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COMMENT

THE CONSTITUTIONALITY OF THE MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT IN LIGHT OF *SHELBY COUNTY V. HOLDER*

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INTRODUCTION

On October 28, 2009, President Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into law.[1] The Shepard–Byrd Act received considerable attention because it was the first federal statute to criminalize violence based on "gender, sexual orientation, gender identity, or disability" in 18 U.S.C. § 249(a)(2)(A).[2] But the Act was also revolutionary in the way it treated actual or attempted violence based on "actual or perceived race, color, religion, or national origin of any person" in § 249(a)(1).[3] This provision eliminated the

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1. Pub. L. No. 111-84, 123 Stat. 2835 (2009) (codified at 18 U.S.C. § 249 note (2012)); Remarks on the Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 2 Pub. Papers 1605 (Oct. 28, 2009). The Shepard–Byrd Act was prompted by the shockingly brutal, hate-based murders of Matthew Shepard and James Byrd Jr. Obama Signs Hate Crimes Bill into Law, CNN (Oct. 28, 2009, 7:39 PM), http://www.cnn.com/2009/POLITICS/10/28/hate.crimes/index.html (on file with the *Columbia Law Review*) [hereinafter Obama Signs] (explaining Act).

2. 18 U.S.C. § 249(a)(2)(A); Obama Signs, supra note 1 (reporting Shepard–Byrd Act as "first major federal gay rights legislation").

3. 18 U.S.C. § 249(a)(1). Religion and national origin are accorded Thirteenth Amendment protection because, according to Congress, at the time of ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, and continuing today,

> members of certain religious and national origin groups were and are perceived to be distinct "races." Thus in order to eliminate . . . the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments . . . .

Pub. L. No. 111-84, § 4702, 123 Stat. at 2836. Further, the Thirteenth Amendment protects "every race and every individual" through its denunciation of the condition of slavery. Hodges v. United States, 203 U.S. 1, 17 (1906).

nexus to federally protected activities required by previous hate-crimes legislation.[4] Congress premised its authority to drop the federal nexus for race, color, religion, or national origin in § 249(a)(1) on its power to promulgate legislation to eradicate "badges and incidents of slavery"[5] under Section 2 of the Thirteenth Amendment.[6] Importantly, this new legislation gives the federal government authority to prosecute a wider range of racially motivated violence.[7]

Section 249(a)(1) survived constitutional challenges in *United States v. Maybee* and *United States v. Hatch*, in which the Eighth and Tenth Circuits upheld the statute as within Congress's power under the Thirteenth Amendment.[8] But § 249(a)(1)'s constitutionality was thrown into question with the Court's decision in *Shelby County v. Holder* on June 25, 2013.[9] Soon after *Shelby County* was announced, defendants in *Cannon v. United States* challenged § 249(a)(1) as unconstitutional.[10] The defendants argued in part that the Court's interpretation of Section 2 of the *Fifteenth* Amendment in *Shelby County* requiring Congress to justify "extraordinary measures" based on current discriminatory conditions in voting rights affected the meaning of Congress's power under Section 2 of the Thirteenth Amendment, given that both are Reconstruction

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4. The earlier hate-crimes statute, 18 U.S.C. § 245, which is still in place and available to prosecutors, requires proof not only that a crime was motivated by animus based on race, color, religion, or national origin, but also that it was motivated by the victim's participation in one of six enumerated federally protected activities. 18 U.S.C. § 245(b)(2)(A)–(F). This nexus served to bring the legislation under Congress's authority to enforce the Thirteenth and Fourteenth Amendments and the Commerce Clause, though § 245 has been upheld even when resting solely on the Thirteenth Amendment. United States v. Nelson, 277 F.3d 164, 191 (2d Cir. 2002). In upholding § 245 based solely on the Thirteenth Amendment power, the Second Circuit noted that the Court had narrowed the reach of Congress's power under the Commerce Clause in United States v. Morrison, 529 U.S. 598, 610–11 (2000), and United States v. Lopez, 514 U.S. 549, 559–60 (1995). *Nelson*, 277 F.3d at 191 n.28.

5. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (explaining Congress's power under Thirteenth Amendment "to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation").

6. See infra note 26 and accompanying text. There is still a federal nexus required for hate crimes based on gender, sexual orientation, gender identity, and disability, since these characteristics do not fall within the purview of the Thirteenth Amendment. This Comment does not discuss the portion of the statute dealing with gender, sexual orientation, gender identity, and disability, codified at § 249(a)(2)(A). Instead, it discusses only § 249(a)(1), which deals with race, color, religion, and national origin and does not require a federal nexus.

7. See infra notes 30–33 and accompanying text (discussing difficulty and somewhat arbitrary results arising from requirement to prove not only racial animus, but also desire to interfere with federally protected activity under previous hate-crimes statute).

8. See infra notes 34–35 and accompanying text (discussing *Maybee* and *Hatch*).

9. 133 S. Ct. 2612 (2013). United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013), was decided after *Shelby County*, but it did not address *Shelby County*'s relevance to § 249(a)(1)'s constitutionality.

10. 750 F.3d 492, 497 (5th Cir. 2014).

Amendments.[11] The Fifth Circuit rejected the defendants' argument, holding that "[e]ven if the legal landscape regarding the Reconstruction Amendments has changed in light of *Shelby County* . . . absent a clear directive from the Supreme Court, we are bound by prior precedents."[12] In essence, the Fifth Circuit asked the Court to take up this question. This Comment will explore Congress's power to enforce the Thirteenth Amendment prior to *Shelby County* and will discuss the enactment of Shepard–Byrd, including the authority for § 249(a)(1) specifically. It will then analyze the potential effects of *Shelby County* on precedent interpreting Congressional power under the Thirteenth Amendment and § 249(a)(1) through briefs submitted on the issue in *Cannon*. Finally, this Comment will conclude that § 249(a)(1) should be upheld going forward as a valid exercise of Congress's constitutionally conferred authority.

I. CONGRESS'S AUTHORITY UNDER SECTION 2 OF THE THIRTEENTH AMENDMENT

A. Jones v. Alfred H. Mayer Co.

The Supreme Court articulated the extent of Congress's authority under Section 2 of the Thirteenth Amendment[13] in *Jones v. Alfred H. Mayer Co.*[14] In *Jones*, the Court upheld 42 U.S.C. § 1982, which "prohibit[s] all racial discrimination, private and public, in the sale and

11. See infra notes 66–70 and accompanying text (discussing portion of defendants' argument in *Cannon*).

12. *Cannon*, 750 F.3d at 505. Section 249(a)(1) has also been challenged in light of *City of Boerne v. Flores,* the seminal case on Congress's power to promulgate legislation pursuant to Section 5 of the Fourteenth Amendment. 521 U.S. 507 (1997). *Boerne* requires "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id. at 508. Defendants in *Cannon* and *Hatch* argued that *Boerne*'s interpretation of the Fourteenth Amendment informs a proper interpretation of the Thirteenth Amendment. *Cannon*, 750 F.3d at 502; *Hatch*, 722 F.3d at 1201. This Comment will not undertake a separate analysis of *Boerne*'s effect on the Thirteenth Amendment, partly because that topic is fodder for an entire separate article, see, e.g., Jennifer Mason McAward, The Scope of Congress's Thirteenth Amendment Enforcement Power After *City of Boerne v. Flores*, 88 Wash. U. L. Rev. 77, 81–82 (2010), and partly because it is not necessary given that *Shelby County* is more recent. For a discussion of this implication, see infra notes 98–99 and accompanying text. The scope of this Comment will be limited to whether the Court's most recent standard for evaluating congressional action pursuant to a Reconstruction Amendment—the standard applied in *Shelby County*, see infra notes 45–58—has any relevance to evaluating congressional action pursuant to the Thirteenth Amendment and, if so, what that portends for the constitutionality of § 249(a)(1).

13. See U.S. Const. amend. XIII, § 2 ("Congress shall have the authority to enforce this article by appropriate legislation.").

14. 392 U.S. 409 (1968).

rental of property."[15] The Court found that Congress has the "power under the Thirteenth Amendment *rationally* to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation,"[16] including § 1982.

The Court approvingly cited Senator Trumbull's statement on the Senate floor in 1864 arguing that the Thirteenth Amendment may be used to "destroy all these discriminations in civil rights against the black man . . . . It was for that purpose that the second clause of the amendment was adopted . . . ."[17] Invoking *McCulloch v. Maryland*'s formulation of the Necessary and Proper Clause—which articulated Congress's broad authority to implement legislation so long as it was aimed at a constitutionally authorized end[18]—the Court held that the ends pursued and the means employed by § 1982 were appropriately within the scope, letter, and spirit of the Constitution.[19] According to the *Jones* Court, "abolishing all badges and incidents of slavery in the United States" is an appropriate end to enforcing the Thirteenth Amendment;[20] under Section 2 of the Thirteenth Amendment, Congress has the authority to decide the appropriate means to accomplish that end.[21] *Jones* remains the controlling interpretation of Congress's authority under the Thirteenth Amendment.[22]

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15. Id. at 437. The petitioners in *Jones* challenged § 1982's application to private individuals. Id. at 412. Section 1982 was part of the Civil Rights Act of 1866, enacted immediately after the Thirteenth Amendment was ratified, and subsequently reenacted in 1870 after the Fourteenth Amendment was ratified. Id. at 422 & n.28.

16. Id. at 440 (emphasis added).

17. Id.

18. 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

19. *Jones*, 392 U.S. at 443–44 ("'The end is legitimate,' [Congressman Wilson of Iowa] said, 'because it is defined by the Constitution itself. The end is the maintenance of freedom. . . . This settles the appropriateness of this measure, and that settles its constitutionality.' We agree.").

20. Id. at 439.

21. Id. at 440 ("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." (quoting Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull)) (internal quotation mark omitted)). Section 1 of the Thirteenth Amendment reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1.

22. See, e.g., United States v. Nelson, 277 F.3d 164, 183–85 (2d Cir. 2002) (relying upon *Jones* as establishing "broader account of [Thirteenth Amendment] enforcement power").

B. *Enactment of Shepard–Byrd*

The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act was enacted on October 28, 2009.[23] As codified in 18 U.S.C. § 249(a)(1), the Act criminalizes hate crimes motivated by race, color, religion, or national origin.[24] Unlike earlier hate-crimes legislation,[25] § 249(a)(1) does not contain any federal nexus for liability.[26] Instead, § 249(a)(1) relies upon Congress's authority under Section 2 of the Thirteenth Amendment to enforce Section 1 of the Thirteenth Amendment by appropriate legislation.[27] Congress justified this legislation in the Act's findings section:

> 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.[28]

To justify its exercise of authority, Congress documented the current and ongoing problem of racial violence in the United States in statistical terms.[29]

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23. See supra note 1 and accompanying text (chronicling enactment).

24. The relevant text reads: "Whoever . . . willfully causes bodily injury to any person or . . . attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person shall be imprisoned . . . ." 18 U.S.C. § 249(a)(1) (2012).

25. 18 U.S.C. § 245, which is the statute criminalizing hate-based violence prior to § 249(a)(1), requires a finding that the violence was motivated not only by "race, color, religion or national origin," but also "because [the victim] is or has been" performing one of six federally protected activities. Id. § 245(b)(2)(A)–(F).

26. The Department of Justice website on Shepard–Byrd explains: "This section of the statute has a broader reach than existing hate crime statutes . . . . Section 249(a)(1) was passed pursuant to Congress's Thirteenth Amendment authority to eradicate badges and incidents of slavery. The government need prove no other 'jurisdictional' element to obtain a conviction." Matthew Shepard & James Byrd, Jr., Hate Crimes Prevention Act of 2009, U.S. Dep't of Justice, http://www.justice.gov/crt/about/crm/matthewshepard.php (on file with the *Columbia Law Review*) (last visited Oct. 24, 2014).

27. U.S. Const. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

28. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4702, 123 Stat. 2835, 2836 (2009) (codified at 18 U.S.C. § 249 note). For an explanation of religion and national origin as badges of slavery, see supra note 3.

29. H.R. Rep. No. 111-86, pt. 1, at 5 (2009). The Brief for the United States in *United States v. Cannon* summarizes the findings well, including that "[s]ince 1991, the FBI has identified over 118,000 reported violent hate crimes"; "in 2007 alone the FBI documented more than 7600 hate crimes, including nearly 4900 (64%) motivated by bias based on race or national origin"; and "a 2002 Senate Report addressing proposed legislation that ultimately became Section 249 noted that 'the number of reported hate crimes has grown almost 90 percent over the past decade,' averaging '20 hate crimes per day for 10 years

Dropping the federal nexus in § 249(a)(1) broadens the federal power to combat racially motivated violence. The federal nexus in 18 U.S.C. § 245, an earlier-enacted hate-crimes statute, is more limiting in that it requires prosecutors to prove not only that the violence at issue was motivated by racial animus, but also that it was committed because the victim was participating in a federally protected activity.[30] Perhaps the most high-profile example of this added requirement's effect is the prosecution of Joseph Paul Franklin under § 245 for shooting civil-rights activist Vernon Jordan while he was in a motel parking lot.[31] The jury acquitted Franklin because, while there was clear evidence that Franklin was motivated by racial animus, the jurors did not believe that he was also motivated by Jordan's use of the public accommodation.[32] Dropping this requirement gives the federal government authority over more instances of racially motivated violence.[33]

Section 249(a)(1) was challenged as unconstitutional by defendants in *United States v. Maybee*,[34] *United States v. Hatch*,[35] and *United States v. Cannon*.[36] In each of these cases, the circuit courts upheld the constitu-

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straight.'" Brief for the United States as Appellee at 35–36, United States v. Cannon, 750 F.3d 492 (5th Cir. 2014) (No. 12-20514), 2013 WL 8718635 (citations omitted).

30. 18 U.S.C. § 245(b)(2)(A)–(F). The statute criminalizes attempted or actual injury or intimidation "because of . . . race, color, religion or national origin *and* because [the victim] is or has been" participating in one of six enumerated federally protected activities, including attending public school, participating in a state service, applying for or enjoying employment, serving as a juror, traveling in interstate commerce, or enjoying public accommodations. Id. (emphasis added).

31. See Jeff Wiehe, Crossing Paths with Serial Killer 3 Decades Ago, J. Gazette (Nov. 20, 2013, 1:06 PM), http://www.journalgazette.net/article/20131120/LOCAL/311209980 (on file with the *Columbia Law Review*) (describing shooting and failed prosecution of Franklin).

32. See James Morsch, Comment, The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation, 82 J. Crim. L. & Criminology 659, 662 (1991) (noting Franklin's membership in Klu Klux Klan and American Nazi Party).

33. The federally protected activity nexus can lead to arbitrary results. For instance, a beating that occurred in a privately owned parking lot could not be federally prosecuted, while a similar beating occurring on the adjacent publicly owned sidewalk could be federally prosecuted. A racially motivated shooting occurring on a street in a gated community could not be federally prosecuted, while a similar shooting on a public street could be.

34. 687 F.3d 1026 (8th Cir. 2012). In *Maybee* the defendants challenged § 249(a)(1) as unconstitutional, arguing that dropping the interstate nexus element included in § 245 but not § 249(a)(1) was beyond Congress's authority. Id. at 1031. The Eighth Circuit rejected this argument, holding that "[w]hile Maybee argues that § 249(a)(1) sweeps more broadly than § 245(b)(2)(b), he provides no substantial argument as to why the particular scope of § 249(a)(1) renders it constitutionally infirm." Id.

35. 722 F.3d 1193 (10th Cir. 2013), cert. denied, 134 S. Ct. 1538 (2014). The Tenth Circuit upheld § 249(a)(1), finding that the statute employed a limited, permissible "approach as a means to rationally determine the badges and incidents of slavery." Id. at 1206.

36. 750 F.3d 492 (5th Cir. 2014). This case will be discussed in greater detail in Part II. Briefly, the Fifth Circuit rejected the defendants' argument that Congress's power under Section 2 of the Thirteenth Amendment was diminished by the Court's decision in

tionality of § 249(a)(1).[37] The Supreme Court has yet to address the question, which was recently revived by the Court's decision in *Shelby County v. Holder*.[38] Part II explores the decision in *Shelby County* and examines the case's effect on § 249(a)(1) through briefs submitted in *United States v. Cannon*.[39]

II. THE DECISION IN *SHELBY COUNTY V. HOLDER* AND ITS IMPLICATIONS FOR § 249(a)(1)

A. Shelby County v. Holder

In *Shelby County v. Holder*, the Supreme Court invalidated section 4(b) of the Voting Rights Act of 1965.[40] This section encompassed the coverage formula[41] that Congress used to identify which states would be subject to the Act's preclearance requirement.[42] Congress passed the Voting Rights Act based on its power under Section 2 of the Fifteenth Amendment to promulgate appropriate legislation to enforce Section 1's promise of the right of citizens to vote.[43] It was initially upheld in *South Carolina v. Katzenbach*, which established that "Congress may use any *rational* means to effectuate the constitutional prohibition of racial discrimination in voting."[44] The *Shelby County* Court invalidated the Voting Rights Act's coverage formula, finding that it unjustifiably imposed

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Shelby County interpreting Congress's power under Section 2 of the Fifteenth Amendment. Id. at 505.

37. See supra notes 34–36 (discussing outcomes in each case).

38. 133 S. Ct. 2612, 2631 (2013).

39. The Fifth Circuit specifically requested briefing on *Shelby County*'s effect on § 249(a)(1). Request for Supplemental Briefing, United States v. Cannon, 750 F.3d 492 (5th Cir. 2005) (No. 12-20514) ("The parties are requested to file supplemental briefing regarding the following question: How, if at all, does the Supreme Court's decision in Shelby County v. Holder, 133 S. Ct. 2612 (2013), impact this case?").

40. *Shelby Cnty.*, 133 S. Ct. at 2631 (2013) ("[Congress's] failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.").

41. The Act was reauthorized in 2006, but the coverage formula used in the 2006 Act was initially enacted in 1975. Id. at 2620–21.

42. The preclearance requirement is embodied in section 5 of the Voting Rights Act. It requires approval of any changes in voting procedures in covered states by either the Attorney General or a three-judge panel in Washington, D.C. Id. at 2620; see Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 4–8, 120 Stat. 577, 580–81.

43. The text of the entire amendment reads:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XV.

44. 383 U.S. 301, 324 (1966) (emphasis added).

unequal burdens on individual states, in contravention of the principle of equal sovereignty among the states.[45]

In its *Shelby County* decision, the Court did not employ the *Katzenbach* "rational means" test[46] and in fact did not explicitly articulate a standard of review specifically applicable to the Fifteenth Amendment.[47] Instead, it held that in order to impose a current burden on a specific state, the legislation in question "must be justified by current needs."[48] Because the Voting Rights Act's coverage formula was "based on 40-year-old facts having no logical relation to the present day," the Act was not justified by current needs.[49]

The Court's failure to define a standard of review for the Fifteenth Amendment was unexpected.[50] Parties in *Shelby County* disagreed over the appropriate standard of review: The government argued that the Court should employ *Katzenbach*'s "rational means" test, and the defendants argued that the Court should import the standard articulated for the *Fourteenth* Amendment in *City of Boerne v. Flores*[51] into its interpretation of Congress's Fifteenth Amendment power.[52] The Court did not adopt either of these standards.

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45. *Shelby Cnty.*, 133 S. Ct. at 2631. *Katzenbach* had previously declined to invalidate the Voting Rights Act under an equal-sovereignty theory. 383 U.S. at 328–29 ("The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.").

46. See supra note 44 and accompanying text (explaining *Katzenbach* rational-means standard).

47. See Richard Hasen, The Curious Disappearance of *Boerne* and the Future Jurisprudence of Voting Rights and Race, SCOTUSBlog (June 25, 2013, 7:10 PM), http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/ (on file with the *Columbia Law Review*) (noting surprise at Court's failure to address standard of review in *Shelby County*).

48. *Shelby Cnty.*, 133 S. Ct. at 2622 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)) (internal quotation marks omitted).

49. Id. at 2629. The "current burdens, current needs" standard employed in *Shelby County* was borrowed from *Northwest Austin*, 557 U.S. at 203, a 2009 case interpreting the Voting Rights Act. Interestingly, the *Northwest Austin* Court declined to articulate a standard of review for the Fifteenth Amendment, despite being asked to do so by both parties. Id. at 204.

50. See Hasen, supra note 47 ("Perhaps the biggest surprise of *Shelby County* is that the majority purported to ignore th[e] *Boerne* [standard of review] issue.").

51. 521 U.S. 507, 520 (1997). In *Boerne,* the Court announced the standard to be applied in reviewing legislation promulgated pursuant to Section 5 of the Fourteenth Amendment: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id.

52. Shelby Cnty. v. Holder, 679 F.3d 848, 859 (D.C. Cir. 2012), rev'd, 133 S. Ct. 2612. The D.C. Circuit found that although the Court had not articulated a standard of review in *Northwest Austin*, the questions it raised in the case suggested that *City of Boerne v. Flores*'s congruence-and-proportionality standard was the appropriate inquiry. Id.

Instead, the *Shelby County* opinion was driven by "a fundamental principle of *equal* sovereignty among the States"[53]—in essence, the idea that the States are "equal in power, dignity and authority" in relation to one another.[54] This federalism-driven principle is "highly pertinent in assessing subsequent disparate treatment of States."[55] Equal sovereignty guided the analysis of the Voting Rights Act's coverage formula because the formula applied to only nine states, singling them out for disparate treatment.[56] According to the Court, this disparate treatment was not justified by current needs, and thus the coverage formula was invalid.[57] This differential treatment of states in relation to one another is somewhat unique to the Voting Rights Act, thus the *Shelby County* decision has left scholars perplexed as to the actual standard of review applied to the Fifteenth Amendment.[58]

B. *The Challenge in* United States v. Cannon

In *United States v. Cannon*, the Fifth Circuit upheld the convictions of three self-proclaimed white supremacists[59] for beating an African American man after calling him racial slurs.[60] The defendants challenged their convictions based in part on their contention that § 249(a)(1) is unconstitutional.[61] The defendants alleged that the *Shelby County* Court announced a new interpretation of Congress's power under the Fifteenth Amendment that should be applied to the Thirteenth Amendment.[62] Under this interpretation, the defendants argued that § 249(a)(1) is an overreach of Congressional power.[63] The Fifth Circuit requested that the parties separately brief the issue of *Shelby County*'s effect on the continued validity of § 249(a)(1).[64]

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53. *Shelby Cnty.*, 133 S. Ct. at 2623 (quoting *Nw. Austin*, 557 U.S. at 203) (internal quotation marks omitted).

54. Id. (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911)) (internal quotation marks omitted).

55. Id. at 2624 (citing *Nw. Austin*, 557 U.S. at 203).

56. Id.

57. See supra note 49 and accompanying text (describing *Shelby County*'s "current burdens, current needs" standard borrowed from *Northwest Austin*).

58. See, e.g., Calvin Massey, The Effect of *Shelby County* on Enforcement of the Reconstruction Amendments, 29 J.L. & Pol. 397, 422 (2014) (noting "uncertainty surrounding the present scope of congressional power to enforce the Fifteenth Amendment"). Part III addresses this question more fully.

59. 750 F.3d 492, 495–96 (5th Cir. 2014) (describing defendants showing off Aryan and Nazi related tattoos and referring to one another as "woods," a "term commonly used by members of white supremacy organizations").

60. Id. at 495–96, 508–09.

61. Id. at 497.

62. Id. at 504.

63. Id. at 497, 504.

64. Supplemental Brief for the United States as Appellee at 1, *Cannon*, 750 F.3d 492 (No. 12-20514), 2013 WL 4677226 [hereinafter U.S. Supplemental Brief].

In their supplemental brief addressing the Fifth Circuit's question,[65] the defendants adopted arguments put forth by amici curiae Todd Gaziano, Gail Heriot, and Peter Kirsanow.[66] The amici argued that the decision in *Shelby County* requires invalidating § 249(a)(1). This argument proceeded as follows: The text of Section 2 of the Thirteenth Amendment and Section 2 of the Fifteenth Amendment are "nearly identical."[67] Because of this similarity, the Court's holding in *Shelby County*—that Congress may only impose current burdens on states under Section 2 of the Fifteenth Amendment based on current needs—applies to legislation passed under Section 2 of the Thirteenth Amendment.[68] Following this logic, § 249(a)(1) must be unconstitutional because Congress has failed to show that § 249(a)(1) is a response to a current threat of the reemergence of slavery.[69] The amici brief stated: "If the threat of African American disenfranchisement has declined greatly between 1965 and 2006, the threat of slavery has fallen off the map in the last century and a half."[70]

The amici further argued that § 249(a)(1) is inconsistent with *McCulloch v. Maryland*'s admonition to "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[71] According to the defendants, the only legitimate end to Section 2 legislation is the enforcement of Section 1's ban on slavery.[72] The brief argued that rooting out badges and incidents of slavery is not a legitimate end of the Thirteenth Amendment in itself, but instead is only a means of combating the recurrence of slavery.[73] Because § 249(a)(1) is geared toward eliminating "violent bias crimes" and is not a faithful effort to

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65. Supplemental Brief for Appellant Cannon at 1, *Cannon*, 750 F.3d 492 (No. 12-20514), 2013 WL 4505757.

66. Id.; Supplemental Brief for Amici Curiae Todd Gaziano, Gail Heriot & Peter Kirsanow, *Cannon*, 750 F.3d 492 (No. 12-20415), 2013 WL 4505756 [hereinafter Amici Brief]. Amici Heriot and Kirsanow are members of the Civil Rights Commission. Commissioners, U.S. Comm'n on Civil Rights, http://www.usccr.gov/about/commissioners.php (on file with the *Columbia Law Review*) (last updated Nov. 3, 2014).

67. Amici Brief, supra note 66, at 1. Compare U.S. Const. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."), with U.S. Const. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

68. Amici Brief, supra note 66, at 9–10 (applying "current burdens, current needs" test to § 249(a)(1)).

69. Id. at 6.

70. Id. at 9–10.

71. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

72. Amici Brief, supra note 66, at 5 n.3.

73. Id. at 5 n.3, 6 (arguing language in *Jones* regarding badges, incidents, vestiges, and relics of slavery was mere dictum).

root out the risk of the recurrence of slavery, its ends are not legitimate, and thus it fails *McCulloch*.[74]

The United States' response brief argued that *Shelby County* has no bearing on Congress's power under Section 2 of the Thirteenth Amendment.[75] First, the government argued that *Shelby County* was motivated in part by federalism concerns that attach to the Fourteenth and Fifteenth Amendments.[76] According to the United States, this concern is "simply not present in the context of Thirteenth Amendment legislation addressing private actions and applying nationwide."[77]

Second, the government argued that the analogy between *Shelby County*'s purportedly outdated coverage formula and what defendants argued to be the outdated threat of slavery is inapposite because Congress grounded § 249(a)(1) in findings of current conditions requiring redress. Specifically, "Congress found that bias crimes continue to be 'disturbingly prevalent,'" reporting that "the FBI documented more than 3800 race-based hate crimes" in 2007.[78] Congress documented a current problem of race-motivated violence at the time Shepard–Byrd was passed.[79]

Third, the United States argued that precedent requires upholding the constitutionality of § 249(a)(1).[80] *Shelby County* said nothing about the Thirteenth Amendment. Furthermore, recent cases have affirmed Congress's power under the Thirteenth Amendment, including *Patterson v. McLean Credit Union*[81] and *CBOCS West, Inc. v. Humphries*,[82] upholding 42 U.S.C. § 1981.[83] According to the government, Congress's power to "rationally reach badges and incidents of slavery that thwart the rights of African Americans to full and equal freedom" under Section 2 of the

74. Id. at 6. It is important to note that this theory is inconsistent with the *Jones* decision and thus at best misconstrues Supreme Court precedent. See supra notes 18–21 and accompanying text (summarizing *Jones*'s discussion of *McCulloch* argument).

75. U.S. Supplemental Brief, supra note 64, at 1–2.

76. Id. at 4 (arguing there is "tension in our federal system between the exercise of Congress's remedial power under the Fourteenth and Fifteenth Amendments and issues of state sovereignty").

77. Id.

78. Id. at 6 (quoting H.R. Rep. No. 111-86, pt. 1, at 5 (2009)).

79. Congress also included findings justifying reauthorization of the Voting Rights Act. See Brief for the Attorney General as Appellee at 24, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 11-5256), 2011 WL 6008650 ("Congress held 21 hearings, heard from dozens of witnesses, and amassed more than 15,000 pages of evidence of ongoing voting discrimination in covered jurisdictions."). The problem the Court had with the reauthorization was that Congress did not use these findings to update the coverage formula based on current conditions. *Shelby Cnty.*, 133 S. Ct. at 2629.

80. U.S. Supplemental Brief, supra note 64, at 7–9.

81. 491 U.S. 164, 171 (1989), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, as recognized in CBOCS W., Inc. v. Humphries, 553 U.S. 442, 450–51 (2008).

82. 553 U.S. at 445.

83. U.S. Supplemental Brief, supra note 64, at 8.

Thirteenth Amendment is firmly established, and Congress's determination that race-based violence is a badge or incident of slavery is absolutely rational.[84]

Despite requesting supplemental briefing on *Shelby County*'s impact on § 249(a)(1), the Fifth Circuit did not engage with the arguments presented by the government, defendants, or amici on this question. Instead, after summarizing the arguments presented, the Fifth Circuit noted that the Supreme Court did not mention the Thirteenth Amendment in its *Shelby County* decision, and until the Supreme Court explicitly says otherwise, it is bound by *Jones*'s holding that rooting out the badges and incidents of slavery is a legitimate exercise of congressional authority under the Thirteenth Amendment.[85] The Fifth Circuit is the first federal appellate court to address the question of *Shelby County*'s effect on § 249(a)(1) and Congress's power under the Thirteenth Amendment, but it is unlikely to be the last.

III. SECTION 249(a)(1) REMAINS VALID LAW

Although the Fifth Circuit did not engage with *Shelby County*'s impact on § 249(a)(1), going forward courts should explicitly confront this question and hold that § 249(a)(1) remains valid. This Part adopts and expands upon two of the government's strongest points in *Cannon*: Part III.A argues that the Thirteenth Amendment power to root out the badges and incidents of slavery remains unchanged. It presents precedent not put forth by the government that explicitly acknowledges this power in the hate-crimes context and rejects the notion that Reconstruction Amendments must be interpreted together. Part III.B argues that the *Shelby County* standard is a federalism-driven standard and thus does not properly apply to the Thirteenth Amendment.

A. *Precedent Upholding Hate-Crimes Legislation*

The government's brief in *Cannon* pointed to Supreme Court precedent in *Patterson v. McLean Credit Union* and *CBOCS West, Inc. v. Humphries*, both upholding exercise of the Thirteenth Amendment power in promulgating 42 U.S.C. § 1981, a statute that protects property and contract rights.[86] While this Supreme Court precedent is persuasive authority for § 249(a)(1)'s constitutionality, the government did not explore federal-court precedent specifically upholding hate-crimes legislation premised on the Thirteenth Amendment. As mentioned above,

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84. Id. at 9.

85. The court concluded that § 249(a)(1) is a "valid exercise of congressional power because Congress could rationally determine that racially motivated violence is a badge or incident of slavery." United States v. Cannon, 750 F.3d 492, 505 (5th Cir. 2014). For a discussion of *Jones*, see supra Part I.A.

86. See supra notes 80–83 and accompanying text (discussing government's argument on this point).

the Eighth and Tenth Circuits have both upheld § 249(a)(1) as constitutional,[87] but perhaps more persuasive is *United States v. Nelson*, a 2002 case upholding the constitutionality of 18 U.S.C. § 245,[88] the hate-crimes statute preceding § 249(a)(1).[89] In *Nelson*, Judge Calabresi engaged in a lengthy analysis of Congress's power under Section 2 of the Thirteenth Amendment,[90] finding that the authority identified in *Jones* was still valid and properly exercised in promulgating § 245.[91] The Supreme Court left Judge Calabresi's conclusion undisturbed.[92]

Nelson is important to the analysis of § 249(a)(1) because it upheld Congress's power to root out the badges and incidents of slavery through federal hate-crimes legislation as recently as 2002.[93] While *Shelby County* had not yet been decided at the time of *Nelson*, another seminal Reconstruction Amendment case had been decided: *City of Boerne v. Flores*.[94] *Boerne* formulated a standard of review for legislation promulgated under Section 5 of the Fourteenth Amendment.[95] Importantly, the Second Circuit in *Nelson* rejected *Boerne*'s applicability to Thirteenth

87. See supra notes 34–35 and accompanying text (discussing *Hatch* and *Maybee*).

88. 277 F.3d 164, 180–86 (2d Cir. 2002). Judge Calabresi engaged in a lengthy analysis of Congress's power under Section 2 of the Thirteenth Amendment, finding that the authority identified in *Jones* was still valid and properly exercised in promulgating § 245. Id. While § 245 has a federal hook, see supra notes 4, 30–33 and accompanying text, the Second Circuit in *Nelson* upheld § 245 on the sole authority of Congress's power under the Thirteenth Amendment. *Nelson*, 277 F.3d at 175; supra note 4.

89. For a discussion of § 245, see supra note 4.

90. See William M. Carter, Jr., Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery, 40 U.C. Davis L. Rev. 1311, 1358 (2007) ("*United States v. Nelson* provides the most thorough examination in the contemporary case law regarding whether and in what circumstances the Thirteenth Amendment's proscription of the badges and incidents of slavery extends beyond African Americans." (footnote omitted)).

91. *Nelson*, 277 F.3d at 180–86. While § 245 was meant to rest upon the commerce, Fourteenth Amendment, and Thirteenth Amendment powers, see supra note 4, the Second Circuit in *Nelson* upheld § 245 on the sole authority of Congress's power under the Thirteenth Amendment. 277 F.3d at 175. The government declined to present an argument that § 245 rests on the Fourteenth Amendment, as § 245 prohibits private as well as public action. Id. at 174–75. The court then decided that the Commerce Clause was not necessary to § 245's constitutionality. Id. at 175. It held that § 245 falls "comfortably within Congress's powers under the Thirteenth Amendment." Id.

92. Nelson v. United States, 537 U.S. 835 (2002) (denying certiorari).

93. The government's cited cases upholding the Thirteenth Amendment power deal with 42 U.S.C. § 1981, which was originally enacted by the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27, whereas 18 U.S.C. § 245 was enacted in 1968, Pub. L. No. 90-284, tit. I, § 101(a), 82 Stat. 73, 73–75 (1968), and amended as recently as 1996, Pub. L. No. 104-294, tit. VI, § 604(b)(14)(C), (37), 110 Stat. 3488, 3507, 3509 (1996). This undermines the argument that § 1981's proximity to the Civil War changes the analysis.

94. 521 U.S. 507, 520 (1997).

95. Id. The case announced that legislation under Section 5 of the Fourteenth Amendment must be congruent and proportional to the underlying constitutional infringement that Congress sought to redress. Id.

Amendment congressional action,[96] indicating that an interpretation of one Reconstruction Amendment does not automatically change the interpretation of other Reconstruction Amendments.[97] This conclusion is bolstered by the fact that the Supreme Court similarly did not apply the *Boerne* Fourteenth Amendment standard to its interpretation of the Fifteenth Amendment in *Shelby County*,[98] as was expected and requested.[99]

In *Nelson*, the Second Circuit expressly rejected the notion that all Reconstruction Amendments need to be interpreted together. The Supreme Court implicitly agreed through its decision not to apply *Boerne* to the Fifteenth Amendment in *Shelby County*. The two cases taken together suggest that applying *Shelby County*'s standard to the Thirteenth Amendment, in the face of Supreme Court silence on the matter, would be an overreach not dictated by precedent.

B. Shelby County *as a Federalism Doctrine*

Even if courts are not persuaded that the Reconstruction Amendments can be separately interpreted, there is reason to believe that the *Shelby County* standard is strictly a federalism standard not applicable to all congressional exercise of authority under the Fifteenth Amendment. As the United States pointed out in its supplemental brief to the Fifth Circuit in *Cannon*, *Shelby County* said nothing about Congress's authority under the Thirteenth Amendment.[100] For most of its brief, however, the government implicitly accepted that *Shelby County* articulated a Fifteenth Amendment standard,[101] only mentioning in passing the possibility that the Court "did not purport to change the standard of review" for the Fifteenth Amendment.[102] This possibility is a compelling reason to keep *Shelby County* out of the realm of Thirteenth Amendment power. This section will expand upon that argument.

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96. *Nelson*, 277 F.3d at 185 n.20 (noting *Boerne* "cannot be read" by the court "as applying to the [Thirteenth Amendment] context").

97. Id. ("There is, moreover, a crucial disanalogy between the Fourteenth and Thirteenth Amendments as regards the scope of the congressional enforcement powers these amendments, respectively, create.").

98. See U.S. Supplemental Brief, supra note 64, at 7 n.4 (noting *Shelby County* does not cite or address *Boerne*).

99. See supra notes 50–52 and accompanying text (noting absence of *Boerne* in *Shelby County*). *Shelby County* demonstrates that the Court does not think the pure *Boerne* standard governs evaluations of congressional authority under different Reconstruction Amendments. The Court could have applied the *Boerne* standard in *Shelby County*, but chose not to, demonstrating that application of *Boerne* is at least situational and likely limited to Section 5 of the Fourteenth Amendment.

100. U.S. Supplemental Brief, supra note 64, at 7; supra notes 47–52 and accompanying text (discussing lack of standard of review in *Shelby County*).

101. U.S. Supplemental Brief, supra note 64, at 4, 7 (distinguishing Thirteenth Amendment from Fourteenth and Fifteenth Amendments).

102. Id. at 8.

The Court in *Shelby County* was most concerned with the Voting Rights Act's disparate treatment of states based on what the Court viewed as past, and thus irrelevant, conditions.[103] It tied the "current burdens, current needs" test directly to Congress's decision to single out specific states: "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."[104] Because of its preoccupation with the concept of equal sovereignty, there is a colorable argument that the Court's "current burdens, current needs" test is not a Fifteenth Amendment standard at all. Instead, "current burdens, current needs" can be interpreted as a general federalism standard that applies only when the federal government has singled out certain states for disparate treatment.

This general federalism standard is not applicable to § 249(a)(1), as the statute does not disturb federalism in the way that the Voting Rights Act did. The statute does not differentiate states from one another. And as the government brief pointed out, it "does not displace state law," but rather "was intended to *supplement* state authority."[105] Congress has not exercised its Thirteenth Amendment power to impose disparate burdens on individual states, and thus the "current burdens, current needs" standard is inapplicable to the statute.

Given the *Shelby County* Court's focus on equal sovereignty of the states, it is not clear that the standard articulated in *Shelby County* would be applicable to all exercises of authority under the Fifteenth Amendment, let alone exercises of authority under the Thirteenth Amendment. Going forward, courts should interpret the *Shelby County* standard as a doctrine cabined to equal-sovereignty concerns.

CONCLUSION

In passing § 249(a)(1), Congress relied upon the Court's determination that rooting out the badges and incidents of slavery is a legitimate end under the Thirteenth Amendment. The Court's decision in *Shelby County* should not bear on the standard of review used to evaluate Congress's authority under the Thirteenth Amendment and as such should not be used to invalidate § 249(a)(1). Federal hate-crimes legislation is an important tool in ensuring consistent national protection against racially motivated violence.[106] Promulgating legislation under the

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103. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2625–29 (2013).

104. Id. at 2629.

105. U.S. Supplemental Brief, supra note 64, at 5.

106. See supra notes 30–33 (discussing acquittal of Vernon Jordan's assailant under § 245); cf. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4702, 123 Stat. 2835, 2836 (2009) ("Federal, State, and local authorities [may] work together as partners in the investigation and prosecution. . . . The problem of crimes motivated by bias is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States, local jurisdictions, and Indian tribes."); Ryan D. King, The

Thirteenth Amendment allows the federal government to pursue a consistent, wide-ranging enforcement strategy.[107] The next court to confront the question of *Shelby County*'s effect on § 249(a)(1) should affirm the Thirteenth Amendment precedent established in *Jones*, followed in *Nelson*, and left undisturbed by *Shelby County*.

Preferred Citation: Georgina C. Yeomans, Comment, *The Constitutionality of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act in Light of* Shelby County v. Holder, 114 COLUM. L. REV. SIDEBAR 107 (2014), http://www.columbialawreview.org/Constitutionality-Shelby-County_Yeomans.

Context of Minority Group Threat: Race, Institutions, and Complying with Hate Crime Law, 41 Law & Soc'y Rev. 189, 189 (2007) ("[T]here exists significant variation in the degree to which local law enforcement agencies enforce and comply with these laws.").

107. See supra notes 30–33 (discussing inconsistency that results from federal nexus requirement).