# *Comments*

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## The Thirteenth Amendment and the Hate Crimes Prevention Act: Is There Room for Religion?



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## INTRODUCTION

A Lebanese woman wearing a headscarf pulls into a parking space outside a sandwich shop in Tulsa, Oklahoma. She exits her vehicle and walks toward the restaurant when a man, angered because she parked her car too close to his, approaches her. The man begins following the woman while repeatedly yelling anti-Muslim slurs at her. The woman makes it into the restaurant, but, as she leaves, she spots the man kneeling by her car pulling a knife out of a tire. When she questions the man, he strikes her in the head while continuing to spout antireligious epithets. Local police arrest the man for the assault, and Tulsa County prosecutors charge him with three misdemeanors. The Tulsa County District Attorney later dismisses the state charges without prejudice, and a federal investigation ensues.[1]

In 2009, Congress enacted The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA) to combat crimes like the one

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[1] Bill Braun, *Tulsa County Hate Crime Charge Dismissed in Light of Federal Investigation*, TULSA WORLD (Mar. 17, 2014, 11:28 PM), http://www.tulsaworld.com/homepagelatest/tulsa-county-hate-crime-charge-dismissed-in-light-of-federal/article_b59d2ee0-ae55-11e3-b69d-001a4bcf6878.html; *see also* Rick Couri, *Man Accused of Religious Hate Crime Against Woman He Believes Is Muslim*, KRMG (Jan. 3, 2014, 7:03 AM), http://www.krmg.com/news/news/local/man-accused-religious-hate-crime-against-woman-he-/ncbfx/; *Tulsa Police Arrest Stuart Manning, Suspected of Assaulting Woman; Suspect Charged with Hate Crime*, KJRH (Jan. 3, 2014, 10:38 AM), http://www.kjrh.com/news/local-news/tulsa-police-arrest-stuart-manning-suspected-of-assaulting-woman-suspect-charged-with-hate-crime.

described above.[2] In an effort to address the inadequacies of current state criminal laws to punish and deter such crimes, Congress enacted the HCPA to provide a means to federally prosecute—and aid state authorities in prosecuting—violent crimes motivated by hatred toward the victim or victims.[3] In support of the HCPA, Congress found that "violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem."[4] Further, Congress noted that hate-motivated violence devastates not just the actual victim, but the victim's family and friends, as well as the larger community of people sharing the victim's targeted traits.[5] It was Congress's intent to address the growing incidence of hate crimes nationwide by providing federal prosecutors with an effective way to punish and eliminate a wide variety of hate-motivated, violent criminal activity.

In enacting the HCPA, Congress expressly intended to combat hate crimes targeting people because of their religion.[6] The right to freely practice and choose one's religion is deeply rooted in the American conscience, and, historically, Americans have strived to preserve that right.[7] Hate-motivated violence targeting religious groups directly threatens victims' fundamental right to religious freedom. And regrettably, bias-motivated violence aimed at people because of their religion continues to make up a significant portion of hate crimes committed in the United States.[8] It is not difficult to see why

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2 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4701, 123 Stat. 2835 (2009) (codified at 18 U.S.C. § 249 (2012)). Matthew Shepard was brutally murdered in 1998, allegedly because of his sexual orientation. Lisa Kye Young Kim, *The Matthew Shepard and James Byrd, Jr. Hate Crimes Act: The Interplay of the Judiciary and Congress in Suspect Classification Analysis*, 12 LOY. J. PUB. INT. L. 495, 495–96 (2011). That same year, James Byrd, Jr. was beaten, tied to a truck, and dragged to his death because he was black. *Id.* at 496 n.17. These horrific crimes galvanized the nation and sparked widespread support for hate crime legislation. *Id.* at 496.

3 § 4702, 123 Stat. at 2835.

4 *Id.* § 4702(1), 123 Stat. at 2835.

5 *Id.* § 4702(5), 123 Stat. at 2835.

6 *Id.* § 4702(1), 123 Stat. at 2835.

7 *See generally* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989) (discussing historical and modern religious liberty and freedom in America).

8 *See Latest Hate Crime Statistics: Annual Report Shows Slight Decrease*, FED. BUREAU OF INVESTIGATION (Nov. 25, 2013), http://www.fbi.gov/news/stories/2013/november/annual-hate-crime-statistics-show-slight-decease/annual-hate-crime-statistics

Congress found it necessary to include religious protection in the HCPA.[9]

However, Congress's constitutional authority to federally criminalize hate crimes that target religious groups remains in question. Specifically, because the HCPA is grounded, in part, on Congress's Thirteenth Amendment authority, there may be a deficiency in the protection the HCPA is providing to religious groups. An analysis of Thirteenth Amendment jurisprudence reveals the possibility that not all religions are protected under the Amendment.[10] As a result, a crime like the one described above may be outside the HCPA's reach, and the perpetrator could escape punishment in the federal system.

This Comment explores the extent to which federal hate crime legislation such as the HCPA protects people from bias-motivated violence on account of their religion. In doing so, it examines racial and religious protection in the context of Thirteenth Amendment jurisprudence and federal hate crime legislation. This Comment seeks to explain and clarify the relationship between the Thirteenth Amendment, religion, and federal hate crime statutes like the HCPA.

Part I provides a historical background to the HCPA and the Thirteenth Amendment. Part II closely examines race and religion in the context of the Thirteenth Amendment. As will become evident, racial and religious classifications uniquely intersect in Thirteenth Amendment jurisprudence. Part III discusses the scope and limitations of the HCPA's ability to protect people from violent crimes motivated by hatred toward religion and identifies two resulting problems. This Part briefly explores equal protection issues that may arise in connection with prosecutions under the HCPA. In doing so, it suggests that a portion of the HCPA, as applied, violates equal protection principles. Lastly, Part IV discusses three approaches to interpreting Congress's Thirteenth Amendment power and argues that the Thirteenth Amendment gives Congress the authority to protect people of all religious groups from hate crimes.

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-show-slight-decrease (stating that nineteen percent of hate crimes in 2012 targeted religious groups).

[9] Congress also included religious protection in another federal hate crime statute, 18 U.S.C. § 245(b)(2)(B), which makes it unlawful to interfere with "any person because of his race, color, religion or national origin" for enjoying a service provided by the State. 18 U.S.C. § 245(b)(2)(B) (2012).

[10] *See infra* Part II.

# I
# BACKGROUND AND HISTORY

## *A. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*

The HCPA contains two main provisions: §§ 249(a)(1) and 249(a)(2).[11] Congress invoked two different sources of federal power to justify each provision.[12] Section 249(a)(1), which is this Comment's focus, was justified pursuant to Congress's Thirteenth

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[11] Title 18 U.S.C. § 249 reads, in relevant part:

> (a) In general.—
>
> (1) Offenses involving actual or perceived race, color, religion, or national origin.—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the 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 national origin of any person—
>
> (A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both . . .
>
> (2) Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.—
>
> (A) In general.—Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the 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 religion, national origin, gender, sexual orientation, gender identity, or disability of any person—
>
> (i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both . . .
>
> (B) Circumstances described.—For purposes of subparagraph (A), the circumstances described in this subparagraph are that—
>
> (i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—
>
> (I) across a State line or national border; or
>
> (II) using a channel, facility, or instrumentality of interstate or foreign commerce;
>
> (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A).

18 U.S.C. § 249(a)(1)–(2).

[12] *See* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4702, 123 Stat. 2835–36 (2009).

Amendment authority. Section 249(a)(2), on the other hand, is predicated on Congress's power to regulate interstate commerce.

Section 249(a)(1) makes it a crime to cause bodily injury to a person "because of the actual or perceived race, color, religion, or national origin of any person."[13] This section was justified pursuant to the Enabling Clause of the Thirteenth Amendment, which gives Congress the constitutional authority to govern purely private conduct, although within certain parameters.[14] In enacting the statute, Congress made the following finding:

> For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery 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. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.[15]

As is evident, Congress found the proper authority to enact § 249(a)(1) in the Thirteenth Amendment and did not deem it necessary to act pursuant to the Commerce Clause, the Fourteenth Amendment, or any other constitutional power. According to Congress, § 249(a)(1) could be justified on Thirteenth Amendment grounds because bias-motivated violent crimes on account of race are significantly related to the remnants of slavery.[16] Additionally, Congress found that because certain religious groups were perceived as distinct races when the Thirteenth Amendment was adopted, assaults on the basis of religion should be prohibited "at least to the extent such religions . . . were regarded as races" when the Amendment was adopted.[17] Thus, § 249(a)(1) may reach purely localized hate crimes that target people because of their "race, color, religion, or national origin," provided those groups were perceived as races in the 1860s.

Section 249(a)(2) expands protection to people who are attacked because of their "gender, sexual orientation, gender identity, or

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[13] 18 U.S.C. § 249(a)(1).

[14] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439–40 (1968); *see also* discussion throughout.

[15] § 4702(7), 123 Stat. at 2836.

[16] *Id.*

[17] *Id.* § 4702(8), 123 Stat. at 2836.

disability."[18] Because these classifications are likely outside the scope of Thirteenth Amendment protection, Congress sought to rely on its Commerce Clause authority to enact § 249(a)(2).[19] Congress included in § 249(a)(2) an interstate commerce nexus, whereby the defendant's offense must be linked in some way to a channel, facility, or instrumentality of interstate commerce.[20] By resorting to the Commerce Clause, Congress ensured that people subjected to violence because of their gender, sexual orientation, or disability were protected under § 249(a)(2), provided the offense is linked to interstate commerce.

Much debate surrounds the constitutionality of the HCPA.[21] On one hand, the HCPA has been lauded as a much needed and lawful use of Congress's ability to legislate criminal conduct.[22] When the HCPA was enacted, President Barack Obama remarked, "through this law, we will strengthen the protections against crimes based on the color of your skin, the faith in your heart, or the place of your birth. . . . No one in America should be forced to look over their shoulder because of who they are."[23] On the other hand, § 249(a)(1) has been criticized and challenged as an unconstitutional overextension of Congress's Thirteenth Amendment authority to govern private conduct.[24] As will become evident, these challenges highlight the unsettled nature of Thirteenth Amendment jurisprudence.

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18 18 U.S.C. § 249(a)(2). Congress also repeated religion and national origin in this section, likely to cover instances in which a particular religion or national origin is not considered a distinct race within Thirteenth Amendment protection. United States v. Hatch, 722 F.3d 1193, 1205 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014).

19 *See* § 4702(6), 123 Stat. at 2835–36.

20 *See* 18 U.S.C. § 249(a)(2)(B).

21 This Comment's focus is primarily on § 249(a)(1) and Thirteenth Amendment jurisprudence. For a discussion of the constitutionality of § 249(a)(2), see Michael F. Pabian, *The Hate Crimes Prevention Act: Political Symbol or Prosecutorial Tool?*, 48 CRIM. L. BULL. 347, 356–63 (2012).

22 *See* H.R. REP. NO. 111-86, at 5–9 (2009); Brief for the United States as Appellee at 30–38, United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013) (No. 12-2040).

23 Remarks on the Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 2009 DAILY COMP. PRES. DOC. 1–2 (Oct. 28, 2009), *available at* http://www.gpoaccess.gov/presdocs/2009/DCPD-200900859.pdf.

24 *See* H.R. REP. NO. 111-86, at 38–46 (2009) (stating the dissenting views); Brief for Cato Inst. et al. as Amici Curiae Supporting Petitioner, Hatch v. United States, *cert. denied*, 134 S. Ct. 1538 (2014) (No. 13-6765); Gail Heriot & Alison Schmauch Somin, *Sleeping Giant?: Section Two of the Thirteenth Amendment, Hate Crimes Legislation, and Academia's Favorite New Vehicle for the Expansion of Federal Power*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 31 (2012).

### *B. The Thirteenth Amendment*

Section 1 of the Thirteenth Amendment reads, "[n]either 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," and Section 2 states, "Congress shall have power to enforce this article by appropriate legislation."[25]

In the aftermath of the Civil War, the Thirteenth Amendment was ratified to abolish slavery in the United States.[26] And Section 2 of the Thirteenth Amendment—the Enabling Clause—gives Congress the unique power to enact legislation that effectuates the purpose of Section 1: ensuring that slavery never again exists in the United States.

Since the Thirteenth Amendment's ratification, Congress has passed civil rights legislation that purports to eliminate the "badges and incidents of slavery"[27] by prohibiting public and private discrimination in various contexts.[28] Federal hate crime statutes such as the HCPA are among the pieces of legislation Congress has justified on Thirteenth Amendment grounds. But the meaning and extent of Congress's legislative power under the Enabling Clause continues to be a debated subject in both academia and federal courts. Although ratified in the aftermath of the Civil War, the extent of Congress's Thirteenth Amendment power to stamp out slavery and its remnants remains evasive and unsettled.[29] In particular, whether Congress may protect all religious groups from hate crimes pursuant to its authority under the Thirteenth Amendment is an unresolved issue.

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[25] U.S. CONST. amend. XIII.

[26] *Id.*

[27] The Civil Rights Cases, 109 U.S. 3, 20 (1883).

[28] *See, e.g.*, Civil Rights Act of 1866, 42 U.S.C. § 1981 (2012) (establishing equal rights among races in making contracts); Civil Rights Act of 1866, 42 U.S.C. § 1982 (2012) (establishing equal rights among races in property conveyance); Fair Housing Act, 42 U.S.C. § 3604(e) (2012) (prohibiting discrimination in real estate transactions); 18 U.S.C. § 245(b)(2)(B) (2012) (criminalizing hate crimes against victims using public facilities); Church Arson Prevention Act of 1996, 18 U.S.C. § 247(c) (2012) (criminalizing destruction of religious property on account of associated race, color, or ethnic characteristic); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249(a)(1) (discussed throughout).

[29] *See* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561 (2012).

Before looking closer at the extent to which the Thirteenth Amendment and § 249(a)(1) of the HCPA protect religious groups, it is necessary to first examine the Supreme Court's line of cases interpreting the Thirteenth Amendment. Discussing these cases will flesh out the origin and contours of Congress's Thirteenth Amendment legislative powers.

### *C. Thirteenth Amendment Case Law*

The phrase "badges and incidents of slavery" has become a well-known mantra for describing and interpreting the boundaries of Congress's power under the Thirteenth Amendment.[30] The phrase was first used in 1883 by Justice Bradley in the *Civil Rights Cases*[31]: Section 2 of the Thirteenth Amendment "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[32] Since then, in a few landmark cases, the Supreme Court has weighed in on the proper interpretation of the Thirteenth Amendment and Congress's power to abolish the badges and incidents of slavery. These important decisions, discussed below, reflect the unique complexities of interpreting Congress's legislative power to ensure that slavery—whether literal slavery or a "badge" or "incident" of slavery—never exists in the United States.

#### *1. The* Civil Rights Cases

The *Civil Rights Cases* mark the beginning of the Supreme Court's cases interpreting the Thirteenth Amendment. The *Civil Rights Cases* are five consolidated cases based upon alleged violations of the Civil Rights Act of 1875.[33] Operators of hotels, theaters, and railroads were prosecuted in various locations for denying African Americans equal use of their facilities.[34] The primary question before the Court was

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30 Many scholars have hypothesized about the correct interpretation of the Thirteenth Amendment and the "badges and incidents of slavery." *See, e.g.*, William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007) (advocating for a balanced interpretation of the Thirteenth Amendment); McAward, *supra* note 29 (arguing for a limited definition of the "badges and incidents of slavery"); *see also infra* Part IV.

31 109 U.S. at 20.

32 *Id.*

33 *Id.* at 4.

34 *Id.*

whether the Civil Rights Act of 1875 was constitutional under the Thirteenth or Fourteenth Amendments.[35]

Justice Bradley, writing for the majority, began by dispelling any notion that the Civil Rights Act of 1875 was constitutional on Fourteenth Amendment grounds.[36] Justice Bradley found that the Fourteenth Amendment prohibits only the denial of equal protection by a State, not the denial of equal protection in private conduct.[37] Therefore, the Court held that the Civil Rights Act of 1875 cannot be constitutionally sustained under the Fourteenth Amendment because the Act targets private discrimination rather than State-induced discrimination.[38]

The inquiry then turned to the Thirteenth Amendment. Justice Bradley explained that the Thirteenth Amendment, unlike the Fourteenth Amendment, "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."[39] Justice Bradley acknowledged that "Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents."[40] However, Justice Bradley went on to interpret what he meant by "badges and incidents of slavery" with a fairly narrow lens. The question for the Court, essentially, became "[c]an the act of a mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the accommodation [to an African American], be justly regarded as imposing any badge of slavery or servitude upon the applicant . . . ?"[41]

Justice Bradley answered in the negative. The Court found that the type of discrimination involved—denying African Americans equal accommodations in places of business—did not reflect or amount to a badge or incident of slavery.[42] Therefore, the Court held that Congress could not prohibit such conduct pursuant to the Thirteenth

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35 *Id.* at 8–9.
36 *Id.* at 4–19.
37 *Id.* at 11.
38 *Id.* at 19.
39 *Id.* at 20.
40 *Id.* at 21.
41 *Id.* at 24.
42 *Id.* at 25.

Amendment, and the Civil Rights Act of 1875 must be held unconstitutional.[43]

Justice Harlan, in a lone dissent, embraced a more progressive view of the badges and incidents of slavery.[44] Justice Harlan noted that the Thirteenth Amendment does not provide Congress with the authority to "regulate the entire body of the civil rights which citizens enjoy."[45] However, Justice Harlan clarified that the type of discrimination involved in the *Civil Rights Cases* certainly would amount to a "badge of servitude."[46] He further explained:

> [T]he power of Congress under the Thirteenth Amendment is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent, at least, of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race.[47]

Despite Justice Harlan's broader construal of the badges and incidents of slavery, the majority's narrow interpretation of Congress's legislative powers under the Enabling Clause of the Thirteenth Amendment remained in place for many years.

### *2.* Jones v. Alfred H. Mayer Co. *and the Expansion of the Badges and Incidents of Slavery*

The Supreme Court's 1968 decision in *Jones v. Alfred H. Mayer Co.*[48] marked a new era in Thirteenth Amendment jurisprudence.[49] The *Jones* decision significantly broadened the interpretation of the

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[43] *Id.*

[44] *Id.* at 26 (Harlan, J., dissenting).

[45] *Id.* at 36.

[46] *Id.* at 43.

[47] *Id.* at 37.

[48] 392 U.S. 409 (1968).

[49] One preceding case decided in 1906 should be noted: *Hodges v. United States*, 203 U.S. 1 (1906), *overruled in part by Jones*, 392 U.S. 409. *Hodges* severely limited Congress's Thirteenth Amendment power. In striking the convictions of white men for harassing African Americans at a lumber manufacturer, the Court held that the United States lacked jurisdiction to stop racially motivated discrimination in labor contracts. *Id.* at 20. Although the Court noted that the Thirteenth Amendment applies to all races including the Chinese, Italian, and Anglo-Saxon "races," the Court held that Congress may govern only the actual condition of slavery, not its badges and incidents. *Id.* at 17. The Court stated, "[I]t was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man and yet justified in a condition of slavery." *Id.* at 19. *Hodges*, however, was overruled in part by *Jones*, 392 U.S. at 441–43 n.78.

Thirteenth Amendment and the meaning of "badges and incidents of slavery" as determined by the *Civil Rights Cases*. And, although decided more than forty years ago, *Jones* remains the primary authority in Thirteenth Amendment case law.

In *Jones*, the petitioner, an African American, filed a complaint in the District Court for the Eastern District of Missouri alleging that the respondent refused to sell petitioner a home for the sole reason that petitioner was African American.[50] Relying in part on § 1982 of the Civil Rights Act of 1866,[51] the petitioner sought injunctive and other relief.[52] Writing for the majority, Justice Stewart held that § 1982 "bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."[53]

In making this ruling, the Court expounded upon the legislative history of the Civil Rights Act of 1866. The Court cited the words of Senator Trumbull, who introduced the bill in 1866:

> [The Thirteenth Amendment] declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect.[54]

The Court went on to find that the Civil Rights Act of 1866 should function exactly as its terms suggest—to prohibit all racial discrimination in the United States, whether or not under the color of law.[55]

The Court next turned to the question of whether the Civil Rights Act of 1866 was a constitutional exercise of Congress's Thirteenth Amendment power.[56] In holding that the Act was constitutional, the Court squarely addressed how broadly or narrowly Congress's power

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50 *Jones*, 392 U.S. at 412.

51 This portion of the Civil Rights Act of 1866 reads: "[a]ll citizens of the United States shall have 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." 42 U.S.C. § 1982 (2012).

52 *Jones*, 392 U.S. at 412.

53 *Id.* at 413.

54 *Id.* at 431 (internal quotation marks omitted).

55 *Id.* at 436.

56 *Id.* at 437–38.

under Section 2 of the Thirteenth Amendment should be interpreted.[57] The Court stated, "the majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act."[58] Further, the Court cited again, and vehemently agreed with, Senator Trumbull's words referencing the Enabling Clause:

> It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.[59]

The Court concluded that the Civil Rights Act of 1866 was a legitimate exercise of Congress's power under Section 2 of the Thirteenth Amendment, and Congress has the authority to rationally determine what the badges and incidents of slavery are through appropriate legislation.[60] Private conduct such as denying an African American the right to contract could thus be considered a "badge," "incident," "relic," or "vestige" of slavery within the meaning of the Thirteenth Amendment.[61]

In the aftermath of *Jones*, academic theories regarding the types of private conduct Congress could reach pursuant to the Enabling Clause became widespread.[62] Even if there is no consensus as to the precise meaning of the "badges and incidents of slavery," the *Jones* decision solidified the constitutionality of Congress's Thirteenth Amendment authority to enact legislation aimed at maintaining a society free from racial discrimination.

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[57] *Id.* at 438.

[58] *Id.* at 439–40.

[59] *Id.* at 440 (citation omitted) (internal quotation marks omitted).

[60] *Id.* In a 1976 case, *Runyon v. McCrary*, the Court held that 42 U.S.C. § 1981, another codified portion of the Civil Rights Act of 1866, was also constitutional under the Thirteenth Amendment. 427 U.S. 160, 178–79 (1976).

[61] *Jones*, 392 U.S. at 442–43 (using the word "relic" to describe the lingering effects of slavery); *id.* at 441 n.78 (using the word "vestige" to describe the lingering effects of slavery); *see also* McAward, *supra* note 29, at 592–96 (discussing the meaning of the Court in *Jones* using the words "relic" and "vestige").

[62] McAward, *supra* note 29, at 596–97 (listing the variety of injustices scholars have proposed Congress should be able to eradicate via the Thirteenth Amendment).

*3. Post-*Jones *Thirteenth Amendment Cases*

Two subsequent Supreme Court cases that reaffirmed and expanded upon the principles set out in *Jones* should also be mentioned. In the first case, *Griffin v. Breckenridge*, a group of African Americans brought an action under the Klu Klux Klan Act, 42 U.S.C. § 1985(3),[63] against two white citizens.[64] The plaintiffs alleged that the two white defendants conspired to assault and detain the plaintiffs, thereby depriving them of equal protection, privileges, and immunities under the laws of the United States and Mississippi, in violation of § 1985(3).[65] The issue before the Court was the scope and constitutionality of § 1985(3).[66]

After citing the *Civil Rights Cases* and *Jones*, the Court noted that the "varieties of private conduct [the Thirteenth Amendment] may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery."[67] The Court concluded that Congress was within its authority under the Thirteenth Amendment when enacting a statute that created a remedy for African Americans who have been victims of racially discriminatory private action.[68] Section 1985(3) was thus held constitutional.[69]

The majority in *Griffin* supplemented the opinion with an additional comment pertaining to the classes of people the Thirteenth Amendment may protect. The Court alluded to the possibility that the Thirteenth Amendment, as exercised through § 1985(3), may protect not just races, but other class-based groups. The Court stated, "[t]he language requiring intent to deprive of *equal* protection, or *equal*

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63 Title 42 U.S.C. § 1985(3) provides, in relevant part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (2012).

64 403 U.S. 88, 89–92 (1971).

65 *Id.*

66 *Id.* at 93.

67 *Id.* at 105.

68 *Id.*

69 *Id.*

privileges and immunities, means that there must be some racial, *or perhaps otherwise class-based*, invidiously discriminatory animus behind the conspirators' action."[70]

In the second case, *McDonald v. Sante Fe Trail Transportation Co.*,[71] a group of white men brought an action against the men's employer, a transportation company, for wrongfully discharging the group, in violation of 42 U.S.C. § 1981.[72] The white petitioners claimed that they were wrongfully dismissed from employment because similarly charged black employees were not dismissed.[73] The issue before the Court was whether § 1981 could apply to discrimination against whites.[74] The Court held that § 1981 protects all races, including whites, from discrimination.[75] In doing so, the Court cited the decree in *Hodges v. United States* that Congress's Thirteenth Amendment authority may reach "every race and individual."[76]

*Jones* and the post-*Jones* cases illuminate a few key tenets of Thirteenth Amendment jurisprudence. First, it is entirely constitutional for Congress to regulate private, racially discriminatory conduct pursuant to the Enabling Clause of the Thirteenth Amendment. Second, under the Thirteenth Amendment, Congress may protect all races from discrimination, not just the African American race. And further, there is a possibility, following the suggestions in *Griffin*, that the Thirteenth Amendment's protection may reach not only races, but also other class-based groups.[77]

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[70] *Id.* at 102 (emphasis added) (citation omitted).

[71] 427 U.S. 273 (1976).

[72] *Id.* at 275–78. Title 42 U.S.C. § 1981 states, in part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (2012). The petitioners also alleged violations of Title VII of the Civil Rights Act of 1964. *McDonald*, 427 U.S. at 275–78.

[73] *McDonald*, 427 U.S. at 275–78.

[74] *Id.* at 276.

[75] *Id.* at 287–89.

[76] *Id.* at 288 n.18 (citations omitted) (internal quotation marks omitted); *see also supra* note 49.

[77] Two more Supreme Court cases need to be discussed here. In *United Brotherhood of Carpenters of America & Joiners v. Scott*, the Court, reaffirming *Griffin*, withheld affirmative judgment regarding whether § 1985(3) could reach classes other than races, but

The next Section explores in more depth the various classes of people the Thirteenth Amendment may or may not protect. Specifically, Part II examines Congress's ability to protect religions from discriminatory conduct under its Thirteenth Amendment authority to abolish the badges and incidents of slavery.

## II
## RACIAL AND RELIGIOUS CLASSIFICATIONS AND THE THIRTEENTH AMENDMENT

Before turning to a discussion of the HCPA and bias-motivated hate crimes against religious groups, it is helpful to examine how courts have analyzed racial and religious classification in the context of the Thirteenth Amendment. Inspecting the unique interplay between race and religion is necessary to understand how religion is treated in Thirteenth Amendment jurisprudence.

As explained in Part I, the Supreme Court has held that the African American race may be protected under the Thirteenth Amendment.[78] Additionally, Supreme Court precedent indicates that all races fall under the Thirteenth Amendment's protection, not just African Americans.[79] However, two subsequent Supreme Court cases reveal that classifying according to race is not a simple or straightforward task. Perhaps due to the blurry lines between racial identity and religious identity, the Court has left an imperfect picture regarding which class of people Congress may protect under the Thirteenth Amendment.

This Part begins by discussing notions of race-based religious protection under the Thirteenth Amendment. Illustrations of two Supreme Court cases shed light on how religions came to be classified with reference to antiquated notions of race. Then, a

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outright declined to hold that § 1985(3) could reach animus targeting economic class. 463 U.S. 825, 837–38 (1983). And, in *Bray v. Alexandria Women's Health Clinic*, the Court held that opposition to abortion does not qualify alongside racial discrimination as an "otherwise class-based, invidiously discriminatory animus," as required by *Griffin*, and that opposition to abortion does not by itself reflect animus against women in general. 506 U.S. 263, 268–69 (1993) (citation omitted). While these cases analyzed at length *Griffin*'s proclamation that the Thirteenth Amendment and § 1985(3) could "perhaps" reach classes other than races, neither case foreclosed the possibility that there are classes beyond race that warrant protection from animus. These two cases merely declined to extend the Thirteenth Amendment and § 1985(3)'s protection to animus aimed at economic classes and women seeking abortions.

[78] *See supra* Part I.C.

[79] *See supra* Part I.C.

discussion of circuit court cases highlights the current and unsettled state of the law surrounding Thirteenth Amendment religious protection.

### *A.* Saint Francis College, Shaare Tefila Congregation, *and Race-Religions*

In 1987, the Supreme Court handed down two opinions that addressed which classes of people could bring an action under 42 U.S.C. §§ 1981 and 1982.[80] Both opinions turned to nineteenth-century conceptions of race when deciding who could be protected under §§ 1981 and 1982.[81] These cases eventually became the guiding authority for determining which classes of people are protected under the Thirteenth Amendment.

In *Saint Francis College v. Al-Khazraji*, an Iraqi-born college professor brought suit under § 1981 against Saint Francis College for denying him tenure.[82] Al-Khazraji alleged he was discriminated against because of his Arabian ancestry or race.[83] The question before the court was whether a person of Arabian ancestry could be protected from racial discrimination under § 1981.[84]

To answer this question, the Court delved into nineteenth-century notions of race, drawing from legislative history and nineteenth-century dictionaries and encyclopedias.[85] Rejecting Saint Francis College's argument that Arabs were considered part of the Caucasian race both contemporarily and in the nineteenth century, the Court explained, "[t]he understanding of 'race' in the 19th century . . . was different. Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law."[86] The Court then made explicit findings of various groups that were considered races in the nineteenth century, including Arabs.[87]

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[80] *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987).

[81] For a thorough analysis and critique of these decisions, see Jennifer Grace Redmond, *Redefining Race in* Saint Francis College v. Al-Khazraji *and* Shaare Tefila Congregation v. Cobb*: Using Dictionaries Instead of the Thirteenth Amendment*, 42 VAND. L. REV. 209 (1989).

[82] 481 U.S. at 606.

[83] *Id.*

[84] *Id.* at 607.

[85] *See id.* at 610–13.

[86] *Id.* at 610.

[87] *Id.* at 610–13.

For example, in the nineteenth century, certain classes of people—such as Arabs, Jews, Mexicans, Finns, and Germans—were all considered races.[88] Further, the Court noted that discrimination based on ancestry or ethnic characteristics "is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory."[89] The Court concluded that because Arabs were part of a distinct ethnic group considered a "race" in the nineteenth century, they were among the classes of people that could be protected under § 1981 on account of their "ancestry or ethnic characteristics."[90] Therefore, Al-Khazraji's § 1981 action could be sustained.[91]

In *Shaare Tefila Congregation v. Cobb*, the reasoning in *Saint Francis College* was extended to encompass discrimination against Jews.[92] A Jewish congregation and individual members brought an action under § 1982 against the defendants for desecrating their synagogue.[93] At issue was whether Jews could state a claim under § 1982.[94] Because the Court had previously held that both §§ 1981 and 1982 derive from the Civil Rights Act of 1866,[95] the Court deferred to the same legislative and historical analysis it undertook in *Saint Francis College*:

> [T]he question before us is not whether Jews are considered to be a separate race by today's standards, but whether, at the time § 1982 was adopted, Jews constituted a group of people that Congress intended to protect. It is evident from the legislative history of the section reviewed in *Saint Francis College*, a review that we need not repeat here, that Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute.[96]

The Court held that Jews cannot be foreclosed from bringing a cause of action under § 1982, even if Jews are today considered to be part of the Caucasian race.[97]

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88 *Id.* at 611–12.

89 *Id.* at 613.

90 *Id.*

91 *Id.*

92 481 U.S. 615, 616–18 (1987).

93 *Id.* at 616.

94 *Id.* at 617.

95 Runyon v. McCrary, 427 U.S. 160, 170–71 (1976).

96 *Shaare Tefila Congregation*, 481 U.S. at 617–18.

97 *Id.* at 618.

Although neither *Saint Francis College* nor *Shaare Tefila Congregation* explicitly mentions the Thirteenth Amendment, the opinions became legislators' and judges' reference points for discerning which classes of citizens the Amendment protects.[98] The reason for this is twofold. First, the Supreme Court has seldom addressed this issue. Thus, legislators and judges have had no choice but to turn to the next best authority for guidance—the Supreme Court's interpretation of statutes passed alongside the Amendment.[99] Second, because §§ 1981 and 1982 were enacted in the wake of the Thirteenth Amendment, legislators and judges have found that the Supreme Court's interpretation of these statutes could apply to the Amendment itself.[100] Thus, as the law stands today, *Saint Francis College* and *Shaare Tefila Congregation* provide at least a general guide for discerning which classes of people the Thirteenth Amendment protects.

By harkening back to nineteenth-century notions of race in interpreting §§ 1981 and 1982, *Saint Francis College* and *Shaare Tefila Congregation* created a point of confusion in Thirteenth Amendment jurisprudence that still resonates today.[101] Because these opinions became the reference point for Thirteenth Amendment interpretation, religious identity is now understood through a racial lens for purposes of Thirteenth Amendment classification. More specifically, *Shaare Tefila Congregation*'s inclusion of Jews in the ethnic-racial category produced an irregularity in the protection the Thirteenth Amendment provides to religious groups by contemporary standards: people of one religion, Judaism, are protected under the Thirteenth Amendment, whereas people of many other religious faiths may not be.

But must a religion always be considered a nineteenth-century "race" to warrant Thirteenth Amendment protection? The next

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98 *See, e.g.*, United States v. Nelson, 277 F.3d 164, 178 (2d Cir. 2002) (finding that because §§ 1981 and 1982 were passed in the wake of the Thirteenth Amendment, the Supreme Court's analysis of these statutes may apply, a fortiori, to the Thirteenth Amendment itself); 142 CONG. REC. H6451 (daily ed. June 18, 1996) (statement of Rep. Hyde) (stating that the Court's interpretation of §§ 1981 and 1982 applies to the Thirteenth Amendment).

99 *See supra* note 98 and accompanying text.

100 *See supra* note 98 and accompanying text.

101 *See generally* Molly E. Swartz, *By Birth or by Choice? The Intersection of Racial and Religious Discrimination in School Admissions*, 13 U. PA. J. CONST. L. 229, 232–33 (2010) (discussing the blurry distinction between race and religion and noting the difficulty of classifying "ethnoreligious" groups such as Jews).

Section will explore two circuit court opinions that touch upon this issue.

### *B. Circuit Court Decisions*

Beyond that which can be gleaned from *Saint Francis College* and *Shaare Tefila Congregation*, the Supreme Court has never addressed whether religions may be protected directly under the Thirteenth Amendment. However, a few circuit courts have weighed in on the matter.[102] When addressing religious protection under the Thirteenth Amendment, circuit courts have inconsistently applied the Supreme Court precedent laid out in *Saint Francis College* and *Shaare Tefila Congregation*. The key issue is whether Congress may protect religions directly under the Thirteenth Amendment, or whether Congress may reach only those religions considered races in the nineteenth century.

#### *1.* United States v. Nelson

The Second Circuit's opinion in *United States v. Nelson*[103] contains possibly the most expansive reading of Congress's Thirteenth Amendment power to protect classes of people other than races, such as religious groups.[104] The *Nelson* decision opened the door for the argument that the Thirteenth Amendment's protection reaches all religions directly, without a detour through nineteenth-century definitions of race.

In *Nelson*, two defendants appealed their convictions under 18 U.S.C. § 245(b)(2)(B)[105] for willfully intimidating and interfering

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102 Only a few circuit court decisions, discussed in this Section, specifically address whether religions are protected under the Thirteenth Amendment. However, a number of circuit courts have analyzed whether federal hate crime statutes, including the HCPA and 18 U.S.C. § 245(b)(2)(B), are constitutional under the Thirteenth Amendment. *See, e.g.*, United States v. Cannon, 750 F.3d 492 (5th Cir. 2014), *cert. denied*, No. 14-5356 (U.S. Dec. 1, 2014), 2014 WL 3698394; United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014); United States v. Maybee, 687 F.3d 1026 (8th Cir. 2012); *Nelson*, 277 F.3d 164; United States v. Bledsoe, 728 F.2d 1094 (8th Cir. 1984).

103 *Nelson*, 277 F.3d 164.

104 *See* Carter, *supra* note 30, at 1358.

105 The statute makes it unlawful to interfere with "any person because of his race, color, religion or national origin" for enjoying a service provided by the State. 18 U.S.C. § 245(b)(2)(B) (2012). This legislation provides an excellent analogy to § 249(a)(1) of the HCPA. Section 245(b)(2)(B) criminalizes bias-motivated interference because the victim is enjoying a "federally protected activity" such as a service, benefit, or program provided by the State. *Id.* On the other hand, the HCPA does not require that the victim be engaged in a federally protected activity; the HCPA reaches bias-motivated violence generally,

with a victim because of his Jewish religion.[106] The defendants' primary claim was that § 245(b)(2)(B) represents an improper extension of Congress's power under the Constitution.[107] The government countered, arguing, inter alia, that § 245(b)(2)(B) falls squarely within Congress's Thirteenth Amendment legislative authority.[108] To reach its decision, the Second Circuit undertook a thorough discussion of the constitutionality of § 245(b)(2)(B) and Congress's powers under the Thirteenth Amendment.[109]

The court began by analyzing the history and scope of the Thirteenth Amendment.[110] Following Supreme Court precedent, the court determined that the Thirteenth Amendment's decree abolishing slavery in the United States applies equally to all races.[111] So, the key question for the court became whether Jews are a "race" such that they may be afforded protection under the Thirteenth Amendment and, consequently, § 245(b)(2)(B).[112]

The court held that the Thirteenth Amendment does in fact protect Jews, as a race, from discrimination.[113] The court explained that "'race' as used in Thirteenth Amendment jurisprudence is a term of art, whose meaning is not limited by today's usage."[114] Then, after citing the *Saint Francis College* and *Shaare Tefila Congregation* interpretations of §§ 1981 and 1982, the Second Circuit noted,

> [T]hese arguments apply, *a fortiori*, to the Thirteenth Amendment itself. For it is on the authority of the Thirteenth Amendment that the applications of these civil rights statutes developed. . . . Accordingly, we find that Jews were among the "races" intended to be protected from slavery and involuntary servitude by the

whether or not the victim is enjoying a federally protected activity. 18 U.S.C. § 249(a)(1). Nevertheless, for purposes of Thirteenth Amendment analysis, § 245(b)(2)(B) is a helpful comparison to the HCPA, for § 245(b)(2)(B) has been found constitutional on Thirteenth Amendment grounds, and § 245(b)(2)(B) and the HCPA protect the same classes of people, including religions. *Id.*; 18 U.S.C. § 245(b)(2)(B).

106 *Nelson*, 277 F.3d at 168–69.

107 *Id.* at 173.

108 *Id.* at 174.

109 *Id.* at 173–92.

110 *Id.* at 175.

111 *Id.* at 176.

112 *Id.* at 175–77.

113 *Id.* at 178.

114 *Id.* at 176.

> Thirteenth Amendment, and that Congress may today protect Jews pursuant to that Amendment.[115]

Thus, the court's position was that because Jews were considered a race in the nineteenth century when the Thirteenth Amendment was adopted, Congress has the power through the Thirteenth Amendment to implement statutes such as § 245(b)(2)(B) to protect Jews from animus.

The court, however, did not end its analysis there. Specifically rejecting the defendants' argument that the Thirteenth Amendment protects Jews neither as a race nor a religion, the court stated, "there is strong precedent to support the conclusion that the Thirteenth Amendment extends its protections to religions directly, and thus to members of the Jewish religion, without the detour through historically changing conceptions of 'race' that we have just taken."[116] The court based this conclusion on the idea that nothing in the conceptual or linguistic notions of slavery and involuntary servitude "limit[] the banning of these evils only when they are imposed along racial lines."[117] Therefore, "the subjugation of one person to another by coercive means" remains the same whether the subjugation is done on account of race, religion, or for some other reason.[118] Accordingly, the Second Circuit found that Jews are protected by the Thirteenth Amendment irrespective of whether they were considered a race in the nineteenth century, and, further, "the Thirteenth Amendment extends its protections against slavery to *religions* as well as to races."[119]

The Second Circuit's expansive interpretation of the Thirteenth Amendment has been met with some criticism. One scholar, Professor William M. Carter, Jr., commented, "[t]he most significant problem is that the court conflated the Amendment's prohibition of slavery and involuntary servitude with its equally important purpose of eliminating the badges and incidents of slavery."[120] In other words, simply because someone has suffered "enslavement through physical, economic, or legal coercion" does not mean that he "has suffered a badge of slavery related to the system of African slavery."[121] Thus,

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115 *Id.* at 178.

116 *Id.* at 179.

117 *Id.* (citing United States v. Kozminski, 487 U.S. 931, 942 (1988)).

118 *Id.* at 179–80.

119 *Id.* at 178 n.14.

120 Carter, *supra* note 30, at 1360.

121 *Id.* at 1361.

the *Nelson* court's oversight was the assumption that if the Thirteenth Amendment's prohibition of slavery is race-neutral, so too is its prohibition of the legacies of slavery.[122]

Nevertheless, the *Nelson* decision left the door open for the interpretation, at least in the Second Circuit, that Congress may protect all religions directly under the Thirteenth Amendment. Since *Nelson*, no court has issued a direct ruling on the status of religious protection under the Thirteenth Amendment. However, in a recent case, *United States v. Hatch*, the Tenth Circuit adopted a fairly restrained approach when interpreting the HCPA and Congress's Thirteenth Amendment authority.[123] The court in *Hatch* stuck closely to Supreme Court precedent, neglecting to adopt the broader view that the Thirteenth Amendment protects religions directly, as the court did in *Nelson*.

*2.* United States v. Hatch

In *Hatch*, William Hatch and two friends kidnapped and assaulted a mentally-disabled Navajo man in New Mexico.[124] The men told the victim they were drawing "feathers" and "native pride" on his body with a marker, but instead drew satanic and anti-homosexual images.[125] The men also branded a swastika on the victim's arm with a heated wire.[126] The government charged all three men with violating § 249(a)(1) of the HCPA for subjecting the victim to physical violence on account of his race.[127] The defendants argued in district court that § 249(a)(1) is unconstitutional.[128] This argument

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122 *See id.* Carter adopts a balanced view, in which the Thirteenth Amendment should "be interpreted in an evolutionary manner, but with specific regard to the experience of the victims of human bondage in the United States (i.e., African Americans) and the destructive effects that the system of slavery had upon American society, laws, and customs." *Id.* at 1312. This view sits somewhere between what he calls the "strict textualist" view, which limits the Amendment's scope to literal slavery, and the "expansionist approach," which applies the badges and incidents of slavery to any discrimination suffered by any identifiable group. *Id.* at 1366. Further discussion of the various theories for interpreting the Thirteenth Amendment's scope can be found *infra* Part IV.

123 722 F.3d 1193 (10th Cir. 2013).

124 *Id.* at 1195–96.

125 *Id.* at 1195.

126 *Id.* at 1195–96.

127 *Id.* at 1196.

128 *Id.*

was rejected.[129] William Hatch appealed, and the sole question before the Tenth Circuit was the constitutionality of § 249(a)(1) of the HCPA.[130]

The court presented a comprehensive history of the Thirteenth Amendment and the Supreme Court's case law interpreting the "badges and incidents of slavery."[131] Next, the court disposed of the defendant's federalism argument, which claimed that § 249(a)(1) amounts to congressional overreach by unconstitutionally intruding into matters reserved to states.[132] Then, the court turned to the main issue: whether § 249(a)(1) is a constitutional exercise of Congress's authority under Section 2 of the Thirteenth Amendment and *Jones*.[133]

The court began its constitutional analysis by examining the "salient characteristic of the victim" being protected by the HCPA.[134] Following the Supreme Court's *Saint Francis College* and *Shaare Tefila Congregation* decisions, the court explained that in the nineteenth century, certain religious groups and national origins were perceived as distinct races.[135] In light of this, the HCPA may protect religions and national origins "'at least to the extent such religions or

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[129] *Id.*; *see* United States v. Beebe, 807 F. Supp. 2d 1045 (D. N.M. 2011), *aff'd sub nom.* United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013).

[130] *Hatch*, 722 F.3d at 1196.

[131] *Id.* at 1196–1201; *see supra* Part I.B–C.

[132] *Hatch*, 722 F.3d at 1201. The defendant based his federalism argument on a synthesis of principles derived from the Tenth Amendment and post-*Jones* precedent pertaining to the Commerce Clause and Section 5 of the Fourteenth Amendment. *See id.* The court, however, noted that it will be up to the Supreme Court to decide whether its federalism cases should apply to the Thirteenth Amendment. *Id.* Moreover, it will also be up to the Supreme Court to determine the outer limits of *Jones*'s rational determination standard. *Id.*; *see also* United States v. Cannon, 750 F.3d 492 (5th Cir. 2014), *cert. denied*, No. 14-5356 (U.S. Dec. 1, 2014), 2014 WL 3698394 (holding that § 249(a)(1) is a constitutional exercise of Congress's Thirteenth Amendment authority, and rejecting defendants' federalism argument that Congress's powers illuminated in *Jones* should be restricted in light of recent Supreme Court decisions relating to the Fourteenth and Fifteenth Amendments).

[133] *Hatch*, 722 F.3d at 1205. The court also considered an equal protection challenge to the HCPA, discussed *infra* Part III.A.

[134] *Hatch*, 722 F.3d at 1205. For this portion of its constitutional analysis, the court focused on three 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." *Id.* According to the court, if Congress satisfactorily took into account all three considerations, the HCPA would be deemed constitutional pursuant to Congress's Section 2 Thirteenth Amendment authority to rationally determine the badges and incidents of slavery. *Id.* Although not spelled out in case law, the court had "no trouble endorsing this approach as a means to rationally determine the badges and incidents of slavery." *Id.* at 1206.

[135] *Id.* at 1205.

national origins were regarded as races' in the 1860s."[136] The court concluded that Congress extended § 249(a)(1)'s protection to only those groups considered races in the nineteenth century when the Thirteenth Amendment was adopted.[137] Furthermore, Congress was within the boundaries of the Thirteenth Amendment when enacting § 249(a)(1) with this limited reach.[138]

The *Hatch* ruling justified § 249(a)(1)'s constitutionality on fairly narrow grounds. Unlike *Nelson*, the court in *Hatch* chose not to make broader, sweeping comments regarding Thirteenth Amendment racial and religious classification. This is likely because the targeted trait was the victim's racial ancestry, rather than the victim's religion, and therefore the court did not need to comment extensively on religious protection. The court explained, "[w]hile facially broad, the *Jones* formulation supports the narrower approach Congress took in the racial violence provision—and we need not speculate on whether a broader criminalization of conduct under this rationale would pass constitutional review."[139] Thus, the court ended its inquiry into the Thirteenth Amendment once it found constitutional justification for § 249(a)(1).

Although the *Hatch* decision was limited to this narrow analysis, the case makes evident that Thirteenth Amendment religious protection continues to be evaluated by referencing nineteenth-century notions of race. The court in *Hatch* was comfortable defining the HCPA's religious protection in terms of nineteenth-century race-religions, whereas the court in *Nelson* went further, finding that § 245(b)(2)(B) could simultaneously protect religions directly and be valid under the Thirteenth Amendment.

The *Nelson* and *Hatch* decisions exemplify two alternate ways to interpret Congress's ability to protect religions pursuant to the Thirteenth Amendment. Following *Nelson*, all religions may be protected by statutes justified on Thirteenth Amendment grounds. Following the more limited reasoning in *Hatch*, only those religions considered races in the nineteenth century are protected by the Thirteenth Amendment. Without further guidance from the Supreme Court, the status of religious protection under the Thirteenth

136 *Id.* (quoting Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4702(8), 123 Stat. 2836 (2009)).

137 *Hatch*, 722 F.3d at 1206.

138 *Id.*

139 *Id.*

Amendment will remain caught between these two possible interpretations.

The next Part turns to a discussion of religion and the HCPA. How does the current inconclusive state of the law affect the HCPA's ability to protect religious groups from hate-motivated violence? What are the consequences of a statute that on its face protects the "religion" of "any person," but in reality may be protecting only select religions?

## III
## RELIGION AND THE HCPA

As the law currently stands, Judaism is the only religion that has been formally recognized as protected by the Thirteenth Amendment.[140] As such, § 249(a)(1) of the HCPA likely cannot protect religious groups other than Jews against hate crimes, unless the religious group was considered a race in the nineteenth century.[141]

Yet the statutory text of § 249(a)(1) indicates that the HCPA protects "any person" from bias-motivated violence on account of his or her "religion."[142] The plain language of the statute, then, is misaligned with the protection the HCPA is providing. This inconsistency illuminates a few problems. First, the HCPA violates equal protection principles because the provision as applied makes distinctions based on religion. Although the HCPA has been challenged for its alleged unequal protection of races,[143] no court has addressed an equal protection challenge based on the HCPA's unequal protection of religions.[144] Second, there is a real possibility that many hate crimes against religious groups could go unpunished in federal court. If the HCPA is limited to protecting only nineteenth-century race-religions, then religious groups other than Jews, or any religion not deemed a race in the nineteenth century, are simply not

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140 *See* United States v. Allen, 341 F.3d 870 (9th Cir. 2003) (holding 18 U.S.C. § 245(b)(2)(B) constitutional under the Thirteenth Amendment and applying it to a crime against Jews); United States v. Nelson, 277 F.3d 164, (2d Cir. 2002) (holding that the Thirteenth Amendment protects Jews).

141 Pabian, *supra* note 21, at 355–56.

142 18 U.S.C. § 249(a)(1) (2012).

143 *See infra* Part III.A.

144 At the time of publication of this Comment, research did not reveal any cases in which the HCPA's constitutionality was challenged based on its unequal protection of religions.

protected by the HCPA.[145] This gap in the HCPA's protection creates the perception of inequality in the public eye, which is problematic. These two problems will each be discussed in turn.

### *A. Problem 1: The HCPA and Equal Protection of Religion*

Due to the irregularity in the HCPA's protection of religions, the statute is vulnerable to an equal protection challenge. Three circuit courts have addressed the constitutionality of § 249(a)(1) of the HCPA,[146] but only one court confronted an equal protection challenge.[147] That court was the Tenth Circuit in *Hatch*, which specifically rejected the defendant's argument that the HCPA violated equal protection principles.[148] However, in *Hatch*, the defendant's equal protection argument was limited to a criticism of the HCPA's alleged unequal protection of races.[149] The defendant claimed that the HCPA, as applied through the Thirteenth Amendment, violates equal protection principles because it protects only formerly enslaved races—rather than all races—and therefore makes distinctions based on race.[150] But that argument was significantly weakened because, as the court explained, "the Thirteenth Amendment protects all races, not just those that had been subject to slavery in the United States."[151] Thus, the court concluded that the HCPA does not in fact make

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145 Some hate crimes against religions could be prosecuted by federal authorities under § 249(a)(2), the portion of the HCPA enacted pursuant to the Commerce Clause. *See supra* note 18 and accompanying text. Of course, the crime would have to be linked in some way to a channel, facility, or instrument of interstate commerce. *See* 18 U.S.C. § 249(a)(2).

146 *See* United States v. Cannon, 750 F.3d 492 (5th Cir. 2014), *cert. denied*, No. 14-5356 (U.S. Dec. 1, 2014), 2014 WL 3698394 (holding that § 249(a)(1) is a constitutional exercise of Congress's Thirteenth Amendment authority to rationally define the badges and incidents of slavery, and rejecting defendants' federalism argument that Congress's powers illuminated in *Jones* should be restricted in light of recent Supreme Court decisions relating to the Fourteenth and Fifteenth Amendments); United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014) (discussed throughout); United States v. Maybee, 687 F.3d 1026 (8th Cir. 2012) (holding that § 249(a)(1) is constitutional even without a requirement that the willful infliction of injury be motivated both by the victim's race and by the victim's enjoyment of a public benefit, as distinguished from 18 U.S.C. § 245(b)(2)(B)).

147 *Hatch*, 722 F.3d at 1208.

148 *Id.*

149 *Id.*

150 *Id.* at 1208–09.

151 *Id.* at 1208 (referencing the finding in *Hodges v. United States* that the Thirteenth Amendment protects all races).

distinctions based on race.[152] Further, the court stated that even if the Thirteenth Amendment was limited to protecting formerly enslaved races, the HCPA would have no equal protection problem because such a limitation is the very sort of legislation the Thirteenth Amendment authorizes.[153] And finally, the court noted that even if the Fourteenth Amendment was interpreted to supersede the Thirteenth Amendment, the HCPA still would not violate equal protection principles because the HCPA's protection extends to "'any person,'" not just formerly enslaved races.[154]

However, a challenge to the HCPA's unequal protection of all religions presents a more forceful equal protection argument. A litigant could argue that the HCPA makes distinctions based on religion because it protects only those religions regarded as races in the nineteenth century. Because not all religions are considered nineteenth-century races, the HCPA's application necessitates religion-based classification. The effect of this classification is that the HCPA provides hate crime protection to some religious groups, such as Jews, while leaving others unprotected.[155] As a result, the HCPA fails to provide uniform, equal protection to all religious groups and should be subject to judicial review for violating Fourteenth Amendment equal protection principles.[156]

If confronted with such an equal protection challenge, a court would have to determine the appropriate level of judicial scrutiny. A legislative classification receives strict judicial scrutiny when the classification interferes with a fundamental right or when it disadvantages a suspect class.[157] A suspect class is a class that is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[158] If a court finds that a suspect class is involved and that it must therefore apply strict scrutiny, then

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152 *Id.* at 1208–09.

153 *Id.*

154 *Id.* at 1209.

155 Jews may be considered "ethnoreligious," i.e., a group that identifies as both ethnic and religious. Swartz, *supra* note 101, at 247–48. However, throughout recent history, Jews have identified more and more as a religious group. *Id.* at 249–50.

156 The Fifth Amendment's Due Process Clause incorporates Fourteenth Amendment equal protection principles into federal laws. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

157 Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976).

158 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

the law in question must be narrowly tailored to serve a compelling government interest.[159]

It is quite possible that a court would review the HCPA with strict scrutiny in a religion-based equal protection challenge. Although the Supreme Court has yet to explicitly recognize that Fourteenth Amendment equal protection principles apply to religions, and has instead relied on the First Amendment to decide religion-related cases, a law that classifies according to religion may still warrant strict scrutiny.[160] Abundant historical evidence suggests that religion should be treated as a suspect class alongside race.[161] Moreover, in the well-known footnote four of *United States v. Carolene Products Co.*, in which the Supreme Court first considered heightened judicial scrutiny for suspect classes, religion was included alongside race as a suspect category.[162] Thus, it is certainly possible that if presented with a religion-based equal protection challenge, a court would review the legislation with strict scrutiny.[163]

Predicting whether the HCPA would survive strict scrutiny in a religion-based equal protection challenge, however, is difficult. On one hand, a court may find that the HCPA survives strict scrutiny as a narrowly tailored law that serves a compelling government interest. Combating and eradicating violence and hatred toward minority groups is likely to be considered a compelling government interest because, as noted by Congress, America's history includes incidences of hate crimes aimed at people because of their race or religion.[164] It therefore follows that protecting the public from hate crimes is a compelling government interest. Additionally, the HCPA may be

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159 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

160 *See* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 911, 918–19 (2013).

161 *Id.* at 965–70 (discussing the Fourteenth Amendment's ban on class legislation and arguing that historical evidence and legislative history indicates the framers intended for the ban on class legislation to include races and religions alike).

162 United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938); *see also* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (listing religion as an inherently suspect distinction).

163 If it was concluded that religions are not a suspect class, a court would scrutinize the HCPA under a more relaxed judicial standard, such as rational basis review. Additionally, a court might use rational basis review by analyzing the HCPA's religion-based classification under the Religion Clauses of the First Amendment. *See* U.S. CONST. amend. I. In any event, this Comment limits its inquiry of the HCPA's constitutionality to a strict scrutiny analysis under the Fourteenth Amendment.

164 *See* H.R. REP. NO. 111-86, at 5 (2009).

considered narrowly tailored because the law protects every class that Congress can reach under the present interpretation of the Thirteenth Amendment.[165] In other words, the HCPA is narrowly tailored because its religion-based distinctions are authorized by the Thirteenth Amendment itself. Moreover, it could be argued that the HCPA's religion-based classification is not problematic because Congress, of course, has an interest in enacting laws that are consistent with the Constitution.

On the other hand, perhaps the HCPA does not serve a compelling government interest, is not narrowly tailored, and would not survive strict scrutiny. Some argue that federal hate crime legislation is unnecessary because states already sufficiently punish violent crimes, and, further, by enacting and enforcing federal hate crime legislation, the federal government unlawfully intrudes into the domain of the states.[166] In this way, criminalizing hate crimes by federal prosecution is not a compelling government interest. Additionally, assuming the federal government does have an interest in protecting the public from hate crimes, perhaps the HCPA is not narrowly tailored; the law does not protect all religious groups from hate crimes and, therefore, fails to meet an essential aspect of the government's goal of eradicating hatred and violence toward minority groups.

However, a traditional means-ends inquiry may not be the most appropriate way to analyze whether the HCPA violates equal protection principles. The HCPA presents a unique conundrum because its equal protection problem arises neither from deliberate congressional animus nor from a classification drafted into the law; rather, the equal protection problem stems from the constitutional authority under which the HCPA was enacted. Put differently, the HCPA infringes equal protection principles because the current interpretation of the Thirteenth Amendment, as applied through the HCPA, allows for unequal treatment of religious groups.

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165 Legislative history indicates that Congress intended the HCPA's protection to mirror the protections granted by the Thirteenth Amendment. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4702, 123 Stat. 2835–36 (2009).

166 *See* H.R. REP. NO. 111-86, at 40–41 (2009) (in which the dissenters argue that there is no justification for the HCPA because states traditionally regulate violent criminal activity); Brief for Cato Inst. et al. as Amici Curiae Supporting Petitioner, Hatch v. United States, *cert. denied*, 134 S. Ct. 1538 (2014) (No. 13-6765) (arguing that states adequately prosecute crimes covered by the HCPA, and that the HCPA violates double jeopardy); *see also* Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863, 1884–87 (summarizing criticisms of the "overfederalization" of criminal law).

But how can a law that is consistent with the prevailing interpretation of the Thirteenth Amendment violate the Equal Protection Clause? The answer is simple: the HCPA is predicated on a flawed interpretation of the Thirteenth Amendment that conflicts with the Fourteenth Amendment's legal protections. Because the Fourteenth Amendment was ratified years after the Thirteenth Amendment,[167] the Fourteenth Amendment's legal guarantees must qualify and supersede any interpretation of the Thirteenth Amendment that allows for religion-based classification or, in other words, allows for a breach of equal protection principles. The Fourteenth Amendment's equal protection decree should be understood as an independent principle that qualifies the Thirteenth Amendment. Although the HCPA's application mirrors the present interpretation of the Thirteenth Amendment, the law still violates Fourteenth Amendment equal protection principles.

While it may be true that "the legal guarantee of equal protection is not a supraconstitutional principle by which the Constitution itself is judged,"[168] the Constitution—in this case, the Thirteenth Amendment—must be interpreted in a way that is consistent with subsequent amendments. Although the court in *Hatch* rejected the argument that the Fourteenth Amendment supersedes the Thirteenth Amendment and thereby subjects the HCPA to an equal protection violation, the court's analysis considered only the HCPA's alleged unequal protection of races. Importantly, the court explained that because the HCPA does not actually draw race-based distinctions, there could be no equal protection violation. By contrast, the HCPA does draw distinctions based on religion. This changes the equal protection inquiry in a dispositive way and may push a court to hold not only that the Fourteenth Amendment must qualify the Thirteenth Amendment, but that the HCPA infringes equal protection principles for allowing arbitrary religion-based distinctions.

Finally, the fact that the HCPA's statutory language states that the law protects "any person" from hate crimes on account of their "religion" does not change the conclusion that the HCPA runs afoul of equal protection principles. The court in *Hatch* refuted the argument that the Fourteenth Amendment supersedes the Thirteenth

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167 *See* U.S. CONST. amend. XIII (ratified in 1865); U.S. CONST. amend. XIV (ratified in 1868).

168 United States v. Hatch, 722 F.3d 1193, 1208 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014).

Amendment by stating that the HCPA does not limit its protection to formerly enslaved races, but protects "any person." But the same cannot be said of the HCPA's protection of religious groups. The reality is that despite its inclusive statutory language, the HCPA, under the current interpretation of the Thirteenth Amendment, does not protect all religious groups. The legislative history makes clear that Congress explicitly limited the HCPA's protection of religions to include only religions considered races in the nineteenth century.[169] Thus, the HCPA's wide-ranging statutory language fails to save the law from an equal protection violation.

In sum, the HCPA violates equal protection principles because its application incorporates an interpretation of the Thirteenth Amendment that conflicts with the legal guarantees the Fourteenth Amendment provides. Currently, the HCPA is protecting one class of people (i.e., Jews) within a given category (religion) while denying protection to other classes of people (other religions) within that same category (religion). For this reason, the HCPA's application violates equal protection principles. If the HCPA is ever challenged on this basis, it is in danger of being deemed unconstitutional.

### *B. Problem 2: Unpunished Federal Hate Crimes and the Perception of Inequality*

The next problem arises out of policy concerns. If the Thirteenth Amendment is limited to protecting only nineteenth-century race-religions, and § 249(a)(1) of the HCPA too is so limited, then a localized violent hate crime committed because the victim was a Muslim, or a Mormon, or a Catholic, will go unpunished in federal court. Yet, the same crime committed because the victim is Jewish is prosecutable under the HCPA. If the nation is truly committed to punishing bias-motivated violence on account of religion, then a statute that, by its language, punishes crimes against religious groups should do just that. Otherwise, the HCPA may be nothing more than a feel-good "political symbol."[170]

Because the HCPA's statutory language is misaligned with its actual ability to protect all religions equally, a perception of inequality is created in the public eye. Americans should be free to live in a country without the fear that they will be attacked or discriminated against because of their religion. Additionally,

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169 *See* § 4702(8), 123 Stat. at 2836.

170 Pabian, *supra* note 21.

Americans should feel comfortable knowing this freedom is being protected equally and is not compromised by a legal ambiguity. If the Thirteenth Amendment can serve to eradicate the badges and incidents of slavery against one religion, the public should not be led to believe that a law passed under its authority is not protecting other religions on an equal footing. The nation has an interest in maintaining laws that provide uniform, equal protection within a given class; the nation also has an interest in keeping the public appropriately informed of this important safeguard. The HCPA should not represent an obstacle to preserving these interests.

## IV
## THE THIRTEENTH AMENDMENT SHOULD PROTECT ALL RELIGIOUS GROUPS FROM HATE CRIMES

Given the unsatisfactory state of Thirteenth Amendment jurisprudence and religious protection, this Comment proposes that Congress's Thirteenth Amendment power to abolish the badges and incidents of slavery should include the power to protect all religious groups equally from hate crimes via statutes like the HCPA.

Whether Congress may protect all religions under the Thirteenth Amendment revolves around this question: does the meaning of the "badges and incidents of slavery" extend to religious groups? In the hate crime context, if a bias-motivated crime on account of religion can be considered a badge, incident, relic, or vestige of slavery, then Congress has the power under the Thirteenth Amendment's Enabling Clause to enact laws that target such crimes. If not, then religious protection has no place in hate crime statutes that are justified on Thirteenth Amendment grounds.

### *A. Three Approaches Regarding the Scope of the Badges and Incidents of Slavery*

There is no shortage of scholarly debate regarding the extent of Congress's Section 2 Enabling Clause power to abolish the badges and incidents of slavery. This debate can be distilled, more or less, into three main approaches: the broad approach, the restrictive approach, and the "prophylactic" or middle approach.[171]

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[171] *See* Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne v. Flores, 88 WASH. U. L. REV. 77, 130–47 (2010).

*1. The Broad Approach*

The broad approach essentially mirrors the *Jones* decision.[172] Under the broad approach, scholars argue that Section 2 of the Thirteenth Amendment gives Congress expansive powers to rationally define the "badges and incidents of slavery."[173] With these expansive powers, Congress may enact a wide variety of civil rights legislation aimed at maintaining a society free from discrimination by providing equal rights to all citizens.[174] Because abolishing the badges and incidents of slavery is a sufficiently ambiguous concept, Congress may interpret its meaning to include the power to enact laws combating discrimination.[175]

The broad approach would likely give Congress the power to protect not only races but other class-based groups, including religions, under the Thirteenth Amendment. Under the broad approach, Congress could, theoretically, determine that hate crimes against religions amount to a badge or incident of slavery, and then legislate accordingly. After all, under *Jones*, Congress itself may rationally determine what are the badges and incidents of slavery.

*2. The Restrictive Approach*

Under the restrictive approach, Congress's Thirteenth Amendment authority would be limited to eradicating literal American institutionalized slavery.[176] Thirteenth Amendment legislation would need to be concretely linked to the goal of eradicating actual slavery and involuntary servitude.[177] Congress would not be permitted to legislate toward the goal of abolishing the badges and incidents of slavery.[178] This approach would effectively eliminate Congress's powers as laid out in *Jones*.[179]

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172 *Id.* at 134.

173 *Id.* at 134–35; *see also* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002); Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337 (2009); Rebecca E. Zietlow, *Free at Last!: Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255 (2010).

174 *See* Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40, 49–50 (2011).

175 McAward, *supra* note 171, at 135.

176 *Id.* at 130–34.

177 *Id.* at 130–31.

178 *Id.*

179 *Id.* at 134.

The restrictive approach would prohibit Congress from justifying any form of hate crime legislation on the Thirteenth Amendment. Hate crimes would be considered wholly unconnected to slavery or involuntary servitude, and, as such, Congress would have no legislative power to protect either races or religions from hate crimes. However, the restrictive approach runs contrary to many Supreme Court cases that give Congress power to legislate regarding the badges and incidents of slavery.[180] Further, historical records indicate that "a broader view of Section 2 prevailed among members of Congress."[181] Thus, the restrictive approach does not necessarily comport with predominant opinions of the Thirteenth Amendment's application.

*3. The "Prophylactic" or Middle Approach*

The "prophylactic" approach represents the middle ground. Under the prophylactic approach, Congress could pass legislation with the goal of eradicating literal slavery, as well as "prophylactic legislation" aimed at abolishing the badges and incidents of slavery.[182] Such prophylactic legislation would need to be tied closely to the slavery system and its aftermath, which would thereby limit Congress's Section 2 power.[183] The prophylactic approach would revise *Jones* by preventing Congress from using "the Thirteenth Amendment as a source of federal power to enact wide-ranging civil rights protections unconnected to the legacy of slavery."[184] Thus, with the prophylactic approach, Congress would not have a blank check to interpret the badges and incidents of slavery as under the broad approach; however, Congress's legislative powers would not be as severely limited as under the restrictive approach.

Although the prophylactic approach requires a tight nexus between the legacy of slavery and Thirteenth Amendment legislation, this requirement would not necessarily preclude religious groups from Thirteenth Amendment protection.[185] It is true that Congress's ability

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180 *Id.* at 133–34.

181 *Id.* at 133.

182 *Id.* at 142.

183 *Id.*

184 *Id.*

185 Professor Jennifer Mason McAward expresses skepticism that minority groups other than African Americans could be protected under a middle-ground approach to Congress's Section 2 Thirteenth Amendment authority. *See id.* at 143. On the other hand, Carter has suggested that, even under a more middle-ground approach to interpreting the badges and

to protect non-race-based classes may be reduced under the prophylactic approach. However, as will be discussed below, there is a sufficiently tight nexus between the legacy of slavery and hate crime legislation aimed at protecting religious groups.[186] Thus, Congress could still protect religious groups from hate crimes pursuant to the Thirteenth Amendment under a middle-ground approach.

### *B. The Badges and Incidents of Slavery Encompasses Hate Crimes Aimed at Religious Groups*

This Comment proposes that Congress's Section 2 Thirteenth Amendment power, under either a broad or prophylactic approach,[187] includes the ability to enact criminal statutes that punish violence motivated by hatred toward all religions. Set forth below are a few key reasons why hate crimes that target any religious group may be considered a badge or incident of slavery.

First, the fact that many religious groups were never subjected to institutionalized American slavery does not preclude them from Thirteenth Amendment protection. As Supreme Court decisions indicate, the meaning of the badges and incidents of slavery is not limited to include only classes of people who were victims of institutionalized slavery in America. The Thirteenth Amendment protects African Americans, who were the victims of American slavery, as well as other races that were never subjected to slavery.[188] Further, the Supreme Court has left open the possibility that certain class-based groups other than races may be included within the

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incidents of slavery, Congress could protect religion-based classes, particularly Muslims, from hate crimes and racial or religious profiling. Carter, *supra* note 30, at 1369–74. I am convinced that even under a middle-ground approach to defining the badges and incidents of slavery, certain non-race-based classes, such as religion-based classes, may still be included within the Thirteenth Amendment's protection, particularly in the hate crime context.

186 *See infra* Part IV.B.

187 As explained above, the restrictive approach is out of sync with current case law, and it is well settled that Congress has the authority under the Thirteenth Amendment to enact legislation aimed at eradicating not only literal American slavery, but the badges and incidents of slavery as well. McAward, *supra* note 171, at 133–34. Therefore, further discussion of the restrictive approach is unnecessary.

188 *See* McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 287–89, 295 (1976) (holding that the Thirteenth Amendment, as exercised through § 1981, protects all races, including Caucasians).

Thirteenth Amendment's protection.[189] Therefore, it is possible for religious groups to be included within the Thirteenth Amendment's protection—this is particularly true in the hate crime context, in which remnants of slavery's legacy may be summoned in a profound way.

Second, crimes motivated by hatred toward both races and religions summon vestiges of slavery-like attitudes. Hate crimes against races and religions alike invoke oppression, animus, and stigmatization of an outcast or minority group. In this way, crimes against races are not a far cry from crimes against religious groups. Crimes committed because the victim was Jewish, Navajo, or Arab—all categories that are considered "races" under the Thirteenth Amendment—invoke similar slavery-like conditions as crimes committed because the victim is Muslim, Mormon, or any another religion. Animus toward religious groups thwarts the Thirteenth Amendment's goal, as articulated by Senator Trumbull in 1866, of ensuring equal rights to all citizens by maintaining a society free from discrimination.[190] Consequently, hate crime statutes protecting religious groups further the goal of abolishing the badges and incidents of slavery in the same way that hate crime statutes protecting the races do.

Lastly, religion, like race, is a classification that warrants heightened protection from animus and discrimination. Although the Supreme Court has not formerly recognized religion as a suspect class warranting strict scrutiny judicial analysis, historical evidence suggests that religion is frequently placed alongside race and deserves heightened legal protection.[191] Therefore, it is reasonable to consider religions alongside races for purposes of Thirteenth Amendment classification, especially if eradicating the badges and incidents of slavery provides Congress with a broad power to ensure equal rights for all.

The law should be updated to allow Congress to protect all religions equally under the Thirteenth Amendment. Violent crimes based on hatred toward religion—whichever religion—invoke slavery-like attitudes, the remnants of which should be abolished from

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189 *See* Griffin v. Breckenridge, 403 U.S. 88, 102-05 (1971) (suggesting that the Thirteenth Amendment, as exercised through § 1985(3), may protect against animus toward racial "or perhaps otherwise class-based" groups).

190 Tsesis, *supra* note 173, at 48–51.

191 *See* Calabresi & Salander, *supra* note 160, at 993–94.

the nation. Moreover, if the Thirteenth Amendment continues to be interpreted in a way that provides protection to some religions but denies protection to many others, then the HCPA will remain in violation of equal protection principles. The HCPA cannot truly live up to its goal and language until the Thirteenth Amendment is reinterpreted to provide Congress with power to protect people of all religions from hate-motivated violence.

## CONCLUSION

The extent of Congress's ability to utilize the Thirteenth Amendment to ensure an end to the badges, incidents, relics, and vestiges of slavery is still a point of disagreement in the legal community. Some interpret the Thirteenth Amendment as giving Congress broad legislative powers, while others are wary of congressional overreach. Although praiseworthy legislation, § 249(a)(1) of the HCPA is at the center of this murky area of law.

The status of religious protection under hate crime statutes like the HCPA is intertwined with the boundaries of Congress's Thirteenth Amendment legislative power. Because these boundaries have not been clearly delineated, protection of religions under the Thirteenth Amendment and the HCPA remains an unsettled issue. Moreover, because the current interpretation of the Thirteenth Amendment allows for unequal treatment of religious groups, the HCPA as applied violates core equal protection principles. Currently, localized hate crimes against many people because of their religion are likely not prosecutable under § 249(a)(1) of the HCPA, despite the statutory language indicating otherwise. Consequently, perpetrators of horrendous crimes similar to the one described at the outset of this Comment may escape punishment in federal court.[192]

In light of *Nelson*'s anomalistic interpretation of the Thirteenth Amendment, as well as the unsatisfactory implications for the protection of religions that stem from *Saint Francis College* and *Shaare Tefilah Congregation*, the Supreme Court should take the next opportunity to update its Thirteenth Amendment jurisprudence. Unfortunately, the Court recently bypassed two such opportunities by denying certiorari in two cases that challenged the HCPA's

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[192] In that case, federal charges were eventually abandoned, and Tulsa County prosecutors reinstated State charges. Skyler Cooper, *Charges Re-Filed in Tulsa Hate Crime Case*, KRMG (Apr. 29, 2014, 4:36 PM), http://www.krmg.com/news/news/local/charges-re-filed-tulsa-hate-crime-case/nfknF/.

constitutionality: *United States v. Hatch* and *United States v. Cannon*.[193] Although these cases involved an assault on account of the victim's race rather than religion, both cases presented an appropriate circumstance for the Supreme Court to rule on Congress's Thirteenth Amendment power, especially in light of federalism principles, double jeopardy concerns, and the confused state of Thirteenth Amendment case law.[194] If the Supreme Court is ever presented with another constitutional challenge to § 249(a)(1) of the HCPA—particularly if the challenge involves a hate crime motivated by animus toward religion—the Court should seize the opportunity to clarify what exactly it means for Congress to have the power to abolish the badges and incidents of slavery. The extent of Congress's Thirteenth Amendment authority is, after all, still ripe for interpretation.

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193 *See* United States v. Cannon, 750 F.3d 492 (5th Cir. 2014), *cert. denied*, No. 14-5356 (U.S. Dec. 1, 2014), 2014 WL 3698394; United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014).

194 *See* Brief for Cato Inst. et. al. as Amici Curiae Supporting Petitioner, Cannon v. United States, No. 14-5356 (U.S. Dec. 1, 2014), 2014 WL 3698394; Brief for The Center for Equal Opportunity as Amicus Curiae Supporting Petitioner, Cannon v. United States, No. 14-5356 (U.S. Dec. 1, 2014), 2014 WL 3698394; Brief for Cato Inst. et al. as Amici Curiae Supporting Petitioner, Hatch v. United States, *cert. denied*, 134 S. Ct. 1538 (2014) (No. 13-6765).