-motivated murders of Matthew Shepard and James Byrd, Jr., Congress passed its most recent hate-crime legislation.[68] The Hate Crimes Act is now codified in federal law and provides in relevant part:

> Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or natural origin of any person . . . shall be imprisoned not more than 10 years, fined in accordance with this title, or both . . . .[69]

The Hate Crimes Act targets criminal activity that is focused on an individual because of a characteristic of that person.[70] It is in this fashion that modern criminal law has evolved to prevent such bias-motivated action.

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61. *Id.* at 205; Margaret K. O'Leary, Note, *Have No Fear (of "Piling Inference upon Inference"): How* United States v. Comstock *Can Save the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, 97 CORNELL L. REV. 931, 942–43 (2012) ("Hate-crime laws generally . . . impose steeper penalties because bias is the motive for the crime. Numerous rationales have been offered to support the passage of special hate-crime legislation. These rationales include deterrence, the necessity to differentiate such crimes because of their severity, and the imperative to signal to potential offenders society's strong disapproval of such conduct." (footnote omitted)).

62. Gillis, *supra* note 58, at 207–08 (internal quotation marks omitted).

63. Pub. L. No. 101-275, 104 Stat. 140 (codified as amended at 28 U.S.C. § 534 (2012)).

64. *Id.*

65. *Id.*

66. This Act was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. Pub. L. No. 103-322, § 280003, 108 Stat. 1796 (1994) (codified at 28 U.S.C. § 994 (2012)); O'Leary, *supra* note 61, at 943 n.94.

67. *See* O'Leary, *supra* note 61, at 943.

68. *Id.* (citing Troy A. Scotting, Comment, *Hate Crimes and the Need for Stronger Federal Legislation*, 34 AKRON L. REV. 853, 873–75 (2001)). In 1998, Matthew Shepard, a college student at the University of Wyoming, died after he was kidnapped, robbed, pistol-whipped, and left tied to a fence for eighteen hours in near-freezing temperatures because he was gay. James Brooke, *Gay Man Dies from Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, at A1. In 1998, James Byrd, Jr. died after he was picked up by three white men in his town in Texas, taken into the woods, beaten, chained to the back of a pickup truck, and dragged behind the truck for two miles because he was black. Carol Marie Cropper, *Black Man Fatally Dragged in Possible Racial Killing*, N.Y. TIMES, June 10, 1998, at A16.

69. 18 U.S.C. § 249(a)(1) (2012).

70. These laws have been the targets of constitutional challenges on a number of fronts including the First and Fourteenth Amendments. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 468

II. *UNITED STATES V. HATCH*

Recently, the Tenth Circuit Court of Appeals furthered the revival of the Thirteenth Amendment in *United States v. Hatch*. The case exemplifies a continuing place in modern criminal jurisprudence for the Thirteenth Amendment and at the same time, presents an argument for the restriction of congressional power under the Amendment.[71] Following the decision of the Tenth Circuit and its call to the Supreme Court to address the arguments for and against the current Thirteenth Amendment framework, Hatch filed a petition for a writ of certiorari in the Supreme Court.[72] Below is a presentation of the facts, procedural posture, and analysis from *Hatch* followed by a discussion of the ramifications of different Supreme Court treatment of Thirteenth Amendment power.

A. Facts

V.K., the victim, is a mentally disabled Navajo man.[73] In April 2010, he went into a McDonald's restaurant in Farmington, New Mexico, where Paul Beebe was working.[74] Beebe took the victim to his home where William Hatch and Jesse Sanford met them.[75] At Beebe's residence, defendants—Hatch, Beebe, and Sanford—assaulted and humiliated the victim.[76] Defendants shaved a swastika into the hair on the back of the victim's head and wrote "White Power" and "KKK" into the shaved lines.[77] They then heated a wire hanger on the stove and branded a swastika into the victim's right bicep.[78] Next, the defendants told the victim they would draw "feathers" and "native pride" on his back.[79] Instead, they drew lewd images, vulgar comments, and a pentagram labeled "666" on the victim's back.[80] The defendants made cell phone video recordings of the branding and drawings.[81]

(2000) (presenting a challenge that the New Jersey hate-crime statute violated Defendant's Fourteenth Amendment right to due process); Wisconsin v. Mitchell, 508 U.S. 476 (1993) (holding that Wisconsin's hate-crime statute did not violate Defendant's First Amendment rights); Glenn v. Holder, 690 F.3d 417, 419 (6th Cir. 2012) (presenting a challenge to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act as a violation of the rights guaranteed by the First Amendment). The challenge presented to the Tenth Circuit, however, was different—it concerned the extent of federal authority to legislate in this area at all. *See* United States v. Hatch, 722 F.3d 1193, 1195 (10th Cir. 2013).

71. *Hatch*, 722 F.3d at 1201–05.

72. A petition for a writ of certiorari was filed on October 1, 2013 and denied on Mar. 24, 2014. *Supra* note 4.

73. United States v. Beebe, 807 F. Supp. 2d 1045, 1047 (D.N.M. 2011) (referring to the victim only as "V.K."), *aff'd sub nom. Hatch*, 722 F.3d 1193.

74. *Id.* William Hatch and Jesse Sanford worked with Paul Beebe at the McDonald's restaurant. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* (internal quotation marks omitted).

78. *Id.*

79. *Id.* (internal quotation marks omitted).

80. *Id.* (internal quotation marks omitted).

81. *Id.*

B. Procedural Posture

Defendants were originally charged under state law with kidnapping, aggravated battery, and conspiracy to commit kidnapping and aggravated battery.[82] While the state prosecution was pending, the federal government indicted the defendants for violating, and conspiracy to violate, a portion of the federal Hate Crimes Act,[83] which makes it a federal crime to subject a person to violence because of race.[84] Hatch was convicted of conspiracy to commit aggravated battery in the state court proceedings.[85] In May 2011, the federal district court rejected defendants' motion to dismiss the federal indictment.[86] Hatch entered a conditional guilty plea on the federal charge of conspiracy to violate the Hate Crimes Act and preserved his right to challenge the constitutionality of the federal statute on appeal.[87] After Hatch was sentenced in both the state and federal proceedings, he appealed to the Tenth Circuit Court of Appeals, arguing that the portion of the Hate Crimes Act under which he was convicted, § 249(a)(1), is beyond any enumerated power of the federal government, including the Thirteenth Amendment.[88]

C. The Tenth Circuit's Analysis in Hatch

The panel of the Tenth Circuit Court of Appeals in *Hatch* unanimously upheld the constitutionality of § 249(a)(1), concluding that Congress acted within its power in enacting that portion of the Hate Crimes Act.[89] Judge Tymkovich wrote the opinion, joined by Judges Murphy and O'Brien, and affirmed the decision of the United States District Court for the District of New Mexico.[90]

The Tenth Circuit began its discussion with an overview of the Reconstruction Amendments.[91] The court then honed in on the most relevant of the three Reconstruction Amendments for its analysis: the Thirteenth Amendment.[92] Noting that, on its face, the Thirteenth Amendment seems to only abolish and prevent the return of slavery and involuntary servitude in the United States and its jurisdictions, the court explained that the Supreme Court had clarified that the enforcement provision of

82. United States v. Hatch, 722 F.3d 1193, 1196 (10th Cir. 2013).
83. 18 U.S.C. § 249(a)(1) (2012).
84. *Hatch*, 722 F.3d at 1196.
85. *Id.*
86. *Id.* (citing *Beebe*, 807 F. Supp. 2d 1045) (rejecting defendants' challenge to the constitutionality of the federal hate-crime statute).
87. *Id.*
88. *Id.*
89. *Id.* at 1195.
90. *Id.*
91. The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, which were enacted at the end of, and in the years following, the Civil War, are generally referred to as the "Reconstruction Amendments." *See id.* at 1196.
92. *Id.* at 1197.

the Thirteenth Amendment also extends to "eradicating slavery's lingering effects, or at least some of them."[93]

The Tenth Circuit first addressed and outlined the historical evolution of the Thirteenth Amendment to include Congress's power to abolish the badges and incidents of slavery.[94] The court outlined the *Civil Rights Cases* where the Supreme Court first mentioned the possibility of the Thirteenth Amendment expanding beyond a mere protection against slavery.[95] Acknowledging the narrow holding in the *Civil Rights Cases*, the court moved its analysis to an overview of the evolution of the badges and incidents of slavery, noting that the phrase as a whole has become the generally accepted judicial gloss on the Thirteenth Amendment congressional power.[96] In its discussion of *Hodges*, the Tenth Circuit presented one main concern regarding the expansion of the Thirteenth Amendment to include private badges and incidents—that it would lead to overly broad congressional power over private action.[97]

The court next addressed the shift in treatment of the Thirteenth Amendment away from the narrow holding from the *Civil Rights Cases* and *Hodges* and presented the backdrop for its conclusion that the Amendment is available in modern jurisprudence as a source of congressional power beyond simply preventing the return of slavery.[98] Here, Judge Tymkovich focused his analysis on the holding of *Jones* where the Supreme Court expanded the usage of badges and incidents of slavery as constitutional congressional authority for enacting legislation preventing biased treatment in the real estate market.[99] The Tenth Circuit recognized that *Jones* expanded the congressional power by holding that Congress has the power to rationally determine what the badges and incidents of slavery are in order to pass legislation to eliminate them.[100] The Tenth Circuit ended its historical discussion by concluding that "after these cases the Thirteenth Amendment can be seen as treating most forms of racial discrimination as badges and incidents of slavery, and that Con-

93. *Id.*

94. *Id.* at 1197–200.

95. *Id.* at 1197–98 ("[I]t is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . . ." (emphasis omitted) (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883))).

96. *Id.* at 1198.

97. *Id.* at 1199 ("In other words, the Court in *Hodges* reasoned that if badges-and-incidents extends to the type of conduct at issue there *and* if Congress's badges-and-incidents authority applies to all races, then Congress could legislate against 'every act done to an individual which was wrong if done to a free man, and yet justified in a condition of slavery.'" (quoting Hodges v. United States, 203 U.S. 1, 19 (1906), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968))).

98. *Id.*

99. *Id.* at 1199–1200.

100. *Id.* at 1200.

gress not only has the power to *enforce* the amendment, but also to a certain extent define its *meaning*."[101]

Judge Tymkovich next discussed the Hate Crimes Act and, after introducing the relevant sections and Congress's cited purposes and authority for enacting it, the court considered the substance of Hatch's constitutional claims.[102] The court quickly determined that, under *Jones*, if Congress rationally determines something—such as racial violence—is a badge or incident of slavery, Congress may broadly legislate against it.[103] Applying the rational-determination test from *Jones* to the Hate Crimes Act at issue in *Hatch*, the court concluded that it was indeed rational for Congress to conclude that racial violence is a badge or incident of slavery and that the Hate Crimes Act is therefore a constitutional exercise of congressional power.[104]

Discussing the various arguments made by Hatch, the court left some of these issues for the Supreme Court to decide.[105] Hatch argued that under the Tenth Amendment, the power to regulate against the badges and incidents of slavery should be left to the states.[106] The Tenth Circuit quickly dismissed this challenge, holding that "when the Constitution explicitly grants Congress authority to act, the Tenth Amendment gives way."[107] The court also analyzed Hatch's claims that recent Supreme Court treatment of the Fourteenth Amendment provides for more limits on congressional power.[108] Hatch argued that under *City of Boerne v. Flores*,[109] congressional power must be evaluated under a test for its congruence and proportionality to the injury at stake.[110] The court described the issue but avoided ruling specifically on this argument, stating that *City of Boerne* did not make mention of the Thirteenth Amendment or *Jones*, and therefore *Jones*' rational-determination test was controlling precedent for the Tenth Circuit, and the issue would need to be addressed by the Supreme Court.[111] The court treated similarly Hatch's argument that in light of *United States v. Morrison*[112] and *United States v. Lopez*,[113]

101. *Id.*

102. *Id.* at 1200–01. The Court presented the language of both subsections of § 249 but noted that only § 249(a)(1) was in question. *Id.* The Court also outlined Congress's explicit announcement that it enacted § 249 under its Thirteenth Amendment badges-and-incidents authority. *Id.*

103. *Id.* at 1201.

104. *Id.* at 1209.

105. *See id.* at 1201–02. Hatch raised many arguments to the constitutionality of § 249(a)(1), the most significant of which was a federalism argument based on recent Supreme Court treatment of post-*Jones* cases concerning the Tenth Amendment and Section Five of the Fourteenth Amendment. *Id.* Hatch argued that the recent restrictions under these doctrines show that the congressional power to determine and enforce against the badges and incidents of slavery is overly broad. *Id.*

106. *Id.*

107. *Id.* at 1202 ("The Thirteenth Amendment, enacted after the Tenth Amendment, explicitly gives Congress power to enforce its prohibitions.").

108. *Id.*

109. 521 U.S. 507 (1997).

110. *Hatch*, 722 F.3d at 1202.

111. *Id.* at 1202–05.

112. 529 U.S. 598 (2000).

two recent Commerce Clause cases, *Jones* creates a loophole for Congress to enact otherwise impermissible police-power legislation.[114] The Tenth Circuit shared the concerns raised by Hatch but left consideration of these arguments to the Supreme Court and reached its ultimate conclusion of the constitutionality of the Hate Crimes Act under the controlling authority of *Jones*.[115] Relying on stare decisis and *Jones* as the controlling precedent for Thirteenth Amendment powers, the Tenth Circuit "[left] it to the Supreme Court to bring Thirteenth Amendment jurisprudence in line with the structural concerns that prompted the limits [on congressional power] announced in *City of Boerne*, *Lopez*, and *Morrison*."[116]

Judge Tymkovich, however, did not stop his analysis at stare decisis. He explained why the Hate Crimes Act may be constitutional even given the recent shift away from unfettered congressional discretion.[117] Judge Tymkovich explained that the Hate Crimes Act presents a more narrow approach to congressional power than what *Jones* allows.[118] With an emphasis on limiting principles imbedded in the Hate Crimes Act, Judge Tymkovich showed that Congress actually included checks within § 249(a)(1), making this specific Act much more narrow and limited than other actions the *Jones* test may allow.[119] He wrote that § 249(a)(1) actually focuses on three connected considerations: (1) the salient characteristic of the victim, (2) the state of mind of the person subjecting the victim to some prohibited conduct, and (3) the prohibited conduct itself.[120] The discussion further outlined each of these elements and concluded that by requiring consideration of these elements on a case-by-case basis, the *Jones* precedent clearly supports § 249(a)(1).[121]

Finally, the Tenth Circuit addressed and rejected Hatch's final arguments that the certification requirement[122] under the Hate Crimes Act

113. 514 U.S. 549 (1995).

114. *Hatch*, 722 F.3d at 1203–04.

115. *Id.* at 1204–05 ("While this debate raises worthwhile questions, the Supreme Court has never revisited the rational determination test it established in *Jones*. And more importantly for our purposes, none of the federalism authorities Hatch cites mention *Jones* or the Thirteenth Amendment. Thus, even if we assume Hatch's authorities impliedly undermine *Jones*'s approach to the Thirteenth Amendment, we may not blaze a new constitutional trail simply on that basis: 'If a precedent of [the Supreme] Court has direct application in a case . . . yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'" (alterations in original) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989))).

116. *Id.* at 1205.

117. *Id.*

118. *Id.* at 1205–06.

119. *Id.* at 1205 ("Although 'badges and incidents of slavery' could be interpreted as giving Congress authority to legislate regarding nearly every social ill (because nearly all can be analogized to slavery or servitude), [§ 249(a)(1)] does not take such an approach.").

120. *Id.*

121. *Id.* at 1206.

122. 18 U.S.C. § 249(b) (2012). The Act requires that the Attorney General certify in writing that the state in which the crime was committed does not have jurisdiction or wants the federal

is unconstitutional and that the Hate Crimes Act constitutes a violation of equal protection.[123] The court dismissed both of these arguments, stating that they have no constitutional significance.[124] Having addressed and dismissed Hatch's arguments and having left consideration of the federalism concerns for the Supreme Court to resolve should it see reason to do so, the Tenth Circuit upheld the constitutionality of 18 U.S.C. § 249(a)(1) as a valid exercise of congressional power under Section Two of the Thirteenth Amendment and affirmed Hatch's conviction.[125]

III. DISCUSSION

The decision of the Tenth Circuit exemplifies a proper use of constitutional construction and inquiry to find a source of power for the enactment of a statute. But the analysis of the court, and the precedent relied on, leaves the question: how far should it go? To answer this question it is first necessary to revisit the Tenth Circuit's approach in *Hatch* and the court's approach to Hatch's "loophole" argument.[126] Next, analysis of the Supreme Court's treatment of the Fourteenth Amendment's enforcement provision and the criticism that followed shows the necessity for judicial scrutiny when attempting a similar approach with regard to the Thirteenth Amendment.

A. The Tenth Circuit's Decision

The court in *Hatch* was correct in upholding the constitutionality of the Hate Crimes Act. The Tenth Circuit gave rejuvenated emphasis to the Thirteenth Amendment as a power that is alive and active in contemporary American jurisprudence. The court in *Hatch* grounded its analysis in the *Jones* precedent, conducting a rational-basis inquiry into congressional power and the badges and incidents of slavery.[127] But the Tenth Circuit left determination of the scope of the Thirteenth Amendment power and *Jones* to the Supreme Court.[128] In modern society, the Thirteenth Amendment remains a sparsely used source of congressional au-

government to prosecute the case instead of the state. *Id.* Hatch challenged this requirement arguing that it is itself a type of congruence-and-proportionality test as was presented in *City of Boerne*. *Hatch*, 722 F.3d at 1207.

123. *Hatch*, 722 F.3d at 1207–08.

124. *Id.* at 1208 ("We therefore see no merit in Hatch's argument that the Hate Crimes Act's certification requirement somehow proves the need for congruence and proportionality, or the lack of it in this case."). The Tenth Circuit noted that although *Jones* overruled the main portion of *Hodges*, *Hodges* still held that the Thirteenth Amendment applied to all races and the power extended to Congress to legislate to protect all races. *Id.* at 1208–09 (clarifying that, "[i]n any event, Hatch's argument does not raise an equal protection problem. . . . [T]he legal guarantee of equal protection is not a supraconstitutional principle by which the Constitution itself is judged. . . . [Section 249(a)(1)] does not run afoul of equal protection principles").

125. *Id.* at 1209.

126. *Id.* at 1203–04.

127. *Id.* at 1201.

128. *Id.*

thority.[129] Will it become more popular as a source of congressional power as other sources become interpreted more narrowly?[130] The answer remains to be seen.[131] Examination of Hatch's arguments, the Supreme Court's recent treatment of similar issues, scholarly criticism of the Supreme Court's decisions, and the Thirteenth Amendment's scope of power and limitations, sheds a sliver of light on the topic.

B. Hatch's Federalism Arguments

Hatch made multiple arguments against the constitutionality of the Hate Crimes Act.[132] His main argument was that the Hate Crimes Act is "impermissible [federal] police power legislation."[133] Hatch argued that *City of Boerne* demonstrates the need for limits on federal power.[134] Hatch's argument is interesting, and the Tenth Circuit called upon the Supreme Court to fully flesh out the federalism concerns inherent in Thirteenth Amendment congressional power.[135]

In *City of Boerne*, in analyzing the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA)[136] as applied to the states, the Supreme Court adopted a congruence-and-proportionality test for determining when Congress may have overstepped its powers under Section Five of the Fourteenth Amendment.[137] Hatch argued that by imposing the congruence-and-proportionality test on the enforcement clause of the Fourteenth Amendment, the Supreme Court showed its desire to limit the

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129. Tsesis, *supra* note 2, at 349.

130. *See id.* at 350.

131. Hatch filed a petition for a writ of certiorari to the Supreme Court on October 1, 2013. *Supra* note 4. The Court denied the petition on Mar. 24, 2014. *Id.*

132. *Hatch*, 722 F.3d at 1201–09.

133. *Id.* at 1203–04.

134. *Id.* at 1202. The Tenth Circuit explained that the Supreme Court in *City of Boerne* addressed Congress's power under Section Five of the Fourteenth Amendment and the inherent problems with unlimited congressional discretion to define the scope of its power. "The Court acknowledged that Section 5 . . . gives Congress important powers, but '[i]f Congress could define its [Section 5] powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be superior paramount law, unchangeable by ordinary means.'" *Id.* (alterations in original) (quoting City of Boerne v. Flores, 521 U.S. 507, 529 (1997)).

135. *Id.* at 1201.

136. 42 U.S.C. § 2000bb (2012).

137. *City of Boerne*, 521 U.S. at 520 (noting that the congruence-and-proportionality test requires a reviewing court to balance the harm Congress seeks to prevent by its action and the means Congress adopts to prevent the harm). Congress's Section Five power involves a similar enforcement provision as in Section Two of the Thirteenth Amendment. *See Hatch*, 722 F.3d at 1202. The Court in *City of Boerne* determined that the evolution of Congress's enforcement power under the Fourteenth Amendment showed it was meant to be a remedial power rather than authority for substantive congressional power. *City of Boerne*, 521 U.S. at 527. Therefore, the Court concluded that the power vested in Congress under Section Five was merely the power to enact enforcement legislation. *Id.* at 529. In imposing limits to the enforcement power granted to Congress, the Court expressed its main federalism concern that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.'" *Id.* (omission in original) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

enforcement powers of Congress.[138] Following this logic, it would have been possible for the Tenth Circuit—and remains possible for future Supreme Court decisions—to impose similar limitations on the enforcement provision of the Thirteenth Amendment.[139] This sort of limitation must be approached carefully with an eye towards how *City of Boerne* affected the Fourteenth Amendment and how similar treatment could affect the Thirteenth Amendment.

The *City of Boerne* Court described the enforcement provision of the Fourteenth Amendment as allowing Congress only to adopt remedial enforcement provisions rather than define its own power and adopt substantive restrictions on the States as it did with RFRA.[140] After *City of Boerne*, the Supreme Court continued to narrow the scope of congressional power, specifically Congress's Commerce Clause power.[141] The Court's decision in *City of Boerne* and the post-*City of Boerne* limitations to congressional power were met with fierce backlash and criticism.[142] Arguments against the Court's retraction of congressional participation in defining the scope of the enforcement provisions focus on two main principles established in *City of Boerne* and achieved through the congruence-and-proportionality test: first, Section Five does not provide the power for Congress to substantively define the scope of rights it may protect; and second, congressional action to protect judicially defined rights must be narrowly tailored to that specific right.[143] Concerning the first principle, it is argued that historical inquiry shows the intent of the framers of the Fourteenth Amendment that Congress be the primary source of enforcement of the Amendment.[144] The Court, when keeping historical intent in mind, should therefore give respect to the interpretations and enforcement legislation of Congress—RFRA being precisely one of these methods of enforcement.[145] Concerning the second principle, it is further argued that the Court's decision to subject congressional enforcement to stringent narrow-tailoring scrutiny (congruence and proportionality), a check more rigorous than any other check on Article I

138. *Hatch*, 722 F.3d at 1202. The *Hatch* court further stated that "[*City of Boerne*] does, however, note the Reconstruction-Era Congress's concern with ensuring that the Fourteenth Amendment did not grant general police power to the national government." *Id.* at 1203.

139. *See id.* at 1202. The *Hatch* court did not follow Hatch's request to limit the Thirteenth Amendment power but rather followed precedent and left the issue for the Supreme Court. *See id.*

140. *City of Boerne*, 521 U.S. at 545 (O'Connor, J., dissenting) (providing a succinct summary of the majority's holdings and reasoning).

141. Evan H. Caminker, *"Appropriate" Means–Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1129 (2001) ("For the first time in seven decades, the Supreme Court has begun to narrow the scope of Congress' power to regulate interstate commerce."). "[M]ore of the Supreme Court's major federalism cases in the last decade involved Section 5 than any other font of federal power." *Id.* at 1131.

142. *See, e.g.*, Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 153 (1997); Caminker, *supra* note 141, at 1132.

143. Caminker, *supra* note 141, at 1131.

144. McConnell, *supra* note 142, at 194.

145. *Id.* at 195.

power, should not be defended.[146] This sort of judicial strangulation of congressional enforcement authority, as exemplified in *City of Boerne*, threatens to engulf more Article I powers and other congressional enforcement provisions—provisions Congress might be better suited to address and carry out as a representation of the voice of the people subject to its power.[147]

Hatch's federalism argument is that *Jones* and the rational-determination test (to determine whether something constitutes a badge or incident of slavery) "create[] a constitutional loophole through which Congress can enact all sorts of otherwise impermissible police power legislation."[148] Hatch argued that this seemingly unrestricted source of enforcement power mirrors the same problem as the *City of Boerne* Court faced when it restricted congressional enforcement authority under the Fourteenth Amendment.[149] Therefore, the argument goes, similar limiting treatment should be taken with respect to Thirteenth Amendment congressional power and the broad grant of power under the *Jones* rational-determination test.[150] In support of this argument, Hatch addressed judicial treatment of Congress's Commerce Clause[151] power in *United States v. Lopez* and *United States v. Morrison*. The *Hatch* court addressed these cases, noting that in each case the Supreme Court restricted an expanding congressional power.[152] The Court in *City of Boerne*, *Lopez*, and *Morrison* established limits on the respective federal powers, and Hatch's argument echoes this rationale.[153] As the Tenth Circuit put it, "'Badges and incidents of slavery,' taken at face value, puts emphasis solely on the conduct Congress seeks to prohibit, and it seems to place few limits on what that conduct might be."[154]

Essentially, Hatch argued—and the Tenth Circuit acknowledged the significance of the inquiry though left resolution of it to the Supreme Court—that without specific limitations on the enforcement provision of the Thirteenth Amendment, Congress will be able to legislate against a plethora of actions, finding rational determinations of the badges and

146. Caminker, *supra* note 141, at 1133.
147. *Id.* at 1198–99.
148. United States v. Hatch, 722 F.3d 1193, 1203–04 (10th Cir. 2013).
149. *Id.* at 1201–04.
150. *Id.*
151. *See* U.S. CONST. art. I, § 8, cl. 3. The power to regulate interstate commerce has expanded since its original drafting. The inquiry demands a determination of whether or not the regulated activity is economic. Economic activities can be viewed in the aggregate whereas non-economic activities can be regulated only if they affect interstate commerce on their own. *See* United States v. Lopez, 514 U.S. 549, 551 (1995).
152. *Hatch*, 722 F.3d at 1203.
153. *Id.* at 1203–04.
154. *Id.* at 1204 (further noting that "[g]iven slaves' intensely deplorable treatment and slavery's lasting effects, nearly every hurtful thing one human could do to another and nearly every disadvantaged state of being might be analogized to slavery—and thereby labeled a badge or incident of slavery under *Jones*'s rational determination test").

incidents of slavery.[155] Thus, it will be up to the Supreme Court to bring the Thirteenth Amendment enforcement power in line with these other limiting cases if it so chooses.[156]

C. Jones*'s Rational-Determination Test*

As *Hatch* made clear, after *Jones* it is for Congress to rationally determine what the badges and incidents of slavery are in order to enact enforcement legislation against them under Section Two of the Thirteenth Amendment.[157] The troubling issue, however, remains: how does the rational-determination test from *Jones* match up with the more recent approach to limit congressional authority not only to enact legislation in a certain area, but also to define the scope of that area? In *City of Boerne*, the Supreme Court recognized that Congress, under Section Five of the Fourteenth Amendment, has a similar power to the enforcement provision of the Thirteenth Amendment.[158] However, the Court held that the enforcement provision of the Fourteenth Amendment provided Congress only with the power to enforce, not the power to determine what amounts to a constitutional violation.[159] A similar approach to the enforcement provision of the Thirteenth Amendment would render the rational-determination test from *Jones* an unconstitutional expansion of congressional power. As the Court in *City of Boerne* mentioned, "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed."[160] So, again, it remains to be seen what the Supreme Court may do with *Jones* and the rational-determination test's expansion of the power explicitly granted by the Thirteenth Amendment. The power as it currently exists under the Thirteenth Amendment to legislate against the badges and incidents of slavery is extremely important and worthwhile. Creating hate-crime statutes should be within congressional power.

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155. *Id.* The Tenth Circuit made note, however, that even in light of the seemingly broad scope of Congress's power under *Jones*, the Hate Crimes Act is not the sort of overly broad frightening legislation that should be called into question under limiting cases such as *City of Boerne*, *Lopez*, and *Morrison*. *See id.* at 1205–06. The Tenth Circuit articulated that the limited scope of the Hate Crimes Act incorporated by Congress into the statute itself sufficiently narrows its applicability. *Id.* at 1205 (noting that the statute requires inquiry into the salient characteristics of the victim, the state of mind of the person subjecting the victim to the conduct, and the conduct itself).

156. *Hatch*, 722 F.3d at 1205.

157. *Id.* at 1201.

158. *Id.* at 1202. Section Five of the Fourteenth Amendment provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

159. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

160. *Id.* at 519–20.

D. Should the Thirteenth Amendment Be Subject to the Same Limits as the Fourteenth Amendment?

If the Supreme Court chooses to further determine the scope of the Thirteenth Amendment, it will have to look very closely at the ramifications of limiting congressional power. If the Court someday answers the call of the Tenth Circuit, it should not overturn *Jones* to bring the Thirteenth Amendment in line with the Fourteenth Amendment and *City of Boerne*. The argument that the similar language of the enforcement provisions of the Thirteenth and Fourteenth Amendments warrants similar treatment with regard to limiting Congress's enforcement powers ignores that the two Amendments are extremely different. The Amendments differ in subject matter and scope, making the application of precedent from one to the other unwarranted and unwise.[161]

Jones and the Thirteenth Amendment are different from all other areas of congressional power because they deal with the badges and incidents of slavery. The Fourteenth Amendment's protections and the enforcement power addressed by *City of Boerne* (and relied on by Hatch in his federalism arguments) are general and apply to extremely broad areas. The Fourteenth Amendment's scope continues to be molded and shaped in modern society.[162] The Thirteenth Amendment is different because its scope is much more narrow and defined.[163] It is limited to slavery.

Slavery was possibly the darkest time in the history of the United States, and its elimination was so important that it has its own specific amendment.[164] The Court should not solve the theoretical problem of overly broad congressional power by overturning *Jones* and stopping congressional power to define the badges and incidents of slavery. In addition to the Thirteenth Amendment's inherent limit that the Fourteenth Amendment lacks—slavery—congressional determinations under *Jones* must still be rational. Is it not enough that under *Jones*, Congress's determination that something constitutes a badge or incident of slavery must be rational? A relation to slavery and the rationality of Congress's

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161. *Compare* U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."), *with* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

162. *See generally* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (applying the Fourteenth Amendment's Equal Protection Clause to public university admissions procedures); McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (incorporating the Second Amendment as applicable to the states through the Fourteenth Amendment); Lawrence v. Texas, 539 U.S. 558 (2003) (applying the Fourteenth Amendment's substantive due process protections to private lifestyle decisions).

163. U.S. CONST. amend. XIII.

164. *See* Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1337–38 (2009).

decision are its limits, and that rationality remains for Article III courts to determine whenever the Thirteenth Amendment power is expanded to a new area.

CONCLUSION

Although the Thirteenth Amendment is often forgotten and is usually viewed as a relic of history, as the Tenth Circuit and the Supreme Court cases cited within *Hatch* have shown, it is very much alive in modern American jurisprudence. The Supreme Court decisions expanding the enforcement power under the Thirteenth Amendment demonstrate its vitality through time. The Tenth Circuit's recognition of Thirteenth Amendment-based congressional power in *Hatch* showcases the Amendment's recent revival and also its significance and meaning in today's society. Unfettered federal governmental power is a concern rooted in the formation of the United States,[165] and limits on authority should exist where governmental power is undefined. However, comparisons may not be made among all things, and where power is restricted already, over-restriction may be detrimental. The Thirteenth Amendment, and the cases interpreting it, clearly shows it is limited by its subject matter, and its reach may not extend beyond what is rationally related to slavery. Notwithstanding that the Amendment has proved itself important in modern American society, its internal limits alone should be sufficient to withstand future judicial scrutiny. But with the existence of arguments proclaiming a potential for broad congressional authority and discretion under the Thirteenth Amendment, it is all but certain that discussion of the Thirteenth Amendment will continue to be a topic in cases to come.

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165. *See, e.g.*, THE FEDERALIST NO. 1 (Alexander Hamilton).

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