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Congress's Power to Legislate Control Over Hate Crimes: Selected Legal Theories

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Summary

Congress has no power under the commerce clause over "noneconomic, violent criminal conduct" that does not cross state lines said Chief Justice William Rehnquist in *United States v. Morrison*. Nor, he added, can the overreach be rectified by calling upon Congress's authority under the Fourteenth Amendment. States can enact hate crime laws, but the reasoning in *Morrison* appears to impact national legislation targeted at crimes against African-Americans, homosexuals, Jews, Muslims or other ethnic minorities — at least when such efforts rest solely on the commerce clause and the Fourteenth Amendment. Congress, however, enjoys additional legislative powers under the spending clauses and the legislative clauses of the Thirteenth and Fifteenth Amendments. Extensive, if something less than all encompassing, national legislation may be possible under the confluence of authority conveyed by the commerce clause, spending clause, and the legislative clauses of the constitution's Reconstruction Amendments, provided the limitations of the First, Sixth and Tenth Amendments are observed.

Introduction. The Department of Justice defines a hate crime as "the violence of intolerance and bigotry, intended to hurt and intimidate someone because of their race, ethnicity, national origin, religion, sexual orientation, or disability."[1] The most recent statistics compiled by the F.B.I. show 7,649 bias-motivated incidents involving 9,035 separate offenses.[2] Inasmuch as the Constitution does not give the federal government general police powers, federal law ordinarily does not reach murder, rape, arson, assault or vandalism. Federal hate crime legislation must draw on one or more of the powers that the Constitution does vest in the federal government. Early proposals relied upon the power to regulate interstate commerce and to implement the Fourteenth Amendment, but

[1] Community Relations Service, U.S. Department of Justice, Hate Crime: The Violence of Intolerance, available on November 21, 2005 at [http://www.usdoj.gov/crs/pubs/crs_pub_hate_crime_bulletin_1201.htm].

[2] Federal Bureau of Investigation, Hate Crime Statistics, 2004, available on November 21, 2005 at [http://www.fbi.gov/ucr/hc2004/openpage.htm].

then the Supreme Court held that those powers alone were insufficient to support a hate crime statute prohibiting gender-motivated violence, *United States v. Morrison*, 529 U.S. 598 (2000). More recent proposals, such as H.R. 259 (Representative Jackson-Lee), H.R. 2662 (Representative Conyers), and S. 1145 (Senator Kennedy) in the 109th Congress, take a layered approach in order to take advantage of authority in the commerce clause, the spending clause, and the legislative clauses in the Thirteenth, Fourteenth, and Fifteenth Amendments.[3]

The Commerce Power. Article I, section 8 of the Constitution enumerates instances in which congressional action is permitted. The most popular enumerated power has been the commerce clause, under which Congress is constitutionally empowered "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Constitution Article I, Section 8, clause 3. With its popularity have come questions of how far Congress's commerce clause powers might go. Having established that a congressional exercise of power was valid if shown to regulate activities "substantially affecting" interstate commerce, *United States v. Darby*, 312 U.S. 100 (1941), the Court in *Wickard v. Filburn*, 317 U.S. 111 (1942), upheld a $117 penalty imposed on a farmer for growing wheat on 12 more acres than he was permitted under the Agricultural Adjustment Act under a "cumulative effects" test — the activity could be regulated if all the regulated activities of similarly situated individuals, taken cumulatively — could have substantial effect on interstate commerce. The cumulate effects test also convinced the Court to uphold provisions of the 1964 Civil Rights Act that required the 216-room Heart of Atlanta Motel to rent its rooms to persons regardless of race, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). For essentially the same reasons, the Court recently upheld as a valid exercise of the commerce power the federal ban on possession of marijuana, even when applicable state law purported to authorize its possession for medicinal purposes, *Gonzales v. Raich*, 125 S.Ct. 2195 (2005).

Yet the power is not boundless. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court decided a suit brought by a former student of Virginia Polytechnic Institute who alleged that she was raped by two university football players. The defendant players and the university argued that the Violence Against Women Act, which allowed victims of gender-motivated violence to bring federal civil suits for damages, was outside the scope of the commerce power. The Court favored the position of the defendants even though Congress had made specific findings that gender-motivated violence deterred interstate travel, diminished national productivity, and increased medical cost, 529 U.S. at 615. The Court concluded that upholding the Violence Against Women Act would open the door to a federalization of virtually all serious crime as well as family law and other areas of traditional state regulation, Id. at 615-16. The Court said that Congress must distinguish between "what is truly national and what is truly local" and its power under the commerce clause reaches only the former, Id. 617-18. In this context, the Court "has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce even though the threat may come only from

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[3] For a more extended discussion of these bills and the legal environment in which they arise see, CRS Report RL32850, *Hate Crimes: Legal Issues*, by Paul Starett Wallace, Jr.

intrastate activities. Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce," 529 U.S. 608-609. Hate crimes that involve interstate travel are within the clause's reach; hate crimes with only an attenuated nexus to commerce are not. Of course, hate crimes statutes that purport to "commandeer" state officials, requiring them to take affirmative governmental action to implement commerce clause based legislation may also exceed the clause's authority, *Printz v. United States*, 521 U.S. 898 (1997).

Thirteenth, Fourteenth and Fifteenth Amendments. Each of the Reconstruction Amendments contains a legislative clause, U.S. Const. Amends. XIII, Section 5; XV, Section 2. Their breadth is defined by the scope of the Amendments of which they are a part. The Fifteenth Amendment forbids either the federal government or the states from denying or abridging the right to vote on the basis of an individual's race, color, or previous condition of servitude. The Fourteenth Amendment prohibits the states from denying equal protection of the law, due process, or the privileges and immunities of U.S. citizenship. In *City of Boerne v. Flores*, 521 U.S. 507(1997), the Court held that the Fourteenth Amendment gives Congress the power to enact civil rights statutes only if (a) the statute is designed to remedy a history of unconstitutional conduct and (2) the remedy contained in the statute, such as requiring states to make reasonable accommodations, is "proportionate" to the history of constitutional violations. Although limited, Congress can "prohibit a somewhat broader swath of conduct" than that prohibited by the Constitution, but only for the purpose of remedying or deterring unconstitutional conduct, *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 63-5 (2000). But *Morrison* made it clear that state action is a prerequisite. Section 5 does not authorize legislation "directed exclusively against the action of private persons, without reference to the laws of the state, or their administration by her officers," 529 U.S. at 621. Hate-driven denials of equal protection, of due process, or the right to vote by state officers or those acting under the color of state law fall within the scope of the legislation sections of the Fourteenth and Fifteenth Amendments; hate crimes by private individuals cannot be reached under those sections.

Section 2 of the Thirteenth Amendment, however, stands on somewhat different footing. The Amendment proscribes slavery and involuntary servitude without reference to federal, state or private action. The Court has observed that "the varieties of private conduct that" Congress "may make criminally punishable ... extend far beyond the actual imposition of slavery or involuntary servitude ... 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," *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971). Might Congress find that violence born of bigotry constitutes just such a "badge and incidence" of slavery, and if so must its remedial legislation be limited to the descendants of those for whose principal benefit the amendments were adopted? The Court's construction of civil rights legislation enacted contemporaneous to the Reconstruction Amendments suggests that the legislative power of those Amendments may be extended not only on the basis of descent but at least to a limited extent on the basis of ethnicity and religion, *Shaare Tefila Congregation v. Cobb*,

481 U.S. 615, 617-18 (1987)(protection of Jews); *St. Francis v. Al-Khazaraii*, 481 U.S. 604, 613 (1987)(protection of Arabs).[4]

The Spending Power. Article I, section 8, clause 1 empowers Congress "to lay and collect taxes ... to provide for the ... general welfare." There has been a general consensus that Congress has expansive powers to attach strings to grants of federal money, including grants to states. While the Supreme Court has indicated that there are limits to this power, *South Dakota v. Dole*, 483 U.S. 203 (1987), these limits never seemed to be an obstacle to conditioning grants of federal money upon states' compliance with certain civil rights obligations, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 123 (1984).

In *South Dakota v. Dole*, the Court considered a federal law that required the Secretary of Transportation to withhold 5% of a state's federal highway dollars if the state allowed persons less than 21 years of age to purchase alcoholic beverages. South Dakota, which allowed 18-year-olds to drink was in a position to lose federal funds for highway construction and sued Secretary Dole, arguing that the highway funding law was not related to setting a national drinking age. In upholding the federal law, the Court announced a four-part test for evaluating the constitutionality of conditions attached to federal spending programs: (1) the spending power must be exercised in pursuit of the general welfare; (2) the grant conditions must be clearly stated, (3) the conditions must be related to a federal interest in the national program or project, and (4) the spending power cannot be used to induce states to do things that would themselves be unconstitutional, 483 U.S. at 207-208. Therefore, Congress under its spending power may condition grants of federal money on states' compliance with specific obligations under federal hate crime legislation if the four-part test for evaluating the constitutionality of the conditions is met.

Limitations. The Bill of Rights imposes a number of limitations upon the manner in which Congress exercises its otherwise available legislative authority. Two of these deserve mention here. The First Amendment declares that "Congress shall make no law... abridging the freedom of speech." In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court examined a local ordinance which made it a misdemeanor to "place on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The Court found the ordinance unconstitutionally restricted speech on the basis of its content. The Court noted that words that expressed hostility toward a person because of his or her sexual orientation or political affiliation were not prohibited by the ordinance. Because the ordinance restricted biases of a particular nature, it barred only those viewpoints that the city council found distasteful, id. at 396.

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[4] See also S.Rept. 107-147, at 18 (2000), quoting a Department of Justice letter for the proposition that "Congress would have the authority under the 13th amendment to extend the prohibitions of" hate crime legislation "to violence that is based on the victim's religion or national origin, at least to the extent the violence is directed at members of those religions or national origins that would have been considered races at the time of the adoption of the 13th amendment."

Thus, the ordinance unconstitutionally allowed persons on one side of a debate to speak freely while restricting the other side's response, id. at 392.

One year later, the Court provided clarification by addressing the constitutionality of other types of hate crime when it considered the constitutionality of a statute that enhanced the penalty for criminal behavior motivated by prejudice. In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), a group of young African-American males selected and severely beat a white boy because of his race. Mitchell was convicted of aggravated battery in connection with the assault and sentenced to four years in prison — two for the battery and two under Wisconsin's hate crime enhancement statute. Chief Justice Rehnquist ruled that the enhancement law was constitutional because it punished violence and the intent that gave rise to that violence, and not speech, id. at 485-88.[5] Hate crime statutes that selectively criminalize bias-motivated speech or symbolic speech are not likely to survive constitutional muster; hate statutes that criminalize bias motivated violence are likely to survive First Amendment challenge.

Hate crime statutes, however, may be subject to another constitutional challenge. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court overturned a hate crime enhanced sentence because the facts upon which the sentence was based had been treated as sentencing factors to be determined by the sentencing judge rather than presented to the jury and found beyond a reasonable doubt as the Sixth Amendment requires. Of course, *Apprendi* and later *United States v. Booker*, 125 S.Ct. 738 (2005), have everything to do with the relative responsibilities of the judge and jury, and otherwise have nothing to do with hate crime enhancements per se.

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[5] See also *Dawson v. Delaware*, 503 U.S. 159 (1992) and *Barclay v. Florida*, 463 U.S. 939 (1983). *Barclay* and *Dawson* upheld consideration of defendant's hate driven motivation as an aggravating factor for capital sentencing purposes.