The Thirteenth Amendment, Human Trafficking, and Hate Crimes

Jennifer Mason McAward[*]

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INTRODUCTION

The two most recent federal statutes passed pursuant to Congress's Thirteenth Amendment enforcement power are the Trafficking Victims Protection Act of 2000 (TVPA) and the Shepard-Byrd Hate Crimes Act of 2009. While the Thirteenth Amendment basis of the TVPA has never been questioned in court, the constitutionality of the Shepard-Byrd Act has been challenged (albeit unsuccessfully) in a series of recent cases. This Essay will consider this disparity and suggest that it tells us something about the parameters of the Thirteenth Amendment enforcement power. In particular, it suggests that congressional power is at its apex when the conduct regulated—like human trafficking—has a close nexus

[*] Associate Professor of Law, University of Notre Dame Law School; J.D., New York University School of Law, 1998; B.A., University of Notre Dame, 1994. Thank you to my outstanding research assistant, Nick Bedenk.

to actual conditions of slavery or involuntary servitude. When the conduct regulated is a step removed from the Amendment's textual prohibitions, as racial hate crimes are, that conceptual space permits greater debate about the validity of Congress's action.

This Essay will begin by examining the text and legislative history of each act, paying particular attention to the evidence Congress amassed connecting the legislation to the prohibitions of the Thirteenth Amendment. It will then contrast litigation filed in response to the TVPA, which has not raised Thirteenth Amendment issues, with the constitutional critiques made in recent challenges to the Shepard-Byrd Act. Those challenges have been unsuccessful to date, which is unsurprising given the deferential standards currently governing Thirteenth Amendment enforcement legislation.[1] However, the arguments made in those challenges are tied to a strain of Supreme Court precedent and legal scholarship that calls for more thorough legislative fact-finding and a tighter link between regulated conduct and substantive constitutional violations. Indeed, judges from two federal courts of appeals have acknowledged that it may be time for the Supreme Court to reexamine the scope of Congress's power to enforce the Thirteenth Amendment.[2]

From this perspective, the Shepard-Byrd Act's prohibition on racial hate crimes may be on shakier constitutional footing than the TVPA. At first glance, this seems ironic given that racial minorities were the original intended beneficiaries of the Thirteenth Amendment's protections. However, it ultimately may mean that at this point in our nation's history, with chattel slavery solidly abolished, the Thirteenth Amendment is best understood as a provision that speaks to labor rights and conditions. If so, Congress's Thirteenth Amendment enforcement power today is more appropriately focused on ensuring free labor than ameliorating racial discrimination.

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1. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (permitting Congress "rationally to determine what are the badges and the incidents of slavery" and then legislate to eradicate them).

2. *See* United States v. Cannon, 750 F.3d 492, 509 (5th Cir. 2014) (Elrod, J., specially concurring) ("[T]here is a growing tension between the Supreme Court's precedent regarding the scope of Congress's powers under § 2 of the Thirteenth Amendment and the Supreme Court's subsequent decisions regarding the other Reconstruction Amendments and the Commerce Clause."); United States v. Hatch, 722 F.3d 1193, 1201 (10th Cir. 2013) ("[I]t will be up to the Supreme Court to choose whether to extend its more recent federalism cases to the Thirteenth Amendment.").

I. THE TRAFFICKING VICTIMS PROTECTION ACT OF 2000

A. The Legislative Record

Congress passed the TVPA "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."[3] To that end, the statute enhances criminal penalties for traffickers, provides protection and assistance programs for victims, and creates a variety of mechanisms to prevent trafficking.

In passing the bill, Congress alluded to both its power to regulate interstate commerce as well as its power to enforce the Thirteenth Amendment. Congress issued findings that "[t]rafficking in persons substantially affects interstate and foreign commerce,"[4] and that human trafficking is "a modern form of slavery" and "the largest manifestation of slavery today."[5] Invoking the Thirteenth Amendment's prohibition on slavery and involuntary servitude, Congress declared that "[c]urrent practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded."[6]

Congress gathered extensive evidence regarding the causes and effects of human trafficking. At the heart of the record was evidence that workers are trafficked under conditions akin to the slave trade and held in conditions akin to slavery. As Senator Sam Brownback stated:

> International sex trafficking is the new slavery. It includes all the elements associated with slavery, including being abducted from your family and home, taken to a strange country where you do not speak the language, losing your identity and freedom, being forced to work against your will with no pay, being beaten and raped, having no defense against the one who rules you, and eventually dying early because of this criminal misuse.[7]

A State Department official testified, similarly, that "[a] trafficking scheme involves a continuum of recruitment, abduction, transport, harboring, transfer, sale or receipt of persons through various types of coer-

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3. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(a), 114 Stat. 1464, 1466. Division A of this bill is denominated the "Trafficking Victims Protection Act of 2000." *See id.* § 101.

4. *Id.* § 102(b)(12).

5. *Id.* § 102(b)(1).

6. *Id.* § 102(b)(22).

7. *International Trafficking in Women and Children: Hearings Before the Subcomm. on Near E. and S. Asian Affairs*, 106th Cong. 72 (2000) (statement of Sen. Sam Brownback).

cion, force, fraud or deception for the purpose of placing persons in situations of slavery or slavery-like conditions, servitude, forced labor or services."[8] And, as one witness put it, "[w]hile we discuss this problem using such terms as 'trafficking' and 'forced labor,' we should make no mistake about it: we are talking about slavery, slavery in its modern manifestations."[9]

Congress also heard evidence regarding the vast scope of the problem of trafficking: "At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year."[10] One witness related stories of debt bondage and sexual slavery in which women are forced to work off tens of thousands of dollars in debt to traffickers by servicing dozens of men a day. The witness concluded that "[t]hese numbers and the accompanying accounts illustrate that trafficking of women and children for purposes of prostitution has become a contemporary form of slavery. The numbers may soon be on par with the African slave trade of the 1700s."[11]

This testimony and these statistics lend great support to Congress's ultimate conclusion that human trafficking is "a modern form of slavery"[12] redressable under the Thirteenth Amendment.

B. Constitutional Challenges

Convictions under the TVPA have been routinely upheld against constitutional challenge. The most common challenge has been to 18 U.S.C. § 1591, a provision of the TVPA that imposes punishment on anyone who "knowingly in or affecting interstate or foreign commerce" entices a minor to engage in a commercial sex act.[13] Many have been convicted under that provision based on conduct that was entirely intrastate, and they have questioned whether Congress had the power to address such conduct. This portion of the TVPA has routinely withstood

8. *Id*. at 11 (statement of the Hon. Frank E. Loy, Under Secretary of State for Global Affairs).

9. *Id.* at 76 (statement of William R. Yeomans, Chief of Staff, Civil Rights Div., U.S. Dep't of Justice).

10. H.R. REP. NO. 106-939, at 3 (2000) (Conf. Rep.).

11. *International Trafficking in Women and Children: Hearings Before the Subcomm. on Near E. and S. Asian Affairs*, 106th Cong. 34 (statement of Dr. Laura J. Lederer, Director, The Protection Project, The Kennedy School of Gov't at Harvard University).

12. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(1), 114 Stat. 1464 (codified at 22 U.S.C. § 7101(b)(1) (2012)).

13. 18 U.S.C. § 1591 (West, Westlaw through Pub. L. 114-115 approved 12-28-2015).

such challenges[14] on the authority of *Gonzales v. Raich*, in which the Supreme Court held that Congress's commerce power permits it to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[15]

The TVPA, however, has never been challenged as beyond Congress's power to enforce the Thirteenth Amendment,[16] even though one commentator has noted that it might be susceptible to challenge on that basis.[17] One portion of the TVPA, enacted as 18 U.S.C. § 1584, prohibits labor that is forced by "means of serious harm or threats of serious harm."[18] Serious harm is defined to include

> any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.[19]

This definition was included to overturn the Supreme Court's decision in *United States v. Kozminski*, which had held that statutory prohibitions on "involuntary servitude" barred only labor coerced through physical force or threats of legal compulsion.[20] The *Kozminski* Court stated that such prohibitions should be read in line with the Court's interpretations of the Thirteenth Amendment itself and concluded that the intent of the Thirteenth Amendment, buttressed by the Court's own precedents, was to prohibit servitude "enforced by the use or threatened use of physical or legal coercion."[21] In passing the TVPA, however, Congress determined that a substantial number of trafficked laborers were in fact subject to

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14. *See*, *e.g.*, United States v. Evans, 476 F.3d 1176, 1179–80 (11th Cir. 2007) (finding § 1591 constitutional as applied to solely intrastate activities); *see also* United States v. Todd, 627 F.3d 329, 333 (9th Cir. 2009) (noting that 18 U.S.C. § 1591, which proscribes the use of interstate commerce for acts of sex trafficking, was easily within Congress's commerce power).

15. Gonzales v. Raich, 545 U.S. 1, 17 (2005).

16. *See* George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551, 1577 (2012). In one case, the defendant challenged a portion of the TVPA, 18 U.S.C. § 1589 (prohibiting forced labor), under the Commerce Clause, and a district court held that this provision was constitutional under Congress's Thirteenth Amendment enforcement power. *See* United States v. Garcia, No. 02–CR–110S–01, 2003 WL 22938040 (W.D.N.Y. Dec. 2, 2003).

17. *See* Rebecca Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 309 (2010).

18. 18 U.S.C. § 1589(a)(2)–(3) (2012).

19. *Id.* § 1589(c)(2).

20. United States v. Kozminski, 487 U.S. 931, 944–45 (1988).

21. *Id.* at 944.

psychological coercion and, therefore, a statutory ban on labor forced through psychological harm would help to enforce the Thirteenth Amendment's ban on involuntary servitude.[22]

Despite the *Kozminski* Court's disclaimers that its task was one of statutory interpretation[23] and that it was "draw[ing] no conclusions . . . about the potential scope of the Thirteenth Amendment,"[24] it is at least arguable that the Court's ruling was "based both on statutory and constitutional interpretation."[25] Thus, Rebecca Zietlow has pointed out that "[t]o the extent that *Kozminski* is a constitutional decision, the Court, influenced by [*City of Boerne v. Flores*[26]], might find the TVPA to be unconstitutionally inconsistent with its own interpretation of the Thirteenth Amendment."[27]

Several defendants have challenged their convictions under § 1584 arguing that *Kozminski* provides the relevant definition of involuntary servitude. The federal courts have routinely rejected these arguments, holding that the TVPA supersedes *Kozminski*.[28] No court has ever confronted—and presumably no litigant has ever raised—the issue of whether Congress exceeded its Thirteenth Amendment enforcement power by seeking to overrule *Kozminski*. While this argument may not have ultimately prevailed, it seems notable that no portion of the TVPA, including its expanded statutory definition of "involuntary servitude," has ever been challenged on Thirteenth Amendment grounds.

II. THE MATTHEW SHEPARD AND JAMES L. BYRD, JR. HATE CRIMES PREVENTION ACT OF 2009

A. The Legislative Record

The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 makes it a federal crime to willfully injure or attempt to injure any person "because of the actual or perceived race, color, religion,

22. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(13), 114 Stat. 1464.

23. *Kozminski*, 487 U.S. at 934, 940, 941.

24. *Id.* at 944; *see also id.* at 952 (noting the possibility of "change by Congress" to its holding).

25. *See* Zietlow, *supra* note 17, at 309–10.

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

27. *See* Zietlow, *supra* note 17, at 310.

28. *See* United States v. Calimlim, 538 F.3d 706, 712, 714 (7th Cir. 2008) (finding § 1584 covers nonviolent psychological coercion and was designed to supersede *Kozminski*); United States v. Bradley, 390 F.3d 145, 150, 156–57 (1st Cir. 2004) (recognizing § 1584 was designed to supersede *Kozminski*).

or national origin of [that] person."[29] The Shepard-Byrd Act is not the first federal law that prohibits racially motivated crimes, but it is the first in which Congress relied exclusively on its Thirteenth Amendment power in passing the bill.[30] In its findings at the beginning of the Act, Congress specifically justified this provision as an exercise of its power to enforce the Thirteenth Amendment. Congress found, first, that "[s]lavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry."[31] Next, Congress asserted that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude."[32]

This finding echoed the language of *Jones v. Alfred H. Mayer Co.*, in which the Supreme Court held that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[33] In that case, the Court held that 42 U.S.C. § 1982, which was part of the Civil Rights Act of 1866, was valid Thirteenth Amendment enforcement legislation.[34] Section 1982 gives "[a]ll citizens of the United States . . . the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[35] In *Jones*, the Court endorsed as rational Congress's determination that private racial discrimination in the sale and rental of property was a badge and incident of slavery: "At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy

29. 18 U.S.C. § 249(a)(1) (2012). The Shepard-Byrd Act also criminalizes hate crimes based on gender, disability, sexual orientation, or gender identity, but a conviction under those provisions requires proof that the crime generally affected interstate or foreign commerce. *Id.* § 249(a)(2)(B). Thus, Congress asserted jurisdiction over these types of hate crimes through its power over interstate commerce.

30. Another federal hate crimes statute requires proof that the crime was motivated not only by animus but also because of the victim's participation in one of six enumerated federally protected activities. *See, e.g.*, 18 U.S.C. § 245(b)(2)(A)–(F) (2012). The Shepard-Byrd Act simply requires animus without any other jurisdictional element.

31. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111–84, div. E., § 4702(7), 123 Stat. 2190 (2009) (codified as amended at 18 U.S.C. § 249 (2012)).

32. *Id.*

33. 392 U.S. 409, 440 (1968).

34. *Id.* at 413.

35. 42 U.S.C. § 1982 (2012).

whatever a white man can buy, the right to live wherever a white man can live."[36]

Three years later, in *Griffin v. Breckenridge*, the Court held that "Congress was wholly within its powers under § 2 of the Thirteenth Amendment in creating" 42 U.S.C. § 1985(3), "a statutory cause of action for Negro 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."[37] The conduct at issue in *Griffin* was racially motivated violence against African Americans who were (mistakenly) believed to be civil rights workers. Thus, the Court's holding implicitly indicates that Congress could rationally regard racially motivated violence as a badge or incident of slavery, at least where such violence is pursued with the intent to deprive the victim of a constitutional right.

Although the Shepard-Byrd Act was passed in 2009, earlier versions containing the same racial hate crimes provision were proposed starting in 1997 and debated for more than a decade.[38] The primary focus of those debates was the need for federal legislation regarding non-race-based hate crimes, especially those based on sexual orientation and gender identity. Still, there was meaningful attention paid to the issue of racial hate crimes. Committee reports and witness statements uniformly pointed to the Thirteenth Amendment enforcement power as the constitutional basis for the racial hate crimes provision of the bill.[39] Indeed, witnesses presented Congress with a capacious understanding of its Thirteenth Amendment enforcement power, testifying that all "racial discrimination directed at African-Americans is a badge or incident of slavery."[40]

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36. *Jones*, 392 U.S. at 443.

37. 403 U.S. 88, 105 (1971).

38. *See, e.g.*, S. 909, 111th Cong. (2009); H.R. 1913, 111th Cong. (2009); S. 1105, 110th Cong. (2007); H.R. 1592, 110th Cong. (2007); H.R. 2662, 109th Cong. (2005); H.R. 4204, 108th Cong. (2004); H.R. 74, 107th Cong. (2001); S. 622, 106th Cong. (1999); H.R. 77, 106th Cong. (1999); S. 1529, 105th Cong. (1998); H.R. 3081, 105th Cong. (1997).

39. *See, e.g.*, S. REP. NO. 107-147, at 14 (2002) ("The 13th Amendment broadly authorizes Congress to regulate acts of violence committed on the basis of race, color, religion, or national origin and therefore provides an ample constitutional basis for the provision of the Hate Crimes Act that addresses crimes falling within these categories.").

40. *The Hate Crimes Prevention Act of 1998: Hearing on S.J. Res. 1529 Before the S. Comm. on the Judiciary*, 105th Cong. 43 (1998) (statement of Professor Lawrence Alexander); *see also id.* at 45 (statement of Professor Chai R. Feldblum) (stating that Congress has power to "impose liability on private persons under section 2 of the 13th Amendment for racially-based discrimination").

Congress's ultimate conclusion of law—that racially motivated violence is a badge or incident of slavery—had wide-ranging support. In 2000, the Justice Department's Office of Legislative Affairs issued a Statement of Administration Position that stated: "[T]he prohibition of racially motivated violence would be a permissible exercise of Congress' broad authority to enforce the 13th amendment."[41] This evaluation was reviewed and endorsed by the Justice Department in 2009,[42] and was relied on by the House and Senate Reports on the bill.[43] Expert testimony supported this view as well.[44]

Congress compiled a factual record with respect to the frequency and effects of hate crimes, although that record did not draw specific links between racial hate crimes and the substantive guarantees of the Thirteenth Amendment. A 2009 House Report cited the most current data then available, which showed that in 2007, the FBI documented 7,624 hate crimes, approximately half of which (50.8%) were racially motivated, 18.4% of which were motivated by religious bias, and 13.2% of which were rooted in ethnicity/national origin bias.[45] Senator Patrick

41. S. REP. NO. 107-147, at 17 (2002) (quoting Letter from Assistant Att'y General Robert Raben to Sen. Edward Kennedy (June 13, 2000)). President George W. Bush offered a different opinion, stating that the racial hate crimes provision "raises constitutional concerns." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 1592 – LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT OF 2007 (2007), *available at* https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/110-1/hr1592sap-h.pdf. He did not consider the Thirteenth Amendment justification for the law, but stated that "the bill would be constitutional only if done in the implementation of a power granted to the Federal government, such as the power to protect Federal personnel, to regulate interstate commerce, or to enforce equal protection of the laws." *Id.* A group of legal scholars wrote a letter to senators expounding the Thirteenth Amendment justification for the bill. *See Legal Scholars Contradict White House on Hate Crimes Bill*, AM. CONST. SOC'Y L. & POL'Y (July 31, 2007), http://www.acslaw.org/acsblog/legal-scholars-contradict-white-house-on-hate-crimes-bill (reproducing letter in full).

42. *See* Constitutionality of the Matthew Shepard Hate Crimes Prevention Act, 2009 WL 2810455 (O.L.C 2009).

43. *See* H.R. REP. NO. 111-86, at 15 (2009); H.R. REP. NO. 110-113, at 17 (2007); S. REP. NO. 107-147, at 17 (2002).

44. *Local Law Enforcement Hate Crimes Prevention Act of 2007: Hearing on H.R. 1592 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H.R. Comm. on the Judiciary*, 110th Cong. 57 (2007) [hereinafter *Hearing 1*] (statement of Dean Frederick M. Lawrence) ("Congressional authority to enact the Hate Crimes Prevention Act is found in the Thirteenth Amendment and in the Commerce Clause of the Constitution."); *id.* at 59 ("The Thirteenth Amendment is more consonant with a positive guarantee of freedom and equal participation in civil society. Violence, directed against an individual out of motive of group bias, violates this concept of freedom.").

45. H.R. REP. NO. 111-86, pt. 1, at 5 (2009).

Leahy cited a report from the Southern Poverty Law Center that "found that hate groups have increased by 50 percent since 2000."[46]

With respect to the effects of hate crimes, Congress heard evidence that such crimes have both individual and societal impacts. Regarding individual minority victims, "bias crimes . . . do not produce a greater level of psychological damage than those aimed at white victims,"[47] but such crimes cause "victims to adopt a relatively more defensive behavioral posture than white bias crime victims typically adopt."[48] With respect to societal effects, "failure to address the problem of hate crimes can cause a seemingly isolated incident to fester into wide-spread tension that can damage the social fabric of the community at large."[49] Moreover, "bias-motivated acts of violence divide our communities, intimidate our most vulnerable citizens, and damage our collective spirit."[50]

There were dissenting voices who urged caution, noting the relative lack of judicial guidance on the meaning of the badges and incidents of slavery,[51] and encouraging more intensive fact-finding as a predicate to the exercise of the Thirteenth Amendment enforcement power. For example, Representative Randy Forbes of Virginia encouraged Congress "to cite evidence, beyond mere claims, that hate crimes against certain groups constitute a 'badge and incidence' [sic] of slavery. Vague assertions that some hate crimes might be linked to vestiges, badges, or incidents of slavery or segregation would not be enough."[52] Similarly, the dissent in a 2007 House Report noted the possibility of future judicial scrutiny:

> The [Supreme] Court will want to ensure that, in defining badges and incidents of slavery to include hate crimes, Congress has enacted remedial and preventative legislation that seeks to end the true effects of slavery, rather than attempting to re-define the term 'slav-

46. *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing on Serial No. J-111-83 Before the S. Comm. on the Judiciary*, 111th Cong. 2 (2009) [hereinafter *Hearing 2*] (statement of Sen. Leahy).

47. *Hearing 1*, *supra* note 44, at 43 (statement of Dean Frederick M. Lawrence).

48. *Id.*

49. H.R. REP. NO. 111-86, at 9 (2009).

50. *Hearing 2*, *supra* note 46, at 4 (statement of Att'y Gen. Eric H. Holder, Jr.).

51. H.R. REP. NO. 110-113, at 44 (2007) ("The Court, however, has not provided much guidance beyond Jones on what constitutes the 'badges and incidents of slavery.'").

52. *Hearing 1*, *supra* note 44, at 134–35 (statement of J. Randy Forbes, Rep. in Cong. from Virginia and Ranking Member, Subcomm. on Crime, Terrorism, and Homeland Sec.); *see also* H.R. REP. NO. 110-113, at 44 (2007) ("Only vaguely asserting that some hate crimes might be linked to vestiges, badges, or incidents of slavery or segregation would not be enough.").

> ery' or 'involuntary servitude' as it has been interpreted by the Supreme Court.[53]

One of the primary critiques offered by opponents of the bill was that Congress's factual findings were not adequate: "Congress [did not] perform the extensive fact-finding required to demonstrate that hate crimes are a national problem that requires a Federal solution."[54] Indeed, Congress did not have before it any information regarding the enforcement and efficacy of state hate crimes laws.[55] As Senator Sessions noted, there was no information that "a noticeable number of cases" failed to be "prosecuted in State and local governments relating to these kinds of issues that we're calling hate crimes."[56] Nor were the 2007 statistics regarding racial hate crimes cited by supporters dispositive of a need for federal legislation: "Statistics for . . . 2002 through 2005 demonstrated a steep decline in the number of hate crimes reported."[57]

Thus, Congress's deliberations leading up to the passage of the Shepard-Byrd Act demonstrate that it took a clear and considered position on the meaning of the badges and incidents of slavery. Congress also compiled a record that evaluated the frequency of racial hate crimes and considered the negative effects that flow from such crimes. At the same time, it is also true that Congress's findings did not explicitly consider the efficacy of state-level hate crimes laws or whether the effect of racially motivated violence has been (or even might lead to) violations of the substantive guarantees of the Thirteenth Amendment, namely slavery or involuntary servitude. Whether the breadth and depth of Congress's inquiry is sufficient to survive judicial scrutiny will depend on the stringency of the review that the Supreme Court would eventually apply.

B. Constitutional Challenges

The question of Congress's power to criminalize race-based hate crimes has begun to make its way through the federal courts. Thus far, three courts of appeals and one district court have upheld the Shepard-Byrd Act as valid exercises of Congress's Thirteenth Amendment en-

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53. H.R. REP. NO. 110-113, at 44 (2007).

54. H.R. REP. NO. 111-86, at 41 (2009).

55. Congress did, however, suggest that federal involvement in hate crimes investigations would enhance the number of state prosecutions. One House Report cited the National Church Arson Task Force as an example of a beneficial state/federal partnership, which resulted in doubling the arson arrest rate and leading to increased numbers of state arson prosecutions. *See* H.R. REP. NO. 111-86, pt. 1, at 7–8 (2009).

56. *Hearing 2*, *supra* note 46, at 4 (statement of Jeff Sessions, U.S. Sen. from Alabama).

57. H.R. REP. NO. 111-86, at 43 (2009).

forcement power.[58] These decisions are undoubtedly correct under the existing framework for analyzing Thirteenth Amendment legislation. Section Two of the Amendment gives Congress the power to "enforce this article by appropriate legislation."[59] The Supreme Court held in the *Civil Rights Cases* that this power permits Congress to pass "all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[60] The Court has never defined what are the "badges and incidents of slavery." However, in *Jones v. Alfred H. Mayer Co.*, the Court held that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[61] Thus, subject only to rationality review, Congress holds the power to define the concept of the badges and incidents of slavery, to identify conduct as falling within that definition, and to choose appropriate legislative responses to that conduct.

In the Shepard-Byrd Act, Congress issued a finding that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the *badges, incidents, and relics of slavery and involuntary servitude*."[62] Implicit in this statement is the idea that racially motivated violence is a badge and incident of slavery, and thus an appropriate subject of Thirteenth Amendment legislation. This is certainly a rational conclusion, as racially motivated violence "was essential to the enslavement of African–Americans and was widely employed after the Civil War in an attempt to return African–Americans to a position of de facto enslavement."[63] Moreover, it is rational to conclude that using fed-

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58. *See* United States v. Cannon, 750 F.3d 492 (5th Cir. 2014); United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013); United States v. Henery, No. 1:14–cr–00088–S–BLW, 2014 WL 5222741 (D. Idaho Oct. 13, 2014). The Eighth Circuit also upheld the Shepard-Byrd Act in *United States v. Maybee*, 687 F.3d 1026, 1030 (8th Cir. 2012), but the constitutional challenge in *Maybee* was narrower than in the other cases. In *Maybee*, the question was whether the Shepard-Byrd Act was constitutionally infirm because it did not require that the victim enjoy a public benefit, as other hate crimes laws require. *See id.*

59. U.S. CONST. amend. XIII.

60. 109 U.S. 3, 24 (1883).

61. 392 U.S. 409, 440 (1968).

62. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111–84, div. E., § 4702, 123 Stat. 2190 (2009) (codified as amended at 18 U.S.C. § 249 (2012)).

63. *See Cannon*, 750 F.3d at 502. This finding also finds support in the Supreme Court's own case law. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971); *see also* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1368 (2007) (arguing that the "paradigmatic" badge and incident of slavery involves a case "where the plaintiff is African American and asserts a contemporary injury that either existed in the same form during slavery or is closely analogous thereto").

eral criminal law to eliminate such violence is "necessary and proper for abolishing" a badge and incident of slavery.[64]

Thus, if *Jones* continues to provide the standard by which courts evaluate Thirteenth Amendment legislation, the Shepard-Byrd Act should easily withstand judicial scrutiny. Indeed, this has been the approach and result in the Fifth and Tenth Circuits and in the District of Idaho.[65]

What is less clear, however, is whether the rationality standard of *Jones* will continue to govern judicial evaluation of Thirteenth Amendment legislation. In 1997, *City of Boerne v. Flores* altered the standard by which courts adjudge Fourteenth Amendment legislation, rejecting rationality review in favor of a more stringent approach that requires federal legislation to be congruent and proportional to judicially determined rights violations.[66] In the Fifteenth Amendment context, the Supreme Court in *Shelby County v. Holder* held that the 2006 reauthorization of § 4 of the Voting Rights Act was invalid because Congress failed to consider "current conditions" with respect to voting discrimination and instead relied on decades-old data and eradicated practices.[67] Although the *Shelby County* Court declined to opine on whether *City of Boerne*'s congruence and proportionality standard applies to Fifteenth Amendment legislation,[68] the Court's holding certainly indicates that the Court is willing to critically assess the factual record that Congress compiles in passing voting rights laws. Although the *Shelby County* Court relied upon and did not overrule *South Carolina v. Katzenbach*—a 1966 case in which the Court upheld the original Voting Rights Act under rationality review—*Shelby County*, at the very least, makes it clear that this must be rationality review with bite.

Whether *Jones*-style rationality review in the Thirteenth Amendment context will remain valid is a topic of debate. Some defend its continued viability.[69] Others, myself included, have argued that *Jones* is obsolete in light of *City of Boerne* and flawed as a matter of Thirteenth

64. *Civil Rights Cases*, 109 U.S. at 24.

65. *See Cannon*, 750 F.3d at 492; United States v. Henery, No. 1:14–cr–00088–S–BLW, 2014 WL 5222741 (D. Idaho Oct. 13, 2014); United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013).

66. 521 U.S. 507 (1997).

67. 133 S. Ct. 2612, 2631 (2013).

68. This issue was briefed but not resolved.

69. *See, e.g.*, Carter, *supra* note 63; Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40 (2012).

Amendment history and constitutional structure.[70] At the very least, however, it is clear that *Jones*'s analytical framework stands in marked contrast to that endorsed by the Court in *City of Boerne* and *Shelby County*.

Judge Jennifer Walker Elrod of the Fifth Circuit noted this dichotomy in a special concurrence in *United States v. Cannon*, a case challenging the constitutionality of the Shepard-Byrd Act. Judge Elrod noted the "growing tension between the Supreme Court's precedent regarding the scope of Congress's powers under § 2 of the Thirteenth Amendment and the Supreme Court's subsequent decisions regarding the other Reconstruction Amendments and the Commerce Clause."[71] She raised particular concern about the scope of Congress's factual findings for the Shepard-Byrd Act. Specifically, she noted that Congress's findings focused on the historical link between slavery and racially motivated violence and that the legislative record developed in passing the Shepard-Byrd Act lacked "any findings that current state laws, or the individuals charged with enforcing them, were failing to adequately protect victims from racially-motivated crimes."[72] Thus, in light of *Shelby County*, Judge Elrod questioned whether Congress should have made "findings regarding 'current needs'" before it chose to "impos[e] current burdens."[73]

Judge Elrod also noted the tension between *City of Boerne* and *Jones*. In *City of Boerne*, the Court reasserted the judicial power of constitutional interpretation and cautioned Congress against attempts to "define its own powers by altering" constitutional meaning.[74] *Jones*, however, empowered Congress to define the concept of the badges and incidents of slavery—what the Tenth Circuit recently characterized as the "power to define the meaning of the Constitution—a rare power indeed."[75] Judge Elrod expressed concern that under *Jones*, "it has indeed become difficult 'to conceive of a principle that would limit congressional power.'"[76] Ultimately, Judge Elrod stated that the lower federal courts

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70. *See, e.g.*, Jennifer Mason McAward, McCulloch *and the Thirteenth Amendment*, 112 COLUM. L. REV. 1769 (2012); Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power after* City of Boerne v. Flores, 88 WASH. U. L. REV. 77 (2010).

71. United States v. Cannon, 750 F.3d 492, 509 (5th Cir. 2014) (Elrod, J., specially concurring).

72. *Id.* at 510.

73. *Id.* at 511 (quoting Shelby County v. Holder, 133 S. Ct. 2612, 2619 (2013)).

74. City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

75. United States v. Hatch, 722 F.3d 1193, 1204 (10th Cir. 2013).

76. *Cannon*, 750 F.3d at 511 (Elrod, J., specially concurring).

"would benefit from additional guidance from the Supreme Court on how to harmonize these lines of precedent."[77]

In light of *City of Boerne*, *Shelby County* and the judicial and scholarly attention regarding the scope of Congress's power to enforce the Thirteenth Amendment, it seems likely that challenges to the viability of the Shepard-Byrd Act will continue to percolate in the courts.

III. WHY THE DIFFERENCE?

At first glance it seems quite strange that a statute meant to protect racial minorities from violence has received greater Thirteenth Amendment scrutiny than a statute meant to protect women and children from sex trafficking. Indeed, racial minorities were more clearly the intended beneficiaries of the Thirteenth Amendment than women and children. And racially motivated violence was unquestionably an integral feature of the institution of American chattel slavery.

Why, then, is it that the TVPA has been immune from Thirteenth Amendment challenge while the Shepard-Byrd Act has not? One can hypothesize many factors that might explain this difference. Perhaps the issue of human trafficking has greater current political salience than that of hate crimes. Perhaps there is a federalism distinction because hate crimes are more thoroughly addressed by state law than human trafficking. Perhaps hate crimes laws raise a greater range of other constitutional concerns than human trafficking laws do. Or perhaps the difference lies in the nature of the Thirteenth Amendment enforcement power. Perhaps the TVPA is simply on sounder constitutional footing than the Shepard-Byrd Act.

Whatever the case may be, the constitutional argument for the TVPA is simple: Human trafficking is modern-day slavery. A law that punishes and seeks redress for human trafficking is "appropriate legislation" under Section Two of the Thirteenth Amendment because it directly "enforce[s]" the substantive promise made in Section One; namely, that "[n]either slavery nor involuntary servitude . . . shall exist within the United States."[78] Given the factual findings Congress made in passing the TVPA,[79] there is virtually no conceptual space between human trafficking and either slavery or involuntary servitude. Thus, there is a direct correspondence between the subject of the TVPA—human trafficking—

77. *Id.* at 509.
78. U.S. CONST. amend. XIII.
79. *See supra* Part A.1.

and subjects of the Thirteenth Amendment—slavery and involuntary servitude.

The Shepard-Byrd Act, however, is prophylactic legislation, not direct legislation like the TVPA. There is attenuation between the subject of the Act—racial hate crimes—and the subjects of the Thirteenth Amendment. Thus, the constitutional argument for the Shepard-Byrd Act requires more steps and raises the question of whether Congress's factual findings are sufficient to sustain the Act.

To the extent that the Thirteenth Amendment requires only that Congress determine there to be a connection between an aspect of the historical slave system and a current societal problem—in other words, a link between past and present—the Act appears to be on solid footing. Racial violence was part and parcel of American chattel slavery.

It may be, however, that the Thirteenth Amendment enforcement power requires not only a link to the past but also a link to the present. Specifically, it may require that Congress determine there to be a link between a current problem and an existing or incipient constitutional violation. Because only actual conditions of slavery or involuntary servitude violate Section One of the Thirteenth Amendment, Congress would have to find that racial hate crimes today are causing (or at least portending) the return of slavery or, perhaps, an entrenched system of second-class citizenship.[80] While Congress did develop a record that supports the conclusion that racial hate crimes have detrimental societal effects, there is nothing in the record linking those effects to current conditions of slavery or involuntary servitude. While racial hate crimes are undoubtedly insidious and destructive on both a personal and societal level, it is difficult to connect hate crimes with future slavery, particularly where forty-five states have their own hate crimes laws.[81] The dearth of congressional findings on this point is unsurprising but certainly notable, and may render the Shepard-Byrd Act susceptible to challenge.

If the Supreme Court does decide to bring the standard for Thirteenth Amendment legislation into line with the standards announced and utilized in *City of Boerne* and *Shelby County*, it will have ramifications for the subjects that Congress will be able to address under that head of

80. *See* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 626–27 (2012).

81. *See Cannon*, 750 F.3d at 512 (Elrod, J., specially concurring) ("[A]t least forty-five (45) states have criminal statutes that impose harsher penalties for crimes that are motivated by bias . . . .") (quoting defendant-appellant's briefing) (citing Anti-Defamation League, State Hate Crime Provisions (Apr. 28, 2009)).

power. Legislation like the TVPA, which directly addresses current constitutional violations and conditions of slavery and involuntary servitude will become the norm. Prophylactic legislation like the Shepard-Byrd Act will be increasingly hard to justify. While racial discrimination continues to be a problem in need of a remedy, Congress's Thirteenth Amendment enforcement power will be focused on directly ensuring free labor rather than addressing entrenched discrimination.

CONCLUSION

Congress has not used its Thirteenth Amendment power lightly or with any great frequency despite the permissive framework for the Section Two power developed in *Jones*. Yet, despite *Jones*, the constitutionality of one of the most recent Thirteenth Amendment enactments—the racial hate-crimes provision of the Shepard-Byrd Hate Crimes Act—has been challenged repeatedly. This history of litigation stands in stark contrast to the dearth of litigation surrounding the TVPA, Congress's other modern piece of Thirteenth Amendment legislation. This disparity likely tells us something about the nature of the Thirteenth Amendment enforcement power and suggests a future path for congressional initiatives under that head of power.