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## One of These Things Is Not Like the Other: The Limitations of the Reconstruction Era Amendments in *United States v. Roof*

Kathryn Anne B. Robinson

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**ONE OF THESE THINGS IS NOT LIKE THE  
OTHER: THE LIMITATIONS OF THE  
RECONSTRUCTION ERA AMENDMENTS IN  
*UNITED STATES V. ROOF*\***

KATHRYN ANNE B. ROBINSON\*\*

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## INTRODUCTION

The Reconstruction Era Amendments to the United States Constitution were passed following the Civil War with the goal of ending the vestiges of slavery in the United States of America.<sup>1</sup> As a result of these amendments, and the power they grant, Congress has passed several laws devoted to maintaining the illegality of slavery and promoting equality among the races. These amendments have been the basis of numerous impactful laws, such as the Civil Rights Act of 1886,<sup>2</sup> the Voting Rights Act,<sup>3</sup> and recently the Hate Crimes Prevention Act.<sup>4</sup> Despite these goals and the immense legislation that they have inspired, the amendments have been severely limited by judicial review in a variety of recent cases, significantly reducing their potential to support equality.

The Fourth Circuit's recent decision in *United States v. Roof*<sup>5</sup> proves that the court is committed to upholding the Thirteenth Amendment as the basis for the Hate Crimes Prevention Act and other similar legislation. The court was correct in not extending the limitations of the Fourteenth and Fifteenth Amendments to the Thirteenth Amendment. However, without a ruling from the Supreme Court, the Thirteenth Amendment could be in danger of the same limitations as the Fourteenth and Fifteenth Amendments, severely threatening the state of civil rights legislation and litigation in the United States.

## I. WHAT ARE THE RECONSTRUCTION ERA AMENDMENTS?

The Reconstruction Era Amendments consist of the Thirteenth, Fourteenth and Fifteenth Amendments.<sup>6</sup> The trilogy was adopted after the Civil War and was aimed at “eliminating legal impediments to freed slaves’ full enjoyment of the rights of

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1. Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 85 (2010).

2. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982, 1987–1992).

3. 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702.

4. 34 U.S.C. §§ 30501–30506.

5. 10 F.4th 314 (4th Cir. 2021).

6. *Id.* at 393.

citizenship.”<sup>7</sup> The Thirteenth Amendment outlawed slavery except as punishment for a crime and allowed Congress to pass any legislation to enforce this.<sup>8</sup> The Fourteenth Amendment requires that no state shall deprive any person of life, liberty, or property without due process of the law.<sup>9</sup> The Fifteenth Amendment established universal male suffrage.<sup>10</sup>

All of the amendments have similar enforcement clauses,<sup>11</sup> which have allowed Congress to create a variety of legislation to carry out the amendments’ goals.<sup>12</sup> In the *Civil Rights Cases*,<sup>13</sup> which struck down the Civil Rights Act of 1875, the Supreme Court determined that the enforcement clauses of these amendments could not be used “as vehicles for reaching private racial discrimination,” thus leaving them in the hands of Congress and the President to enforce as vehicles

7. *Id.*

8. U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”). Section 2 states that “Congress shall have the power to enforce this article by appropriate legislation.” *Id.* § 2.

9. U.S. CONST. amend. XIV (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

10. U.S. CONST. amend. XV (“The right . . . 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.”).

11. The Thirteenth Amendment’s enforcement clause states that “Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII, § 2. The Fourteenth Amendment’s enforcement clause states that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5. The Fifteenth Amendment’s enforcement clause states that “Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XV, § 2.

12. *United States v. Roof*, 10 F.4th 314, 393 (4th Cir. 2021) (“The Amendments all have similarly worded enforcement clauses . . .”). *See also* *United States v. Hatch*, 722 F.3d 1193, 1202 (10th Cir. 2013) (internal citation omitted) (“[T]he three Reconstruction Amendments ‘disclose[] a unity of purpose.’” (quoting *Slaughter-House Cases*, 83 U.S. 36, 67, 21 L. Ed. 394 (1872))); *McAward*, *supra* note 1, at 86 (“[T]here are minute textual differences among the three provisions. However, the operative language remains the same: Congress is mandatorily vested (‘shall have’) with the ‘power to enforce,’ and that power is limited to ‘appropriate legislation.’”).

13. 109 U.S. 3 (1883).

exclusively against governmental and societal discrimination.<sup>14</sup> Given the similarities in these enforcement clauses, there has been significant discourse about whether a limitation to one amendment's enforcement clause should apply to all three or whether it is restricted to its respective amendment.<sup>15</sup>

## II. LIMITATIONS TO THE FOURTEENTH AND FIFTEENTH AMENDMENTS AS POTENTIAL THREATS TO THE THIRTEENTH AMENDMENT

There have been several limitations to the Fourteenth and Fifteenth Amendments' enforcement clauses in recent litigation, and as a result, scholars assert that the Supreme Court has begun to chip away at the legislative authority to enforce the federal civil rights which are at the core of the Reconstruction Era Amendments.<sup>16</sup> These limitations have prevented lawmakers from creating laws pertaining to “sexual violence, age and handicap discrimination, minority voting preclearance, campaign financing, and matching campaign contributions.”<sup>17</sup> Because the Thirteenth Amendment has a nearly identical enforcement clause, limiting it in a similar way would prevent even more legislation from being passed to protect civil rights.

### A. *The Fourteenth Amendment*

The first Reconstruction Era amendment to see a harsh limitation imposed onto its enforcement clause was the Fourteenth. The seminal case regarding the Fourteenth Amendment's enforcement clause is *City of Boerne v. Flores*.<sup>18</sup> In *Boerne*, the Court struck down the Religious Freedom Restoration Act as unconstitutional under the Fourteenth Amendment because it needed to have “congruence and proportionality between the injury to be prevented and remedied and the means adopted to that end.”<sup>19</sup> The test for religious scrutiny under

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14. Samuel Estreicher, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 452 (Apr. 1974).

15. *See generally id.*

16. Alexander Tsesis, *Enforcement of the Reconstruction Amendments*, 78 WASH. & LEE L. REV. 849, 851 (2021).

17. *Id.* at 851–52.

18. 521 U.S. 507 (1997).

19. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

the Constitution was previously a rational basis test, but the Religious Freedom Restoration Act attempted to raise the bar to strict scrutiny.<sup>20</sup> The Court found that this new interpretation would be improper because it would change the Constitution, which is meant to be “superior paramount law.”<sup>21</sup> The Religious Freedom Restoration Act was deemed out of proportion to its object.<sup>22</sup> This established the congruence and proportionality test for the enforcement clause of the Fourteenth Amendment.<sup>23</sup> This test has since been used to strike down several other civil rights laws.<sup>24</sup> This standard is significantly harsher than the previous rational basis test used to expand substantive rights under the Fourteenth Amendment and accordingly limits Congress’s participation in the development of constitutional norms and its discretion.<sup>25</sup>

#### B.      *The Fifteenth Amendment*

The next enforcement clause limited was that of the Fifteenth Amendment. The most important recent case regarding the scope of the Fifteenth Amendment’s enforcement clause is *Shelby Cnty. v. Holder*.<sup>26</sup> In *Shelby Cnty.*, the Court invalidated § 4(b) of the Voting Rights Act of 1965 because it imposed restrictions on states’ voting regimes based on “decades-old data and eradicated practices” when current data was needed to ensure the legislation remedied racial discrimination.<sup>27</sup> The Court ruled that Congress had exceeded its lawmaking authority under the Fifteenth Amendment because “it unjustifiably imposed an unequal burden on individual states in contravention of the principle of equal sovereignty among the states” since nine states were singled out under the Act.<sup>28</sup> In deciding this

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20. *United States v. Roof*, 10 F.4th 314, 393 (4th Cir. 2021).

21. *Id.* at 393–94.

22. *Id.* at 394.

23. *Id.*

24. McAward, *supra* note 1, at 81 (citing *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000)).

25. *Id.* at 100–01.

26. 570 U.S. 529 (2013).

27. *United States v. Roof*, 10 F.4th 314, 394 (4th Cir. 2021).

28. Georgina C. Yeomans, *The Constitutionality of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act in Light of Shelby County v. Holder*,

case, the Court did “not explicitly articulate a standard of review specifically applicable to the Fifteenth Amendment,” which has led some to speculate that this heightened standard of review could be applicable to the other Reconstruction Era Amendments as well.<sup>29</sup> Both the Fourteenth and Fifteenth Amendments’ limitations have resulted in striking down considerable legislation aimed at furthering equality, which, if applied to the Thirteenth Amendment, could do the same.

### III. 13<sup>TH</sup> AMENDMENT UPHELD—*UNITED STATES V. ROOF*

Despite these limitations, the Supreme Court has continued to uphold cases seeking to enforce the Thirteenth Amendment in particular ways that uphold civil rights.

#### A. *Historical Standard for the Thirteenth Amendment*

Unlike the Fourteenth and Fifteenth Amendments, the Thirteenth Amendment’s treatment has remained relatively static since its enactment. In *Bailey v. Alabama*,<sup>30</sup> the Court held that the Thirteenth Amendment was intended to abolish slavery and all of its badges and incidents.<sup>31</sup> In the seminal case on the powers of the Thirteenth Amendment, *Jones v. Alfred H. Mayer Co.*,<sup>32</sup> the Court established the rational determination test for the Thirteenth Amendment. This deferential test empowered Congress to prohibit racial discrimination in the public or private sale or rental of real estate.<sup>33</sup> Most importantly, the Court upheld that it is within Congress’s authority to determine what constitutes a badge or incident

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114 COLUM. L. REV. SIDEBAR 107, 113–14 (2014) (citing *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 557 (2013)).

29. *Id.* at 114 (citing Richard Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 pm), <https://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/>).

30. *Bailey v. Alabama*, 219 U.S. 219 (1911).

31. *Id.* at 241 (“The plain intention was to abolish slavery of whatever name and form and all its badges and incidents.”).

32. 392 U.S. 409, 440–41 (1968).

33. *Id.* at 421 (holding that § 1982 prohibits against discrimination “in the sale or rental of property<sup>34</sup>discrimination by private owners as well as discrimination by public authorities.”).

of slavery and pass legislation arising out it.<sup>34</sup> Since *Jones*, the Supreme Court has not invalidated any statutes under the Thirteenth Amendment.<sup>35</sup> “[T]he Court itself has never explicitly questioned the *Jones* standard, and lower courts continue to invoke that standard to evaluate Thirteenth Amendment legislation” and its enforcement clause.<sup>36</sup>

B. *The Thirteenth Amendment’s Treatment in United States v. Roof*

The Fourth Circuit most recently addressed the parameters of the Thirteenth Amendment in *United States v. Roof*.<sup>37</sup> Faced with several charges under the Hate Crimes Prevention Act for the murder of nine African-American parishioners at Emanuel African Methodist Episcopal Church in Charleston, South Carolina,<sup>38</sup> Dylann Roof argued that the statute was in violation of the Thirteenth Amendment’s enforcement clause.<sup>39</sup> Roof argued that the limitations given to the Fourteenth and Fifteenth Amendments by the tests prescribed in *Boerne* and *Shelby Cnty.* should be applied to the Thirteenth Amendment instead of the current rational determination standard prescribed by *Jones*.<sup>40</sup> Roof argued that the “congruence and proportionality” test from *Boerne* should apply since the amendments are substantially similar in aims and in their enforcement clauses. This would essentially require the Hate Crimes Prevention Act be declared

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34. *Id.* at 440. (“Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.”).

35. Dawinder S. Sidhu, *Threshold Liberty*, 37 CARDOZO L. REV. 503, 520 (2015); see also *Runyon v. McCrary*, 427 U.S. 160 (1976) (prohibiting racial discrimination in the making on private employment contracts); *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (holding that Congress was within its power to create a cause of action for Black people who were the victims of racially discriminatory private actions).

36. McAward, *supra* note 1, at 81.

37. *United States v. Roof*, 10 F.4th 314, 393–94 (4th Cir. 2021).

38. Dylann Roof shot and killed nine African-American parishioners at Emmanuel African Methodist Episcopal Church in Charleston, South Carolina in 2015. *Id.* at 331–33, 391. He was charged with several counts of racially motivated hate crimes. *Id.* at 333.

39. *Id.* at 393.

40. *Id.* at 393–95.



an unfair exercise of power by Congress.<sup>41</sup> Roof substantiated this argument by emphasizing the similarities among the Reconstruction Era Amendments and by arguing that the court did “not have license to reject the generally applicable reasoning set forth in a Supreme Court opinion” in reference to *Boerne* and *Shelby Cnty.*<sup>42</sup>

Despite Roof’s arguments, the Fourth Circuit held that the Thirteenth Amendment would not be given the same limitations as the other Reconstruction Era Amendments.<sup>43</sup> The court held that the limitations that have been placed on the other Reconstruction Era Amendments offer little support for Roof’s position because neither *Boerne* nor *Shelby Cnty.* mention the Thirteenth Amendment.<sup>44</sup> The court also emphasized that nowhere do those cases mention *Jones*, the seminal case on the Thirteenth Amendment’s restrictions.<sup>45</sup>

Similarly, the Fourth Circuit looked to *Shelby Cnty.* and declined to extend its limitations for the same reasons: *Shelby Cnty.* never “addressed Congress’s power to legislate under the Thirteenth Amendment.”<sup>46</sup> The Fourth Circuit said that it would “leave it to the Supreme Court to make adjustments, if any, to well-established Thirteenth Amendment jurisprudence.”<sup>47</sup>

Applying the rational determination test from *Jones*, the court ultimately held that it was not “irrational for Congress to deem racially motivated violence a badge and incident of slavery,” and that the Hate Crimes Prevention Act is a valid exercise of Congressional authority under the enforcement clause of the Thirteenth Amendment.<sup>48</sup>

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41. *See id.* at 393 (“[H]e contends that those tests—created in the context of the Fourteenth and Fifteenth Amendments, respectively—clarify the governing standards for the reconstruction era Amendments and therefore apply to the [Hate Crimes Prevention Act].”).

42. *Roof*, 10 F.4th at 395 (4th Cir. 2021) (quoting *United States v. Hill*, 927 F.3d 188, 199 n.3 (4th Cir. 2019)).

43. *Id.* (“[T]he ‘congruence and proportionality’ test from *City of Boerne* and the ‘current needs’ test from *Shelby County* need not be applied to legislation enacted under the Thirteenth Amendment . . .”).

44. *Id.* at 394 (“[N]either case mentions the Thirteenth Amendment, neither cites *Jones*, and neither discusses Congress’s power to identify and legislate against the badges and incidents of slavery.”).

45. *Id.*

46. *Id.* at 395.

47. *Id.* at 394–95.

48. *See id.* at 395.

IV.      WHY IT IS IMPORTANT THAT THE THIRTEENTH AMENDMENT  
            BE MAINTAINED?

The Thirteenth Amendment is widely considered to be one of the most important Constitutional amendments. The Supreme Court once referred to the Thirteenth Amendment as a “grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government.”<sup>49</sup> It has provided important protections long after institutionalized slavery was eradicated in this country and has provided a tool to eliminate “racially motivated violence” as “an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.”<sup>50</sup>

Congress has passed a variety of civil and criminal legislation under the Thirteenth Amendment. The majority of these laws and practices “are closely linked with slavery and involuntary servitude.”<sup>51</sup> As Justice Bradley stated in the *Civil Rights Cases*, the Thirteenth Amendment gives Congress the power to “enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents.”<sup>52</sup> However, many laws go far beyond anti-slavery laws.<sup>53</sup> For example, the Civil Rights Act of 1866 has been reformed since its enactment and now encompasses such expanded protections as the Fair Housing Act.<sup>54</sup>

A.      *Distinguishing the Thirteenth Amendment*

The Thirteenth Amendment is distinct from other Reconstruction Era Amendments because it commands the government to undertake social transformation by eliminating a practice that was baked into the American identity for hundreds of

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49. *The Slaughter-House Cases*, 83 U.S. 36, 39 (1872).

50. 34 U.S.C. § 30501(7).

51. McAward, *supra* note 1, at 86. For example, the Anti-Peonage Act imposed penalties for “[t]he holding of any person to service of labor under the system known as peonage.” 18 U.S.C. § 1581 (2006); 42 U.S.C. § 1994 (2006).

52. Estreicher, *supra* note 14, at 452–53 (quoting *The Civil Rights Cases*, 109 U.S. 3, 21 (1883)).

53. McAward, *supra* note 1, at 87.

54. 42 U.S.C. § 1981 (2006); 42 U.S.C. §§ 3601–3619.

years.<sup>55</sup> It is also the only constitutional rights guarantee that attacks relations of subjugation and exploitation.<sup>56</sup> The Thirteenth Amendment is “read to prohibit not just slavery and involuntary servitude but also racial profiling, felony disenfranchisement, hate speech, . . . sexual harassment, the use of police informants, . . . the denial of health care, the Confederate flag, the use of orcas at SeaWorld, and even laws permitting physician-assisted suicide.”<sup>57</sup> This allows for creativity in constitutional arguments, which is unusual in amendments to the Constitution.<sup>58</sup> The Thirteenth Amendment is also unique in that it lacks input from states.<sup>59</sup> These factors give the Thirteenth Amendment unique capabilities that must be preserved for the sake of key civil rights arguments in the modern United States.

#### B. *Hate Crimes Prevention Act*

The Thirteenth Amendment is the basis of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act,<sup>60</sup> which authorizes federal prosecution of 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.”<sup>61</sup> This statute has repeatedly been held

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55. James Gray Pope, *What’s Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189, 190 (2011).

56. *Id.*

57. Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1733–34 (2012) (arguing that these are conceptually sound arguments, though perhaps not plausible in the current judicial climate). *See also* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 999 (2002) (“Scholars . . . have recently begun to pay greater attention to the Thirteenth Amendment’s remedial possibilities, suggesting that the prohibition of slavery and involuntary servitude in section 1 can be employed to combat aspects of child abuse, domestic violence, abortion restrictions, and corporate use of foreign slave labor.”).

58. Greene, *supra* note 57, at 1768.

59. *Id.*

60. 18 U.S.C. § 249. The Hate Crimes Prevention Act was passed by President Obama in 2009 following the brutal, hate-motivated murders of Matthew Shepard and James Byrd, Jr. Yeomans, *supra* note 28, at 107 n.1 (citing *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>).

61. 18 U.S.C. § 249(a)(1).

to be a valid exercise of power under the Thirteenth Amendment since Congress has declared that racially motivated violence is a badge and incident of slavery.<sup>62</sup>

Hate crimes are an enormous problem in the United States, making a law like the Hate Crimes Prevention Act necessary.<sup>63</sup> Scholars have noted that the Act likely would not have passed under the Fourteenth Amendment because its interpretation is far more limited.<sup>64</sup> Additionally, given the challenges the Act would potentially face under the First Amendment, the Thirteenth Amendment is likely the only viable option for a hate crimes act at the federal level.<sup>65</sup> As Congress has stated, as a result of the Hate Crimes Prevention Act,

[s]tate and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes . . . . [F]ederal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes.<sup>66</sup>

These are all examples of why it is important that the Thirteenth Amendment, and more importantly the laws enacted under its enforcement clause, are maintained in an unrestricted manner. Given the limitations to other Reconstruction amendments, the Thirteenth Amendment remains an important foundation for civil rights law in this country.

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62. *United States v. Roof*, 10 F.4th 314, 393 (4th Cir. 2021); see also McAward, *supra* note 1, at 79 n.9 (“The Thirteenth Amendment portion of the Act imposes significant penalties on anyone” in relation to race, while the Act “under the Commerce Clause, would extend protection against hate crimes motivated by gender, sexual orientation, gender identity, or disability”).

63. Matthew Trout, *Federalizing Hate: Constitutional and Practical Limitations to the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, 52 AM. CRIM. L. REV. 131, 133 (2015) (indicating that law enforcement agencies reported 5,796 hate crimes to the FBI in 2012).

64. *Id.* at 141. (“[T]he Fourteenth Amendment is limited by its text and interpretation as applying only to state action.”).

65. *See id.* at 144 (explaining that the Supreme Court invalidated a local ordinance reasoning the municipality engaged in content-based discrimination by selectively proscribing certain threats and not acknowledging others).

66. *Roof*, 10 F.4th at 390.

V. WHERE TO GO FROM HERE—THE NECESSITY OF A SUPREME COURT RULING ON THE THIRTEENTH AMENDMENT

As discussed above, the Thirteenth Amendment is threatened by the limitations that have come to affect its sister amendments. To prevent this from happening, it is crucial that the Supreme Court rule on the Thirteenth Amendment’s enforcement clause for two reasons: inconsistency and federalism concerns.

A. *Clear Direction is Needed by the Supreme Court to Avoid Inconsistency*

In order to protect the Thirteenth Amendment, the Supreme Court must rule that the amendment is not subject to the same limitations that the other Reconstruction Era Amendments are. Until the Supreme Court rules, the lower courts will be left to interpret the Thirteenth Amendment without clear direction and could potentially be at risk for inconsistent judgments across the nation. The Court has so far been reluctant to find violations of the Thirteenth Amendment without congressional legislation.<sup>67</sup> In *Roof*, the Fourth Circuit acknowledges that absent clear direction from the Supreme Court, *Boerne* and *Shelby Cnty.* will not be applied.<sup>68</sup> Nonetheless, clear direction should be given to ensure that the Thirteenth Amendment is not limited in the same ways. Courts cannot reject generally applicable reasoning set forth in a Supreme Court opinion.<sup>69</sup> However, it is not clear whether the limiting principles in *Boerne* and *Shelby Cnty.* are “generally” applicable to the other Reconstruction Era Amendments’ enforcement or if they are specific to each amendment individually; therefore, the Court needs to clarify this provision.<sup>70</sup>

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67. See Sidhu, *supra* note 35, at 520 (explaining that the Court recognizes Congress’ authority to determine what are the badges and incidents of slavery and translate that determination into effective legislation and that the Court has not invalidated statutes passed by Congress under its Thirteenth Amendment enforcement power).

68. *Roof*, 10 F.4th at 394 (4th Cir. 2021) (“We decline to [incorporate the limitations], absent clear direction from the Supreme Court.”). See also *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (“[The] Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.”).

69. *United States v. Hill*, 927 F.3d 188, 199 n.3 (4th Cir. 2021).

70. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997); *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013).

The Fourth Circuit in *Roof* holds that Roof's argument is incorrect because a lower court does not have license to reject a "direct application in a case," but whether or not this is true is unknown.<sup>71</sup> It is unclear if the standard outlined in *Shelby Cnty.* does in fact directly control because, as others have noted regarding *Shelby Cnty.*, it was not clear that the standard was applicable only for the Fifteenth Amendment or the other Reconstruction Era Amendments as well.<sup>72</sup> This further emphasizes the need for the Supreme Court to rule on this exact issue.

B. *Federalism Concerns Arising from the Hate Crimes Prevention Act*

Federalism concerns require that the Supreme Court formally declare if the limitations of the Fourteenth and Fifteenth Amendments' enforcement clauses are to be extended to the Thirteenth Amendment. According to *United States v. Hatch*, the Thirteenth Amendment seems to give "Congress the power to define the meaning of the Constitution – a rare power indeed."<sup>73</sup> According to *Beebe*, it is within the scope of the Constitution if the purpose is calculated to forward the object of the constitutional command underlying the legislation.<sup>74</sup> According to *Morrison v. Olson*<sup>75</sup> and *United States v. Lopez*,<sup>76</sup> the punishment of crimes is "the province of state governments."<sup>77</sup> In *Johnson*, the Fourth Circuit determined that "federal laws criminalizing conduct within traditional areas of state law, whether the states criminalize the same conduct or decline to criminalize it, are of course commonplace under the dual-sovereign concept and involve no

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71. *Roof*, 10 F.4th at 395.

72. See Yeomans, *supra* note 28, at 114 (citing Richard Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 pm), <https://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/>). *Contra* *United States v. Beebe*, 807 F. Supp. 2d 1045, 1049 (D.N.M. 2011), *aff'd sub nom.* *United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013) (stating that "to adopt Defendants' position, this Court would have to read *City of Boerne* as creating the sole standard applicable to virtually every enforcement clause in the Constitution").

73. *Hatch*, 722 F.3d at 1204.

74. *Beebe*, 807 F. Supp. 2d at 1056.

75. *Morrison v. Olson*, 487 U.S. 654 (1988).

76. *United States v. Lopez*, 514 U.S. 549, 554 (1995).

77. See *Morrison*, 487 U.S. at 684; *Lopez*, 514 U.S. at 564.

infringement per se of states' sovereignty in the administration of their criminal laws."<sup>78</sup> The delegation to Congress to place a ban on slavery overrides states' powers to pass legislation allowing slavery to persist.<sup>79</sup> However, since it is within the states' province to punish crimes, an issue of federalism could emerge, so it would be helpful for the Supreme Court to determine whether or not the Hate Crimes Prevention Act is a valid exercise of federal power.

#### CONCLUSION

*United States v. Roof* has once again demonstrated that the courts are committed to upholding the Thirteenth Amendment without the restrictions placed on its sister amendments. The Fourth Circuit was correct in upholding the constitutionality of the Hate Crimes Prevention Act, thereby upholding Roof's conviction because it determined that *Shelby Cnty.* and *Boerne* were not applicable in this instance.<sup>80</sup> However, without further consideration from the Supreme Court, the Thirteenth Amendment is in danger of being limited in a similar way by another court and therefore being interpreted in a way that will undermine the civil rights of Americans, specifically by invalidating laws like the Hate Crimes Protection Act and the Fair Housing Act. It is crucial that the Thirteenth Amendment continue to uphold the original goal of all the Reconstruction Era Amendments, to abolish slavery and its badges and incidents, which it can only do in its current state.<sup>81</sup> As it exists currently, there is too much at stake and too little for certain.

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78. *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997).

79. *Beebe*, 807 F. Supp. 2d at 1045, 1057.

80. *See generally* *United States v. Roof*, 10 F.4th 314, 393 (4th Cir. 2021).

81. *McAward*, *supra* note 1, at 85.