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# MANDATORY NATIONAL SERVICE: CREATING GENERATIONS OF CIVIC MINDED CITIZENS

*Andrew M. Pauwels*

## I. INTRODUCTION

While on the campaign trail in the fall of 1960, Senator John F. Kennedy addressed students at the University of Michigan, proposing a novel idea:

> How many of you who are going to be doctors, are willing to spend your days in Ghana? Technicians or engineers, how many of you are willing to work in the Foreign Service and spend your lives traveling around the world? On your willingness to do that, not merely to serve one year or two years in the service, but on your willingness to contribute part of your life to this country, I think will depend the answer whether a free society can compete. I think it can! And I think Americans are willing to contribute. But the effort must be far greater than we have ever made in the past.[1]

With this call to action, Kennedy launched the Peace Corps,[2] a federal program that continues to place thousands of Americans in service-work

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1 Senator John F. Kennedy, Remarks at the University of Michigan (Oct. 14, 1960), *available at* http://www.peacecorps.gov/about/history/speech/.

2 While the speech at Michigan is cited by many as the moment the Peace Corps was born, *see, e.g.*, *History: A Proud and Changing World*, PEACE CORPS (July 16, 2012), http://www.peacecorps.gov/about/history/ ("The Peace Corps traces its roots and mission to 1960, when then-Sen. John F. Kennedy challenged students at the University of Michigan to serve their country in the cause of peace by living and working in developing countries."), the initiative was more formally proposed, and first publicly referred to as the "Peace Corps," in a later campaign address. *See* Senator John F. Kennedy, Staffing a Foreign Policy for Peace, Speech at Cow Palace, San Francisco, CA (Advance Release Text) (Nov. 2, 1960), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=25927 ("I therefore propose . . . a Peace Corps of talented young men willing and able to serve their country in this fashion for 3 years as an alternative to peacetime selective service . . . ."). The Peace Corps was created by Executive Order. Establishment and Administration of the

opportunities abroad.[3]

While Kennedy evoked higher principles to draw young Americans on college campuses to action, young Americans on the same college campuses—and elsewhere—were publicly raging against a public duty: the military draft.[4] As the war in Vietnam ramped up, and more and more young American males were conscripted into the armed services, people asked more and more questions about the legitimacy—both constitutionally and practically—of requiring military service. While many proposed eliminating the draft completely, others proposed a broader and more creative solution: expanding service to create an obligation for all Americans.[5] While the scope of such proposals varied, the intentions were the same. None of these suggestions gained much traction, however, and calls for an expanded national service program faded, especially as increased hostilities in Vietnam distracted America's leaders.[6]

In the late-1980s and early-1990s, the efforts of both Presidents George H. W. Bush[7] and Bill Clinton[8] led to the creation of AmeriCorps, a federal

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Peace Corps in the Department of State, Exec. Order No. 10,924, 26 Fed. Reg. 1789 (Mar. 2, 1961).

3 *See* Paul D. Coverdell, *Peace Corps Fact Sheet*, PEACE CORPS (Oct. 16, 2012), http://files.peacecorps.gov/multimedia/pdf/about/pc_facts.pdf (listing, among other basic statistics, the current Peace Corps as roughly 9000 volunteers serving in seventy-five countries).

4 *See generally, e.g.*, SHERRY GERSHON GOTTLIEB, HELL NO WE WON'T GO!: RESISTING THE DRAFT DURING THE VIETNAM WAR (1991) (presenting firsthand accounts of draft protests).

5 *See* Roger Landrum et al., *Calls for National Service*, *in* NATIONAL SERVICE 21, 33 (Michael W. Sherraden & Donald J. Eberly eds., 1982).

6 *Id.* at 35 ("[President Johnson] opted for guns and made no more speeches about national service. He apparently passed the word to the Marshall Commission not to recommend a national service program. . . . It was apparently the Vietnam War that continued to be the major enemy of national service . . . .").

7 On the campaign trail and at his inauguration, President Bush spoke often of an America united in service to the community and the nation. *See, e.g.*, George Bush, Inaugural Address (Jan. 20, 1989), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=16610 ("I have spoken of a Thousand Points of Light, of all the community organizations that are spread like stars throughout the Nation, doing good. . . . The old ideas are new again because they're not old, they are timeless: duty, sacrifice, commitment, and a patriotism that finds its expression in taking part and pitching in."). In 1990, President Bush signed into law the National and Community Service Act, laying a framework for service learning in schools and service programs through colleges and non-profits. *See* National and Community Service Act of 1990, Pub. L. No. 101-610, 104 Stat. 3127 (codified as amended in scattered sections of 42 U.S.C.).

8 AmeriCorps was created in 1993, with the signing of the National and Community Service Trust Act by then President Clinton; by the following fall, more than 20,000 AmeriCorps members were serving in 1000 American communities in need. *See History, Legislation, and Budget*, AMERICORPS, http://www.americorps.gov/about/ac/history.asp (last visited Mar. 11, 2013); *see also* National and Community Service Trust Act of 1993, Pub. L. No. 103-82, 107 Stat. 785 (codified as amended in scattered sections of 3, 16, and 42 U.S.C.).

organization with goals similar to those of the Peace Corps, focused on domestic service.[9] AmeriCorps, and the many organizations under its umbrella,[10] have spiked in popularity,[11] attracting highly qualified young Americans and placing them in some of the most impoverished areas of the United States.[12]

Despite the popularity of such programs, some scholars, mainstream media members, and politicians argue this is not enough, calling on the government to broadly expand the national service programs.[13] Many modest expansions of existing programs are met with little controversy.[14] However, a few have advocated for sweeping changes in the form of mandatory national service.[15] Merely mentioning mandatory national service can invoke calls of socialism and slavery, sparking pointed criticism regarding the merits and the constitutionality of such a program.[16]

This Note will focus on the constitutionality of such a compulsory national service program in hypothetical form. While debate in the media has focused on the socio-economic and vocational benefits of a broad national service program, legal scholars have said little on the issue of whether such a program would even withstand the scrutiny of the Supreme

9 For a broad discussion of AmeriCorps, including the program's goals, see *What is AmeriCorps?*, AMERICORPS, http://www.americorps.gov/about/ac/index.asp (last visited Mar. 11, 2013).

10 *Id.* ("AmeriCorps is made up of three main programs: AmeriCorps State and National, AmeriCorps VISTA, and AmeriCorps NCCC (National Civilian Community Corps)."). Other well-known organizations—such as Teach For America—also fall under the AmeriCorps umbrella. *See Assistance with Pre-Existing Loans: AmeriCorps Benefits*, TEACH FOR AMERICA, http://www.teachforamerica.org/why-teach-for-america/compensation-and-benefits/assistance-pre-existing-loans (last visited March 11, 2013).

11 *See* Michael Brown, *"No"—Nearly One Million Times*, HUFFINGTON POST (Feb. 15, 2012, 5:07 PM), http://www.huffingtonpost.com/michael-brown/americorps-funding_b_1280200.html (reporting that for the fall of 2012 AmeriCorps would have 82,000 new members, from an applicant pool of roughly 582,000—a rejection rate of eighty-six percent).

12 *See* CORP. FOR NAT'L & CMTY. SERV., AMERICORPS: STATE COMMISSION PERFORMANCE REPORT (2006) (detailing the efforts of AmeriCorps-funded agencies in each of the fifty states).

13 *See, e.g.*, Editorial, *Expanding National Service*, N.Y. TIMES (March 23, 2009), http://www.nytimes.com/2009/03/24/opinion/24tue4.html?_r=0 (describing positively expansions in the AmeriCorps programs early in President Obama's first term).

14 *See, e.g.*, David M. Herszenhorn, *Senate Moves to Expand National Service Programs*, N.Y. TIMES (March 26, 2009), http://www.nytimes.com/2009/03/27/us/politics/27cong.html ("The Senate overwhelmingly approved a bill . . . to broadly expand national community service programs . . . . The vote was 78 to 20 on the measure, renamed the Senator Edward M. Kennedy Serve America Act . . . .").

15 *See, e.g.*, Universal National Service Act, H.R. 5741, 111th Cong. (2010).

16 For an example of the heated discussion, compare generally David Brooks, Op-Ed., *The Great Divorce*, N.Y. TIMES (Jan. 30, 2012), http://www.nytimes.com/2012/01/31/opinion/brooks-the-great-divorce.html?_r=0, with Stuart Anderson, *Mandatory "National Service" for New York Times Columnists*, FORBES (Jan. 31, 2012, 12:44 PM), http://www.forbes.com/sites/stuartanderson/2012/01/31/mandatory-national-service-for-new-york-times-columnists/.

Court. Although no court has addressed the issue, legal scholars in the 1980s briefly engaged in a dialogue regarding the validity of mandatory service.[17] This dialogue will serve as a good starting point, with a set of circuit opinions providing an additional analytical framework for what remains an open issue. This Note will argue that such a scheme, though unprecedented in scope and impact, would withstand constitutional scrutiny. Politicians, scholars, and—ultimately—voters must decide whether or not a program similar to that proposed by this paper should move beyond the hypothetical and become reality; such a normative argument, however, is beyond the scope of this Note.

Part II will briefly describe the history of national service movements in the United States by focusing on two broad programs which preceded the wave of volunteerism sparked by the Peace Corps and AmeriCorps: the military draft and the Civilian Conservation Corps. Part III will analyze the Thirteenth Amendment prohibition against slavery, focusing broadly on the Supreme Court's jurisprudence before turning to specific applications of the Thirteenth Amendment: the military draft and mandatory "volunteer hour" programs in public high schools. In Part IV, this Note will propose and discuss three statutory schemes for making "mandatory" national service a reality and the constitutionality of each.

## II. A History of National Service in the United States

While mandatory national service has never been instituted in the United States, several statutory regimes have created broad programs with sweeping effects. While a detailed history of all service initiatives in the United States[18] is beyond the scope of this Note, a few examples will help frame the constitutional analysis.

### *A. The Military Draft*

Compulsory military service—or, simply, a draft—is most likely what comes to mind for most Americans when they hear compulsory national service. Because the Vietnam War and the surrounding social turmoil are so engrained in our collective consciousness, it might be easy to assume that the draft has been an enduring part of the American military and national identity. This, however, is far from the truth. For roughly the first century of nationhood, the "regular army of the United States was little more than a token force" and Americans "despised conscription."[19] America won the

17 *See generally, e.g.*, Comm. on Fed. Legislation, *The Constitutionality of a Mandatory Non-Military National Service Obligation*, 40 Rec. Ass'n B. City N.Y. 618 (1985) (analyzing the merits and constitutionality of various proposals to expand national service).

18 Also note that this Note focuses only on service initiatives in the United States. The experience of foreign countries could lend further to the discussion of national service but are beyond the scope of this Note.

19 William G. Carleton, *Raising Armies Before the Civil War*, *in* The Military Draft 67, 67 (Martin Anderson ed., 1982).

Revolution using a combination of state militias and unprofessional volunteers, recently recruited,[20] and the young American nation relied on similarly constructed forces in waging its wars in the early nineteenth century.[21] The system exemplified "basic American conditions and values—localism, pluralism, non-professionalism, devotion to liberty, and a folksy egalitarianism."[22]

Despite early calls from the likes of George Washington,[23] conscription or coerced service had no place in the American military until the Civil War, when both the North and the South enacted military drafts.[24] This invasion on liberty was not well received, with "widespread and violent resistance, especially in the North."[25] After the war's end, the draft came to a close. A draft was utilized again in World War I, but, much like after the Civil War, the draft ceased when the war ended.[26]

Congress enacted a peacetime draft for the first time in 1940, albeit reluctantly, as World War II expanded in scope internationally;[27] in fact, it has been argued that the draft of 1940 "was justified only by the existence of an emergency approximating a war crisis, and it was generally expected that the restoration of normal times would bring the end of conscription."[28] In effect, the draft was less of a peacetime draft and more of a "pre-war" draft. Despite these short-term intensions, Congress continued to extend the selective service law after the conclusion of the war, and the peacetime draft became a part of the American military culture.[29] The draft continued—to much controversy[30]—through the Vietnam War.[31] In 1973, at the conclusion of that conflict, the draft was again suspended and the military returned to its all-volunteer roots.[32] For a five year period—from 1975 to 1980—the

20 *See id.* at 68.

21 *See id.* at 69–70 (discussing use of state militias and wartime volunteers in the War of 1812 and, in the Mexican War, fewer state militias and a larger volunteer units, still generally distinct from "the regular army").

22 *Id.* at 74.

23 Richard Gillam, *The Peacetime Draft: Voluntarism to Coercion*, *in* THE MILITARY DRAFT, *supra* note 19, at 97, 101 ("George Washington had believed that a professional standing peacetime army was 'indispensably necessary' and had advocated coercion of service if it were needed.").

24 *Id.* at 102.

25 *Id.*

26 *Id.* In between the Civil War and World War I, the Spanish-American War was fought solely with a volunteer army. *Id.*

27 *Id.* at 103–04.

28 *Id.* at 103.

29 *Id.* at 105–16 (discussing failed Congressional attempts to eliminate the peacetime draft).

30 *See generally* GOTTLIEB, *supra* note 4 (chronicling, in a mostly interview format, the anti-draft movement during the Vietnam War, including draft card burning, fleeing to foreign countries, and on campus demonstrations).

31 *See Background of Selective Service*, SELECTIVE SERVICE SYSTEM (Apr. 30, 2002), http://www.sss.gov/backgr.htm.

32 *Id.*

government also suspended registration for the Selective Service.[33] However, President Carter reinstated the registration requirement in 1980,[34] and the Military Selective Service Act[35] continues to make registration for the draft an obligation of all eighteen-year-old American males.[36]

### *B. The Civilian Conservation Corps*[37]

The Civilian Conservation Corps (CCC) is perhaps the most successful and least controversial example of the federal government mobilizing a large portion of the population to perform nonmilitary service.[38] President Franklin D. Roosevelt oversaw the creation of the CCC within a month of taking office in March of 1933 as part of the New Deal.[39] To Roosevelt, the CCC served a dual purpose: putting people back to work to combat the Great Depression and preserving America's natural resources.[40] Affectionately known by some as "Roosevelt's Tree Army,"[41] this unique collaboration between the Departments of Agriculture, Interior, Labor, and War put people to work on forestry, park maintenance, flood prevention, and other conservation programs.[42]

The CCC specifically targeted a segment of the population hit hard by the Depression: young men.[43] Of the roughly 3,000,000 who served in the Civilian Conservation Corps between 1933 and 1942, eighty-four percent

33 *Id.*

34 *Id.*

35 Military Selective Service Act, 50 U.S.C. app. §§ 451–470 (2006).

36 Except as otherwise provided in this title . . . it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who . . . is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

*Id.* § 453(a).

37 The author acknowledges the voluntary nature of the CCC, distinguishing it from both the draft and the national service program at the heart of this paper. The author discusses the CCC as a comparison point for a broad federal program, employing a large number of Americans in a time of peace in a variety of programs.

38 *See* Donald J. Eberly & Michael W. Sherraden, *National Service Precedents in The United States*, *in* NATIONAL SERVICE, *supra* note 5, at 41, 41–42 ("The CCC was generally perceived to be the most successful of Roosevelt's New Deal programs, receiving the enthusiastic endorsement of Roosevelt's 1936 opponent, Alfred Landon.").

39 *Id.* at 41.

40 BARBARA W. SOMMER, HARD WORK AND A GOOD DEAL 17 (2008).

41 *Id.* at 16.

42 *Id.* at 17. For example, in Minnesota, CCC projects included "restoring and stabilizing national forests, developing and expanding state forests, building a state park system, controlling flooding, and introducing soil conservation measures on agriculture lands in the southern part of the state," among others. *Id.* at 18.

43 *Id.* at 17.

were "young, unmarried men between the ages of about 17 and 28."[44] The government provided camp-style housing, food, and clothing for the men, who were often working in remote parts of the country far from home.[45] In addition, to combat high levels of illiteracy among the men in the camps and to provide for meaningful activity in the evenings after they had concluded their work, the CCC installed academic programs in the camps.[46] Life lessons were also a crucial part of the CCC; the director of the CCC referred to the program as "a practical school where young men in their teens and early twenties are taught how to work, how to live, and how to get ahead."[47]

With the coming of World War II, Congress dissolved the Civilian Conservation Corps; the war eliminated the justifications which had spurred the program's creation, as fifteen million Americans, most from the same pool the CCC drew from, were about to be called to serve in the military.[48] While programs at both the state and national level have attempted to recreate the success of the Civilian Conservation Corps, none could match the New Deal era program for its scope and impact.[49]

## III. Contours of the Thirteenth Amendment's Prohibition of Involuntary Servitude

With these broad programs as a historical backdrop, this section presents a brief background and analysis of the Thirteenth Amendment, through several seminal holdings of the Supreme Court and recent circuit precedent. This Note, in discussing the constitutionality of mandatory national service, makes reference to additional constitutional provisions, but a more expansive discussion of the Thirteenth Amendment is presented as the Amendment is the primary—though not exclusive—focus of the analysis.

### *A. The Text and Early History*

The Thirteenth Amendment was passed in the wake of the Civil War: "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."[50] Clearly, on its face, the amendment abolished the practice of African slavery in the United States. Less clear, however, is the meaning of the phrase "involuntary servitude" and just what Congress meant to abolish in enacting that portion of the

44 Arlene Barry, *Is the Civilian Conservation Corps of the 1930s a 1990s Approach to Dropouts and Illiteracy?*, 42 J. Adolescent & Adult Literacy 648, 650 (1999).

To place the sheer size—3 million men!—of the CCC in perspective, consider this: in the seventeen years from 1994 to 2011, only 704,000 people served in AmeriCorps. *See What is AmeriCorps?*, *supra* note 9.

45 Barry, *supra* note 44, at 650.

46 *Id.* at 650–55.

47 Sommer, *supra* note 40, at 19 (internal quotation marks omitted).

48 Roger Landrum et al., *supra* note 5, at 31.

49 *See, e.g.*, Eberly & Sherraden, *supra* note 38, at 47–48.

50 U.S. Const. amend. XIII, § 1.

amendment.[51] As early as the ratification process, debate raged as to the scope of the amendment, with liberal Republicans arguing for a broad grant of power to the federal government to protect freedom and civil rights of all people and conservative Republicans and Democrats uniting to assert that the amendment addressed only a more narrow freedom from slavery.[52] While much could and has been written on the debate as to the original meaning of the amendment, this Note takes the Supreme Court's precedent as clear on the meaning of the provision and does not address the debate amongst legal scholars as to the original and dynamic meaning of the Thirteenth Amendment.[53]

The Supreme Court, very early after the amendment was passed in the *Slaughter-House Cases*,[54] adopted the narrow interpretation of the amendment and recognized that inclusion of the phrase indicated an intention by Congress to abolish something more than African slavery, but still closely akin to it:

> The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used.[55]

Thus, in a way, "involuntary servitude" was a loophole-closing phrase.

The facts of the *Slaughter-House Cases* did not give the Court much of an opportunity to expound on the definition of involuntary servitude, especially when attempting to answer the question of a mandatory national service program.[56] However, the early twentieth-century Court shed further light on the scope of the term in *Butler v. Perry*[57] by describing what the term did *not*

51 The finger can be pointed squarely at Congress for this lack of clarity. *See* Comm. on Fed. Legislation, *supra* note 17, at 624–25 ("The legislative debates on the Thirteenth Amendment focused exclusively on the abolition of African slavery as it had existed in the United States, and did not discuss what was meant by the term 'involuntary servitude.'").

52 MICHAEL VORENBERG, FINAL FREEDOM 233–39 (2001).

53 Some scholars argue that the amendment "should protect exploited workers, abused women, neglected children, and all other victims of relationships reminiscent of slavery. Such innovative interpretations have reawakened slumbering interest in the amendment and revived the debate about the meaning of constitutional freedom." *Id.* at 248; *see also id.* at 248 n.108 (compiling an "incomplete list" of recent law review articles exploring such a broad interpretation).

54 83 U.S. 36 (1872).

55 *Id.* at 69.

56 At issue in the collected cases was a Louisiana statute which created and granted a monopoly over animal slaughterhouses in New Orleans, as well as limiting where in the city such slaughterhouses could be located. *See id.* at 59–60. Clearly, however, the Court had rejected the broad interpretation of liberal Republicans. *See supra* note 52 and accompanying text.

57 240 U.S. 328 (1916).

encompass. In *Butler*, petitioners challenged a Florida statute which required capable men to perform bridge and road work without pay, subject to a criminal fine for failure to comply.[58] In relying on the *Slaughter-House Cases*, the Court addressed the scope of the Thirteenth Amendment:

> [T]he term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers.[59]

Roadwork, the Court determined, was akin to many of the duties long owed to the state by its citizens,[60] and thus did not violate the prohibition against involuntary servitude.[61]

This framing—that the Thirteenth Amendment's ban on involuntary servitude "was to abolish all practices whereby subjection having some of the incidents of slavery was legally enforced"[62]—has continued to shape courts' interpretation of the Amendment. When an individual has a choice to not perform the required labor, even when consequences for such a choice are "exceedingly bad,"[63] courts have found the Amendment not to bar the labor. The Ninth Circuit, for example, has upheld a state program requiring pro bono services of its lawyers.[64] Classic "civic duties"—such as jury duty[65]—have also been upheld. So, despite the struggles of courts to define the phrase "involuntary servitude" precisely, the case law provides some guidance on what the Thirteenth Amendment was intended to cover and what it does not.

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58 *See id.* at 329–30. The Florida statute at issue required six ten-hour days of work and provided options, including finding an eligible substitute or paying a fee to the county; failure to satisfy any of these three requirements could result in a fifty-dollar fine or a thirty-day imprisonment. *Id.* (citation omitted).

59 *Id.* at 332–33.

60 *See id.* at 331 ("From Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads. The system was introduced from England, and, while it has produced no Appian Way, appropriateness to the circumstances existing in rural communities gave it general favor.").

61 *See id.* at 332–33.

62 United States v. Shackney, 333 F.2d 475, 485 (2d Cir. 1964).

63 *See, e.g.*, Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 459 (2d Cir. 1996) (internal quotation marks omitted) (citing *Shackney*, 333 F.2d at 486).

64 *See* United States v. 30.64 Acres of Land, 795 F.2d 796, 800–01 (9th Cir. 1986) (finding the alternate choice for an attorney is to not practice law).

65 *See, e.g.*, Hurtado v. United States, 410 U.S. 578, 589 n.11 (1973).

### *B. The Military Draft*

#### 1. Direct Challenges to Military Conscription

The United States military first utilized conscription to fill its ranks during the Civil War.[66] From the outset, the draft was met with constitutional challenges, and Chief Justice Roger Taney drafted an opinion striking down the act authorizing conscription as unconstitutional in anticipation of a case reaching the Supreme Court.[67] Taney, however, did not frame his argument under the Thirteenth Amendment's prohibition of involuntary servitude, instead arguing that the draft encroached on the powers of the states[68] and impermissibly extended the war powers of the federal government beyond those enumerated in the Constitution.[69] To Taney, the Federal Conscription Act of 1863 was "unconstitutional and void."[70] Taney never issued his opinion due to the fact that a case challenging the draft was never brought to the Supreme Court in his tenure as Chief Justice.[71]

In 1918, with the United States firmly engaged in the First World War, the Supreme Court had its first opportunity to address the constitutionality of the military draft in *Selective Draft Law Cases*.[72] While the Court spent several pages recounting the historical raising of armies in the United States,[73] it briefly dismissed of the petitioners challenge under the Thirteenth Amendment in a single sentence-long paragraph:

> Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.[74]

The Court, in a similarly cursory discussion, dismissed other constitutional challenges to the draft[75] and upheld conscription, relying a great deal on the expanded powers of the government under the Fourteenth Amendment.[76]

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66 *See supra* note 24 and accompanying text.

67 Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1546 (1969).

68 Roger B. Taney, *Thoughts on the Conscription Law of the United States*, *in* THE MILITARY DRAFT, *supra* note 19, 207, 215–18.

69 *Id.* at 213–15.

70 *Id.* at 218.

71 Friedman, *supra* note 68, at 1548.

72 245 U.S. 366 (1918).

73 *See id.* at 377–88.

74 *Id.* at 390.

75 *Id.* at 389–90 (dismissing, among other arguments, a challenge on impermissible delegation grounds and a challenge under the religious clauses of the First Amendment).

76 *Id.* at 389 ("But to avoid all misapprehension we briefly direct attention to that Amendment for the purpose of pointing out . . . how completely it broadened the national scope of the Government under the Constitution by causing citizenship of the United

The draft continued during World War I and World War II, despite lack of a declared war when the draft was initiated, and again through the Korean and Vietnam Wars, similarly without a declared war.[77] However, the Supreme Court refused to hear any cases which would shed light on the necessity—or lack thereof—of declared war to legitimize conscription.[78] The Seventh Circuit, in *United States v. Fallon*,[79] held that military conscription did not violate the Thirteenth Amendment, dismissing the defendant's argument as "not founded on either logic or good sense."[80] Despite criticism,[81] the holding of the *Selective Draft Law Cases* remains good law, and registration for conscription is still an obligation of all military age males.[82]

2. Conscientious Objector Challenges

During World War II, a Thirteenth Amendment challenge to an aspect of conscription reached the Fifth Circuit in *Heflin v. Sanford*.[83] The draft board classified Petitioner, a military age male, as a conscientious objector and ordered him to report to a camp for work in lieu of military service.[84] He refused to report, was imprisoned, and challenged his imprisonment, by habeas petition, on the grounds that such work amounted to involuntary servitude under the Thirteenth Amendment.[85] Relying on *Butler* and the *Selective Service Cases*, the Fifth Circuit held that the Thirteenth Amendment had "no application to a call for service made by one's government according to law to meet a public need, just as a call for money in such a case is taxation and not confiscation of property."[86] While the court spoke broadly in terms of Congress's power to exact service "to meet public need," the decision

States to be paramount and dominant instead of being subordinate and derivative . . . .") (footnote omitted).

77 *See supra* notes 26–31 and accompanying text.

78 *See* Jason Britt, Note, *Unwilling Warriors: An Examination of the Power to Conscript in Peacetime*, 4 NW. J.L. & SOC. POL'Y 400, 407–08 (2009).

79 407 F.2d 621 (7th Cir. 1969).

80 *Id.* at 624. The defendant had argued that the lack of an exception in the text of the Amendment "allowing the Government to force people into involuntary servitude when it deems it necessary for military purposes" necessitated a finding that "the Thirteenth Amendment prohibits that form of involuntary servitude." *Id.* (internal quotation marks omitted).

81 For an argument as to why the draft is outside the Founder's conception of the military power, see generally Friedman, *supra* note 67. Friedman, however, does not address the Thirteenth Amendment challenge. *Id.*

82 *See* Rostker v. Goldberg, 453 U.S. 57, 83 (1981) (holding that requiring registration of males only did not constitute a violation of the Due Process Clause of the Fifth Amendment and reversing a lower court injunction on registration pursuant to the Military Selective Service Act).

83 142 F.2d 798 (5th Cir. 1944).

84 *Id.* at 799.

85 *Id.*

86 *Id.*

focused primarily on the war power,[87] and thus leaves open questions as to whether or not such a broad public service requirement outside of the context of war would survive such scrutiny.[88]

During the Korean and Vietnam War eras, challenges to compulsory civilian labor in lieu of military service as violating the Thirteenth Amendment again reached several circuit courts. The Ninth Circuit, in *Howze v. United States*,[89] dismissed the argument that the Constitution "prohibits a civilian labor draft in peacetime" by placing the program in the broader context of the draft, which the Supreme Court has long held constitutional:

> Compulsory civilian labor does not stand alone, but is the alternative to compulsory military service. It is not a punishment, but is instead a means for preserving discipline and morale in the armed forces. The power of Congress to raise armies, and to take effective measures to preserve their efficiency, is not limited by either the Thirteenth Amendment, or the absence of a military emergency.[90]

The Seventh Circuit followed suit.[91] Since these cases in the late 1950s through the 1960s, the Thirteenth Amendment has not been evoked to challenge the military draft or civilian service in lieu of conscription.[92]

### *C. Mandatory Community Service in High School*

More recently, several circuits have addressed Thirteenth Amendment challenges of a decidedly different sort: state and local creation of community service requirements for public high school students.

#### 1. The Context—Doing Good to Graduate

The 1980s saw a sharp drop from the previous decade in community service nationally, especially among those Americans twenty-four and younger.[93] This downward trend in community involvement has often been linked to general concerns of civic disinterest.[94] One survey in the early

87 *Id.* at 800 ("The Thirteenth Amendment abolished slavery and involuntary servitude, except as a punishment for crime, but was never intended to limit the war powers of government or its right to exact by law public service from all to meet the public need.").

88 *See* Comm. on Fed. Legislation, *supra* note 17, at 627.

89 272 F.2d 146 (9th Cir. 1959).

90 *Id.* at 148.

91 *See* United States v. Holmes, 387 F.2d 781, 784 (7th Cir. 1967) (agreeing with the Ninth Circuit decision in *Howze*).

92 *See* Britt, *supra* note 78, at 408.

93 CORP. FOR NAT'L & CMTY. SERV., VOLUNTEERING IN AMERICA 2011 RESEARCH HIGHLIGHTS 2 (Aug. 2011), *available at* http://www.aarp.org/content/dam/aarp/livable-communities/learn/civic/volunteering-in-america-research-highlights-2011-aarp.pdf (graphing service participation across various age demographics and finding a drop from over 20% to under 15% for those age 16–19 and a drop from roughly 18% to 12% for those age 20–24).

94 *See, e.g.*, Justin Wagner, *"Doing Good" in Schools: A Legal & Policy Perspective on Community Service in Education*, 17 KAN. J.L. & PUB. POL'Y 56, 57 (2007) ("From 1975 to 2001,

1990s concluded that "[t]he American electorate is angry, self-absorbed and politically unanchored."[95] In response, politicians and scholars called for "schools [to] redouble their efforts to counteract citizen apathy, improve citizen knowledge, and increase citizen participation" through, among other solutions, service based learning.[96] Service integrated into a civics curriculum in the classroom and in after-school programs became crucial.[97] Generally, successful service learning programs in schools integrate the service "with classroom learning and reflection."[98] These programs often include at least "one of the three generally accepted elements of high-quality service learning: student planning of the service activity, participating in regular service for a semester or longer, and writing and reflecting on the service experience."[99]

States and school districts responded to the calls of youthful apathy by enacting service requirements for graduation.[100] Most sweepingly, Maryland began requiring seventy-five hours of community service in order to graduate.[101] Service learning—and service learning graduation requirements—for public school students continue to grow in popularity among the states.[102] Service among teens and young adults has grown dramatically since the

America's youth failed to embrace the Tocquevillian model of civic engagement. With declining rates of voting and civic participation among young Americans, one could have argued that the 'ceaseless agitation' of civic affairs that de Toqueville marveled at had, in large part, ceased to exist.").

95 Todd Clark et al., *Service Learning as Civic Participation*, 36 THEORY INTO PRACTICE 164, 164 (1997).

96 *Id.*

97 Wagner, *supra* note 94, at 60.

98 *Id.*

99 *Id.*

100 *See* Scott Bullock & Dennis D. Hirsch, *Commentary At Issue—Community Service: Do Mandatory Service Requirements for Students Violate Their Rights?*, 82 A.B.A. J. 50, 51 (listing, in a table, various community service requirements in public school systems) (citation omitted).

101 MD. CODE REGS. 13A.03.02.06 (1992) (permitting completion of an approved "locally designed program in student service" in lieu of the seventy-five hour requirement). The Maryland service requirement was adopted in its current form by the Maryland Board of Education in 1992, withstanding several challenges from state legislators. *History of Service Learning*, MD. STATE DEP'T OF ED., *available at* http://www.marylandpublicschools.org/MSDE/programs/servicelearning/History-of-Service_Learning.htm.

102 For a table collecting the service learning statutes and regulations in all fifty states and the District of Columbia, *see* Ed. Comm'n of the States, *High School Graduation Requirement or Credit Toward Graduation—Service-Learning/Community Service*, ECS.ORG, http://ecs.force.com/mbdata/mbtab3NE?sid=a0i70000000wbyv&Rep=SL01 (last visited Mar.11, 2013). Maryland and the District of Columbia remain the only states that require some amount of community service for graduation of all public school students statewide. *See id.* Nineteen states provide the framework for students to receive credit towards graduation for community service. *See id.* Seven states—Colorado, Iowa, Minnesota, Missouri, Rhode Island, Tennessee, and Wisconsin—permit local school boards to require service for graduation. *See id.*

1980s;[103] similarly—and as desired—civic engagement among these demographics has increased as well.[104]

Despite the success of service learning programs, roughly half of the states have no statewide community service program in their education policy.[105] Mandatory community service in public schools has drawn harsh criticism from the very beginning.[106] In addition, state and district-wide service graduation requirements faced constitutional challenges on several grounds. Students and parents brought suit against several school districts in the early- and mid-1990s, advancing differing constitutional claims. The treatment of these cases by the Circuit Courts of Appeal provide valuable insight into how courts would assess the constitutionality of a broader, compulsory service program of the scope this Note contemplates.

### 2. Involuntary Servitude and Service Learning

In *Immediato v. Rye Neck School District*,[107] *Steirer v. Bethlehem Area School District*,[108] and *Herndon v. Chapel Hill-Carrboro City Board of Education*,[109] the Second, Third, and Fourth Circuits, respectively, heard constitutional challenges to community service requirements[110] under the Thirteenth Amendment. The plaintiff-appellants in *Immediato* alleged that, "[b]ecause the school district's program requires students to serve others, it falls within the definition of involuntary servitude and is prohibited by the Thirteenth Amendment."[111] The appellants argued that there was servitude in *the very terms* of the program: "Clearly, the program requires students to serve other individuals or organizations. The 'direct provision' of service to others is

103 CORP. FOR NAT'L & CMTY. SERV., *supra* note 93, at 2 (finding that, in 2010, more than 25% of teenagers age 16–19 reported volunteering, as did roughly 18% of young adults age 20–24).

104 *See* Wagner, *supra* note 94, at 59 ("Surveys since the events of September 11, 2001, show an impressive rise in civic engagement: high school students are increasingly interested in government and current events, college freshmen are increasingly discussing politics, and young adults are voting in higher numbers.").

105 *See* Ed. Comm'n of the States, *supra* note 102.

106 *See, generally, e.g.*, Bullock & Hirsch, *supra* note 100, at 50 ("Forcing people to do good is a sure way to destroy the spirit of volunteering. Mandatory service is unwise and unnecessary.").

107 73 F.3d 454 (2d Cir. 1996).

108 987 F.2d 989 (3d Cir. 1993).

109 89 F.3d 174 (4th Cir. 1996).

110 The Rye Neck District required students to complete forty hours of service and a program of classroom discussion during their four years of high school. *Immediato*, 73 F.3d at 457. The Bethlehem Area School District required enrollment in a "Community Service Program" course and completion of sixty hours of community service during the four high school years. *Steirer*, 987 F.2d at 991. The Chapel Hill-Carrboro City Board of Education required fifty hours of community service, with various additional reflection requirements, including submission of a paper upon completion of the service. *Herndon*, 89 F.3d at 176–77.

111 Brief for Plaintiffs-Appellants at 23, *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996) (No. 95-7237).

what distinguishes compulsory student service from any other school required activity."[112] Further, this violated the Thirteenth Amendment, argued the appellants, because the withholding of a high school diploma constituted a "legal sanction" and rendered the service involuntary.[113] While the school district argued that alternatives existed for those students who chose not to participate, the appellants reasoned "these options were not necessarily viable ones in today's society"[114] in which a high school diploma is so essential. The plaintiffs in the other cases made similar arguments on appeal.[115]

The Second, Third, and Fourth Circuits rejected these arguments. As articulated by the Second Circuit, "the dispositive question" before each court was "whether the mandatory community service program rises to the level of 'involuntary servitude' contemplated by the amendment."[116] While the plaintiffs requested the courts to apply the plain text of the amendment in construing "involuntary servitude,"[117] the courts framed the discussion in terms of context and intent, relying on the Supreme Court's decision in *United States v. Kozminski*: "The Supreme Court has observed . . . that the phrase 'involuntary servitude' was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."[118] The Third Circuit conceded that, within this framework, "it is easier to comprehend the 'general spirit' of the phrase 'involuntary servitude' than it is to define the exact range of conditions it prohibits."[119] In this light, the Third Circuit directly addressed the appellant's splitting of the phrase "involuntary servitude"[120]:

> [I]t is more appropriate to consider whether, taking as a whole the set of conditions existing in the imposition of a mandatory community service pro-

112 *Id.* at 27.

113 *Id.* at 29 (internal quotation marks omitted).

114 Wagner, *supra* note 94, at 67.

115 *See* Brief of Appellants at 35–49, *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989 (3d Cir. 1993) (No. 92-1359) (arguing that, on its face, the service requirement is servitude without compensation as contemplated by the Amendment and, further, that withholding of a diploma is "*prima facie* coercion," satisfying the involuntary prong of the Amendment); Brief of Appellants at 28–38, *Herndon v. Chapel Hill-Carrboro City Bd. Of Educ.*, 89 F.3d 174 (4th Cir. 1996) (No. 95-2525) (arguing roughly the same).

116 Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 459 (2d Cir. 1996); *see also* Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 180 (4th Cir. 1996); Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 997–98 (3d Cir. 1993).

117 *See supra* notes 111–115 and accompanying text.

118 *Immediato*, 73 F.3d at 459 (quoting United States v. Kozminski, 487 U.S. 931, 942 (1988)) (internal quotation marks omitted); *see also Herndon*, 89 F.3d at 181; *Steirer*, 987 F.2d at 998.

119 *Steirer*, 987 F.2d at 998 (citing *Kozminski*, 487 U.S. at 942); *see also Immediato*, 73 F.3d at 459 (quoting the same).

120 "Plaintiffs argue (i) that the program is servitude because the students provide unpaid service to the community for the benefits of others; and (ii) that participation in the program is involuntary because the threat of not receiving a diploma is *prima facie* coercion." *Steirer*, 987 F.2d at 998.

> gram in a public high school, the students providing the services are in a condition of involuntary servitude.[121]

The circuits found Supreme Court precedent to define the prohibition of involuntary servitude in the Thirteenth Amendment as encompassing servitude enforced through either physical coercion or legal coercion.[122] Establishing such coercion is not as simple as the plaintiffs in each case contended: "the critical factor in every case finding involuntary servitude is that the victim's only choice is between performing the labor on the one hand and physical and/or legal sanctions on the other."[123] In other words, "In the Thirteenth Amendment context, 'subtle or indirect' pressure to work does not render that work involuntary."[124] When the "individual may, at least in some sense, choose not to perform, even where the consequences of that choice are 'exceedingly bad,'"[125]courts have found the Thirteenth Amendment not to be violated.[126] The students in each district had choices outside of compliance. For example, the Second Circuit construed the options facing students in the Rye Neck School District accordingly:

> Although students who forego their required service will not graduate, they may avoid the program and its penalties by attending private school, transferring to another public high school, or studying at home to achieve a high school equivalency certificate. While these choices may be economically or psychologically painful, choices they are, nonetheless.[127]

Similarly, the government may impose legal sanctions to enforce certain "well-established 'civic duties'" without running afoul of the Thirteenth Amendment.[128] Within this contextual understanding, the Second, Third, and Fourth Circuits held that the mandatory community service programs as

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121 *Id.*

122 *See Immediato*, 73 F.3d at 460; *Herndon*, 89 F.3d at 181; *Steirer*, 987 F.2d at 998.

123 *Steirer*, 987 F.2d at 999 (citing *Kozminski*, 487 U.S. at 943).

124 *Herndon*, 89 F.3d at 180–81.

125 *Immediato*, 73 F.3d at 459 (quoting United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964).

126 Both the Second and Third Circuits discussed two traditional forms of forced or coerced labor which courts have upheld as constitutional because the petitioner has other choices, albeit bad. Lawyers are often required by states to perform *pro bono* work or abandon their practice of law. *See Immediato*, 73 F.3d at 459 (citing United States v. 30.64 Acres of Land, 795 F.2d 796, 800–01 (9th Cir. 1986)); *Steirer*, 987 F.2d at 999 (same). Similarly, doctors who, in the context of a scholarship program, promise to perform *pro bono* medical services in exchange for said funding may choose between performing the service or paying damages. *See Immediato*, 73 F.3d at 459 (citing United States v. Redovan, 656 F.Supp. 121, 128–29 (E.D. Pa. 1986)); *Steirer*, 987 F.2d at 999 (same).

127 *Immediato*, 73 F.3d at 460.

128 *Steirer*, 987 F.2d at 999 (discussing the Supreme Court jurisprudence upholding the military draft, jury duty, and road construction). *See also Immediato*, 73 F.3d at 459 ("The government may also require the performance of 'civic duties' such as military service, jury duty, and upkeep of local public roads without trenching upon the Thirteenth Amendment." (citations omitted)).

part of a school district's graduation requirements did not amount to involuntary servitude as prohibited by the Thirteenth Amendment.[129]

While these courts upheld the community service programs, "the Second Circuit and Third Circuit noted some limitations to mandatory community service programs in the context of the Thirteenth Amendment,"[130] limitations that may prove particularly probative in the broader context of this Note. First, in *Steirer*, the Third Circuit refused to adhere to the logic of the district court, which relied on *Bobilin v. Board of Education*[131] in ruling for the school district on the theory that the service served the public interest rather than a private interest. Instead, the Circuit left open the issue as to whether "the Thirteenth Amendment is inapplicable merely because the mandatory service requirement provides a public benefit by saving taxpayers money."[132] Thus, "schools"—and presumably proponents of mandatory national service programs such as those contemplated by this Note—"would be wise to avoid relying solely on public benefits as a means of justifying programs under the Thirteenth Amendment and instead focus on the stark differences between community service and the original intent of the Amendment, slavery and involuntary servitude."[133]

Second, the Second Circuit carved out situations in which community service graduation requirements may amount to constitutionally impermissible involuntary servitude, without setting the specifics: "We have recognized that 'there may be some mandatory programs so ruthless in the amount of work demanded, and in the conditions under which the work must be performed, . . . that a court justifiably could conclude that the [work constituted] . . . involuntary servitude.'"[134] Here, the court found that the school district's program did not reach an impermissibly "ruthless" volume: "The work required is not severe: students must perform only forty hours of service

129 *See Immediato*, 73 F.3d at 460 ("Because we conclude that the mandatory community service program is not, on the whole, 'compulsory labor' which, 'in practical operation' produces 'undesirable results' analogous to slavery, we hold that the District's mandatory community service program does not constitute impermissible involuntary servitude." (quoting United States v. Kozminski 487 U.S. 931, 942 (1988))); *Herndon*, 89 F.3d at 181 ("Graduation from a public high school is an important opportunity, but the threat of not graduating does not rise to the level of 'physical or legal coercion.' More importantly, the community service requirement is in no way comparable to the horrible injustice of human slavery. Thus it does not violate the Thirteenth Amendment prohibition of involuntary servitude." (citation omitted) (quoting *Kozminski*, 487 U.S. at 944)); *Steirer*, 987 F.2d at 1000 ("[W]e hold that the mandatory community service program instituted in the Bethlehem Area School District as a high school graduation requirement does not constitute involuntary servitude prohibited by the Thirteenth Amendment.").

130 Wagner, *supra* note 94, at 68.

131 403 F. Supp. 1095 (D. Haw. 1975) (upholding required cafeteria duty in public schools as serving the public interest).

132 *Steirer*, 987 F.2d at 998.

133 Wagner, *supra* note 94, at 69.

134 *Immediato*, 73 F.3d at 459 (quoting Jobson v. Henne, 355 F.2d 129, 132 (2d Cir. 1966) (upholding, but recognizing the quoted limitations on, state requirements of chores for mental patients)).

in four years."[135] In addition, the "conditions under which [the work] must be performed" were deemed to be "hardly onerous,"[136] as students were allowed to choose where they served, how they served, and when they served.[137]

Finally, the Second Circuit warned that a program may become so exploitative as to amount to involuntary servitude under the Thirteenth Amendment.[138] By means of "a seemingly extreme example,"[139] the Court illustrated what it considered to be a program that would fail a constitutional analysis under the amendment:

> If, for instance, the students were required to spend their Saturdays at the homes of their teachers, washing their cars, painting their houses, and weeding their gardens, the extent, nature, and conditions of "service," and the more obviously exploitative purpose of the program, might indeed warrant a finding of "involuntary servitude."[140]

While such a scenario is unlikely—either in the context of graduation requirements or of our broader context of a mandated national service commitment—keeping in mind the fact that the nature of the work may be relevant to the analysis will be valuable in shaping such a program.

### 3. Additional Constitutional Challenges

The plaintiffs in these cases raised additional constitutional challenges which merit brief discussion. For although the focus of this Note is the relationship between mandatory national service and the Thirteenth Amendment's prohibition of involuntary servitude, these arguments may shed light on additional, creative challenges plaintiffs may raise to contest the constitutionality of a national program.

Only the Third Circuit in *Steirer* faced a challenge to the community service graduation requirement on First Amendment grounds: "Plaintiffs contend on appeal that performing mandatory community service is expressive conduct because it forces them to declare a belief in the value of altruism."[141] Such a finding would require strict judicial scrutiny to determine whether the school district's reasons were compelling enough to outweigh this infringement on the students' rights.[142] In affirming the decision below,

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135 *Id.* at 460.

136 *Id.*

137 *Id.* ("Students may choose among a nearly infinite variety of organizations offering a kaleidoscope of service activities. They are free to arrange their own work schedules, and to work in the summers when other school-related duties are minimal.").

138 *See id.* ("It is important to note that the purpose of the program is not exploitative. Rather, it is educational, particularly when coupled with the related classroom discussions.").

139 Wagner, *supra* note 94, at 68.

140 *Immediato*, 73 F.3d at 460.

141 Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 993 (1993).

142 *See id.*

the Court found "the Program does not compel expression protected by the First Amendment," and thus, the Court did not apply strict scrutiny.[143]

According to the Third Circuit, "[t]he freedom of speech protected by the First Amendment, though not absolute, 'includes both the right to speak freely and the right to refrain from speaking at all.'"[144] Relying on statements by school board members speaking in favor of altruism, the plaintiffs argued that the community service qualifies as speech "expressive of the school district's ideological viewpoint favoring altruism."[145] To amount to expressive speech—and thus warrant First Amendment protection—an action must embody an "'affirmation of a belief and an attitude of mind.'"[146] Inherent in this is a finding that the "conduct . . . is 'sufficiently imbued with elements of communication.'"[147]

Within this framework, the Third Circuit set out to assess "the nature of the activity in conjunction with the factual context and environment in which it [was] undertaken."[148] The court considered the "viewer's perception"[149] and found it unlikely that someone in the community, viewing students volunteering, would consider the action an endorsement or belief in the value of altruism. Instead, the court wrote, "students performing community service under the auspices of a highly publicized required school program will be viewed merely as students completing their high school graduation requirements."[150] The court also found relevant the setting, as "[t]he boundaries of expressive conduct have been particularly cabined when the conduct is associated with school curricula"[151] as well as school restrictions on hair and dress.[152] Finally, the court found unrealistic contentions that the students were required to affirm the school district's philosophy, as noth-

143 *Id.* at 997.

144 *Id.* at 993 (footnote omitted) (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

145 *Id.*

146 *Id.* at 994 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943)); s*ee also id.* at 994–95 (discussing Supreme Court case law that found "compelled conduct" to implicate the Amendment's freedom of speech protection only when "obviously expressive," including saluting the flag during the pledge in school, state mottos on license plates, and mandatory union contributions by teachers for political purposes).

147 *Id.* at 995 (quoting Spence v. Washington, 418 U.S. 405, 409 (1974) (holding that flags have, according to Supreme Court precedent, "communicative connotations")).

148 *Id.* at 995.

149 *Id.* (relying on the Supreme Court's holdings in a long line of cases considering "viewer's perception" a factor in protection of expressive conduct).

150 *Id.* at 997.

151 *Id.* at 996 ("For example, we have held that although teachers have a First Amendment right to advocate the use of particular teaching methods outside of the classroom, this right does not 'extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates.'" (quoting Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990))).

152 *See id.* ("[C]ourts have consistently found that hair and dress codes do not infringe students' First Amendment rights in the absence of any showing that a student's appearance was intended as the symbolic expression of an idea.").

ing indicated negative consequences for students who spoke out against the program.[153] Thus, despite the value judgments involved in creating the program,[154] the Third Circuit upheld the district court's decision in finding no implication of the First Amendment.

However, a word of caution from the court on the First Amendment should be considered by any politician seeking to create a mandatory national service program: a service program may cross the line and implicate the Amendment if "a student . . . was required to provide community service to an organization whose message conflicted with the student's contrary view."[155] Thus, school districts would be wise to "either ensur[e] that students have a reasonable and diverse set of community service programs to choose between or by simply implementing a service activity that is sufficiently non-objectionable to a reasonable member of the community."[156] To avoid similar First Amendment challenges, a mandatory national service program must be structured so as to provide broad service choices or non-objectionable activities.

The student-plaintiffs in both *Immediato* and *Herndon* also raised an additional constitutional claim, invoking their substantive due process rights under the Fourteenth Amendment.[157] Specifically, the plaintiffs in both cases argued that the forced service violated the students' personal liberty

153 *See id.* The court might look on the program differently if the students were "confined to the expression of those sentiments that are officially approved." *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)) (internal quotation marks omitted).

154 The court, in fact, acknowledged the pervasiveness of value judgments made in running a school system: "The gamut of courses in a school's curriculum necessarily reflects the value judgments of those responsible for its development, yet requiring students to study course materials, write papers on the subjects, and take the examinations is not prohibited by the First Amendment." *Id.* at 993. These value judgments are generally part of the "considerable discretion" afforded school boards. *Id.* (quoting Edwards v. Aguillard, 482 U.S. 578, 583 (1987)) (internal quotation marks omitted). In the context of the curriculum, "[t]he constitutional line is crossed when . . . the educators demand that students express agreement with the educators' values." *Id.* at 994.

155 *Id.* at 996.

156 Wagner, *supra* note 94, at 66–67.

157 The parents of the students in both cases raised substantive due process claims as well. *See* Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461–62 (2d Cir. 1996); Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 177–79 (4th Cir. 1996). While both courts acknowledged the rights of parents in the raising of their children, *see Immediato*, 73 F.3d at 461 ("Parents . . . have a liberty interest, properly cognizable under the Fourteenth Amendment, in the upbringing of their children."); *Herndon*, 89 F.3d at 177 ("The Supreme Court long has recognized the existence of parents' right to direct their children's education."), both courts dismissed this claim under rational-basis scrutiny, finding the regulation to be reasonable and advancing a legitimate state interest. *See Immediato*, 73 F.3d at 462; *Herndon*, 89 F.3d at 179.

For the purposes of this Note, we need not investigate the parents' claims any further, as the mandatory national service programs would apply only to adults age eighteen and over.

not to serve.[158] Both circuits took seriously the Supreme Court's recent substantive due process jurisprudence, in which the Court expressed a "'reluctan[ce] to expand the concept of substantive due process,'"[159] going "beyond the Bill of Rights only to rights that 'involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . .'"[160] Finding no case law to support the claims of the plaintiffs and justify expansion of substantive due process to include a student's right to choose to engage in community service,[161] both courts denied the Fourteenth Amendment claims.[162]

## IV. Analyzing Potential Constitutional Challenges to a Broad Program of National Service

The limited jurisprudence—especially in the Supreme Court—on the Thirteenth Amendment's prohibition of involuntary servitude provides no concrete answers to the central question presented by this Note: would a program requiring all Americans to serve some period of mandatory civilian service withstand a constitutional challenge? Despite the lack of a clear answer, the Supreme Court—and to a greater extent the circuit courts of appeal—have provided some insights into how such a program would be analyzed, including what factors the Court would consider in weighing such a program. This section presents three programs which would dramatically expand national service. The first presents little in terms of constitutional issues but fails to necessarily reach all target Americans. The second attempts to commandeer an existing, constitutional structure. The third squarely addresses the challenging constitutional question. This section will discuss the constitutional issues—if any—each present.

### *A. The Easy Answer—Offering a Larger Carrot or Wielding a Bigger Stick*

For those interested in dramatically expanding public service without risking serious constitutional challenges, the easiest solution would be to dramatically expand the currently existing programs, most notably AmeriCorps, and adding additional incentives or, in the alternative, new sanctions to encourage involvement. The problem with expansion by either means is that

158 *See Immediato*, 73 F.3d at 462–63; *Herndon*, 89 F.3d at 179.

159 *Immediato*, 73 F.3d at 463 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

160 *Herndon*, 89 F.3d at 180 (alteration in original) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

161 *See Immediato*, 73 F.3d at 463 ("[T]hey cite not a single case in which this 'individual choice' has been declared a fundamental right, or has warranted strict scrutiny of a governmental regulation."); *Herndon*, 89 F.3d at 179 ("[T]here is no precedent for their argument . . . .").

162 *See Immediato*, 73 F.3d at 463 (finding that a student's "free time, and whether or not he will perform any volunteer services" is not constitutionally protected); *Herndon*, 89 F.3d at 180 ("The decision to serve one's community is important, but it is not so 'intimate and personal' that it merits Fourteenth Amendment protection.").

all Americans would still not be required to participate in service, as neither proposal is in any sense mandatory.[163] Currently, the existing service programs have very little to offer potential applicants in terms of incentives.[164] AmeriCorps, for instance, offers a "modest living allowance,"[165] health coverage,[166] and educational benefits, including loan deferment[167] and grant money.[168] The Peace Corps offers similar educational loan deferments,[169] while providing slightly more in terms of immediate financial benefits.[170] There are also practical benefits in terms of training and job opportunities opened up by both organizations.[171] And, of course, both organizations offer benefits that are more difficult to measure and which typical careers do not offer, such as personal fulfillment.[172]

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163 Arguments could be raised that sufficiently harsh sanctions could amount to a program that is mandatory in practical effect. *See infra* notes 179–184 and accompanying text.

164 Admittedly, these tangible benefits are dramatically more than those of true volunteering, but when one compares them to the salaries available in the private sector, it seems accurate to describe the benefits as "little."

165 *See Benefits of AmeriCorps Service*, AMERICORPS, http://www.americorps.gov/for_individuals/benefits/index.asp (last visited Mar. 11, 2013).

166 *See AmeriCorps State and National*, AMERICORPS, http://www.americorps.gov/for_individuals/choose/state_national.asp (last visited Mar. 11, 2013).

167 *See Postponing Student Loan Payments & Getting Interest Paid*, AMERICORPS, http://www.americorps.gov/for_individuals/benefits/benefits_ed_award_repayment.asp (last visited Mar. 11, 2013) ("Individuals who are serving in a term of service in an approved AmeriCorps position may be eligible to temporarily postpone the repayment of their qualified student loans through an action called loan forbearance. . . . [I]f you successfully complete your term of service the National Service Trust will pay all or a portion of the interest that accrued on your qualified student loans during your service period.").

168 *See Segal AmeriCorps Education Award*, AMERICORPS, http://www.americorps.gov/for_individuals/benefits/benefits_ed_award.asp (last visited Mar. 11, 2013) (noting that, in 2011, participants received an education award of $5500 dollars to be utilized for repaying outstanding student loans or pursue further higher education). In addition, some colleges and universities match these awards or provide other benefits. *See Institutions That Provide Scholarships and Resources to AmeriCorps Alumni*, AMERICORPS, http://www.americorps.gov/for_individuals/benefits/ed_award_match.asp (last visited Mar. 11, 2013).

169 *See Financial Benefits and Loan Deferment*, PEACE CORPS (Dec. 12, 2012), http://www.peacecorps.gov/learn/whyvol/finben/.

170 *See id.* ("The Peace Corps provides Volunteers with a living allowance . . . covering housing, food, and incidentals. It provides complete dental and medical care during service . . . . It also covers the cost of transportation to and from the country of service. Unlike other international volunteer programs, there is not a fee to participate in the Peace Corps."). The Peace Corps also provides post-service transitional funding, the use of which is not restricted. *See id.*

171 According to AmeriCorps, participants "gain valuable experience that translates directly into job experience in [their] chosen field" including "teamwork, communication, responsibility, and other essential skills." *Benefits of AmeriCorps Service*, *supra* note 165. The Peace Corps provides training in "a foreign language, technical, skills, and cross-cultural understanding," skills which are crucial in a globalized world. *Professional and Career Benefits*, PEACE CORPS (Dec. 12, 2012), http://www.peacecorps.gov/learn/whyvol/profben/.

172 The AmeriCorps benefits page, before even addressing educational funding or other tangible benefits, stresses the intangible benefits: "Perhaps the biggest benefit you

Increased incentives could draw more young people to the existing programs. Expanded living expense programs, for example, could draw people afraid they will be unable to make ends meet on the minimal allowance of either program. AmeriCorps could, borrowing from the Peace Corps program, provide additional incentives by directly covering travel expenditures or living expenses. Of course, increased benefits, without expanded opportunities, could simply create an even larger backlog of applications.[173] The flip side, of course, is that expanded opportunities and expanded benefits will dramatically increase costs of these programs.

Expanding the incentives for existing programs would face no non-frivolous constitutional challenge that this author can foresee, as these are nothing more than increased appropriations for longstanding programs.

Alternatively, Congress could encourage national service by installing a system of sanctions or disincentives. Congress could, for example, require all colleges and universities receiving federal funding of any kind to install a service requirement in its curriculum or risk losing federal funding. Another sanction-based means of expanding service would be to target students more directly by requiring all students who accept any federal financial aid to complete some minimum service requirement. These are simply two of the more powerful, and potentially landscape-shifting, sanctions Congress could employ; any number of other creative sanctions could be imposed.

Interesting challenges could be raised against the use of sanctions to expand service programs, although these would likely ultimately fail. First of all, tying federal funding of colleges and universities to the creation or expansion of service programs falls within Congress's broad spending powers.[174] The constitutionality of conditional spending, and the framework for analyzing such spending, was outlined by the Supreme Court in *South Dakota v. Dole*.[175] In *Dole*, the Court discussed the ability of Congress "'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'"[176] *Dole* requires a four-part analysis of conditional spending: the spending must be in pursuit of the "general welfare"; the condition must be unambiguous, so as to allow the state to make a knowing choice; the condition must be related to the federal interest in the program; and, finally, the

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will experience when you join AmeriCorps is the satisfaction of incorporating service into your life and making a difference in your community and your country." *Benefits of AmeriCorps Service*, *supra* note 165. The Peace Corps site similarly touts intangibles: "Peace Corps is a life-defining leadership experience you will draw upon throughout your life. The most significant accomplishment will be the contribution you make to improve the lives of others." *What Are the Benefits?*, PEACE CORPS (Dec. 12, 2012), http://www.peacecorps.gov/learn/whyvol/.

173 *See supra* note 11.

174 U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

175 483 U.S. 203 (1987).

176 *Id.* at 206 (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)).

condition cannot be unconstitutional under another provision of the Constitution.[177] There is little reason to doubt a service program, operating on principles of conditional spending, would merit a hard look. The most legitimate challenge would be under the third prong of the *Dole* analysis—the condition must be related to the federal interest—but service can easily be tied to the educational goals of colleges and universities, thus promoting the federal interest in the project.[178]

In addition, the use of sanctions directly targeted at students could raise issues under the Thirteenth Amendment's prohibition of involuntary servitude. A college degree has become a near necessity for employment in American culture[179] while the price of college continues to skyrocket,[180] pushing young people deeper into debt.[181] The federal government provides a large percentage of higher education loans,[182] and losing these loans might discourage college attendance. In a sense, then, national service would become de facto mandatory, as the alternative choices are finding less favorable, higher interest private loans to fund a college education or to not attend college at all. The courts, however, have refused to give much credence to arguments that such "bad choices" amount to involuntary servitude as contemplated by the Thirteenth Amendment. For example, a program requiring doctors to perform *pro bono* medical services as part of a scholarship award was upheld at the district court level.[183] Similarly, the choice between graduating high school and completing a service learning requirement has been upheld as not violating the Thirteenth Amend-

177 *See id.* at 207–08.

178 *Cf. supra* notes 98–99 and accompanying text (discussing the integration of service and learning at the high school level).

179 *See generally* Cynthia English, *Most Americans See College as Essential to Getting a Good Job: College Educated Least Likely to be Unemployed or Underemployed*, GALLUP (Aug. 18, 2011), http://www.gallup.com/poll/149045/americans-college-essential-getting-good-job.aspx (finding that nearly seventy percent of Americans consider a college degree "essential" for getting a job and analyzing the correlation between education attained and employment).

180 *See, e.g.*, Daniel de Vise, *No "Magic Solution" to College Affordability*, WASH. POST (July 25, 2012, 1:28 PM), http://www.washingtonpost.com/blogs/college-inc/post/no-magic-solution-to-college-affordability/2012/07/25/gJQA3d0G9W_blog.html ("The latest figures from the College Board put the average cost for 2011–2012, including tuition, fees, room and board, at $17,131 for four-year public colleges (a 6 percent increase over the previous year) and $38,589 for private, nonprofit institutions (a 4.4 percent increase over the previous year).").

181 *See Average Debt Up Again for New College Grads*, USA TODAY (Oct. 18, 2012, 6:55 AM), http://www.usatoday.com/story/money/personalfinance/2012/10/18/student-debt-increases-again/1639907/ ("Two-thirds of the national college class of 2011 finished school with loan debt, and those who borrowed walked off the graduation stage owing on average $26,600—up about 5% from the class before.").

182 *See id.* ("Private (non-federal) student loans, which generally have weaker borrower protections but have been diminishing as a source of student borrowing, accounted for about one-fifth of the debt owed by the Class of 2011.").

183 United States v. Redovan, 656 F. Supp. 121, 128–29 (E.D. Pa. 1986).

ment.[184] It is likely that, in light of the limited precedent in these parallel situations, a program of expanded national service by way of increased sanctions would similarly be found to not violate the Thirteenth Amendment.

### *B. The Middle Answer—Mandatory National Service Tied to the Military Draft*

Much like the "easy answer,"[185] in which incentives and sanctions may vary, there is no single scheme or plan to institute a system by which all Americans participate in national service. However, a proposal shared by some politicians[186] and scholars[187] has taken shape: integrating civilian national service into the existing framework of the military draft. The Universal National Service Act,[188] as proposed by Representative Charles Rangel, lays out the framework for such a program. Under the Act, every citizen and resident of the United States between the ages of eighteen and forty-two[189] would be required to serve a two-year term of national service, subject to some exceptions.[190] The national service obligation could be satisfied in several ways: voluntary military service, conscripted military service, conscripted civilian service, or voluntary civilian service.[191] Limits are placed on when military service may be required[192] and how many people may be conscripted into military service.[193] While military conscription would only be authorized in times of war or similar circumstances, the two-year obligation to serve always exists.[194]

While the Supreme Court has never addressed such a program, its decision in the *Selective Draft Law Cases*[195] as well as the circuit court conscientious objector decisions[196] seem to provide an answer to the question whether such a program would withstand scrutiny under the Thirteenth Amendment. Despite arguments to the contrary, the Supreme Court has refused to hear further challenges to the power of the federal government to require military service. Similarly, obligations to serve in a civilian capacity, as an alternative to military service, have been upheld not in their own right but as a means to satisfy the already existing and constitutionally valid military obligation of citi-

184 *See, e.g.*, Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 459 (2d Cir. 1996); *see also supra* notes 125–127 and accompanying text.

185 *See supra* Part IV.A.

186 *See, e.g.*, Charles B. Rangel, *Bring Back the Draft*, N.Y. TIMES, Dec. 31, 2002, at A19, *available at* http://www.nytimes.com/2002/12/31/opinion/bring-back-the-draft.html.

187 *See, e.g.*, Charles Moskos & Paul Glastris, Now *Do You Believe We Need a Draft?*, WASH. MONTHLY, Nov. 2001, at 9.

188 Universal National Service Act, H.R. 5741, 111th Cong. (2010).

189 *Id.* § 102(a).

190 *Id.* § 104.

191 *Id.* § 103(d). So, for example, an eligible person can elect to serve Teach For America, thus fulfilling his obligation under the act and avoiding conscription.

192 *Id.* § 103(b).

193 *Id.* § 103(c).

194 *Id.*

195 245 U.S. 366 (1918). *See supra* notes 72–74 and accompanying text.

196 *See supra* Part III.B.2.

zens. As the Ninth Circuit wrote in upholding conscientious objector labor requirements, "[c]ompulsory civilian labor does not stand alone, but is the alternative to compulsory military service," and thus falls within the historic power of Congress to conscript.[197] While reinstating active conscription (as opposed to simply requiring registration) and expanding the scope so that all of-age citizens must participate will certainly draw harsh criticism in the public sphere and face strong political opposition, the courts—based on precedent—will likely not stand in the way of such a program.

### *C. The Challenging Answer—True Mandatory Civilian Service*

Finally, Congress could create a program requiring all Americans to perform a minimum term of civilian service independent of the infrastructure of the pre-existing selective service system. There are reasons to separate military and civilian conscription. From a philosophical standpoint, opposition to war or the buildup of the military industrial complex might lead one to desire severing a service from the military, so that the civilian program could be expanded while the military is contracted. In addition, military leaders may want to continue to operate with an all-volunteer army. Pragmatically, military training costs a great deal, and military leaders want to reap the longest return from this investment. Thus, with an all-volunteer army, the military is likely able to secure longer commitments.[198]

A program of compulsory service devoid of any connection to the military presents a wholly novel question of constitutional law:

> The "public need" exception, discussed in the conscientious objector cases, has never been applied to a full-scale national service requirement which was not related to the military . . . . None of the other non-military requirements have involved anything remotely comparable to the commitment that a full-scale national service project would require. Moreover, the language in the decisions . . . suggests that a public service requirement must be "traditional" . . . .[199]

Charles Black, writing two decades earlier, concluded that such a program would be constitutionally dubious.[200]

The trio of circuit court decisions[201] from the 1990s addressing the issue of community service graduation requirements can be looked to for additional clarity, as these cases fill some of the doctrinal gaps left open in attempting to analogize to the conscientious objector cases. Community ser-

197 Howze v. United States, 272 F.2d 146, 148 (9th Cir. 1959).

198 Bruce Chapman, *A Bad Idea Whose Time Is Past: The Case Against Universal Service*, BROOKINGS REV., Fall 2002, at 10, 11.

199 Comm. on Fed. Legislation, *supra* note 17, at 632.

200 Charles L. Black, *Constitutional Problems in Compulsory "National Service,"* 13 YALE L. REP. (1967), *reprinted in* STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 156, 162 (1969) ("I will close by restating only one idea that, in my mind, summarizes the whole case, whether of constitutionalism or of policy. Large-scale coercion of labor is foreign to our traditions and to our Constitution.").

201 *See supra* Part III.C.

vice programs fall outside both the "public need" in times of war exception as the courts have addressed it[202] as well as outside the "traditional civic duties" exception as characterized by cases such as *Butler v. Perry*.[203] The circuits upheld the community service programs, but provided three warnings regarding the validity under the Thirteenth Amendment which lend clarity to this discussion.[204]

First, the Third Circuit in *Steirer* upheld the service requirement, but refused to follow the lower court's reasoning that service requirements can be justified solely on the grounds that the program provides for "the public, and not private, interest and benefit."[205] Essential to the court's analysis was not the benefit received by the public, but the "stark differences" between what the students were required to do and what the Thirteenth Amendment was ratified to eliminate. From the outset, the Supreme Court has held that involuntary servitude incorporates "those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."[206] While the "general spirit"[207] of the phrase fails to definitively answer the question, it provides the context in which advocates of compulsory service should present the program, whether before the courts, Congress, or the American people. Such a program would bear little resemblance to the institution of African slavery. Presumably, any such program would include job training, provide minimal health, salary, and living benefits, and be aimed towards broad public ends. Additionally, it should be noted that such service is much more akin to—though much broader in scope than—the constitutionally valid "traditional" civic duty exceptions[208] than it is to slavery.

Second, in *Immediato*, the Second Circuit indicated an inclination to find the program unconstitutional under the Thirteenth Amendment if it became "ruthless" in terms of volume of work and conditions in which the work is to be done.[209] The court provided little insight as to what constituted ruthless

202 *See, e.g.*, Heflin v. Sanford, 142 F.2d 798, 800 (5th Cir. 1944).

203 240 U.S. 328 (1916); *see also supra* notes 57–61 and accompanying text.

204 *See supra* notes 130–140 and accompanying text. This section presumes the program will be truly mandatory, meaning that there will be some sort of criminal sanction. Otherwise, the program would have to rely on other sanctions and/or incentives, falling under the discussion in Part IV.A. As the court in *Immediato* found, when the "individual may, at least in some sense, choose not to perform, even where the consequences of that choice are 'exceedingly bad,'" the Thirteenth Amendment is not violated. Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 459 (2d Cir. 1996) (citation omitted).

205 Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 998–1000 (3d Cir. 1993).

206 *Immediato*, 73 F.3d at 459 (quoting United States v. Kozminski, 487 U.S. 931, 942 (1988)) (internal quotation marks omitted).

207 *Id.*

208 *See, e.g.*, Hurtado v. United States, 410 U.S. 578, 589 n.11 (1973) (upholding mandatory jury duty requirements); Butler, v. Perry, 240 U.S. 328, 332–33 (1916) (upholding state mandated road and bridge work); United States v. 30.64 Acres of Land, 795 F.2d 796, 800–01 (9th Cir. 1986) (upholding mandatory pro bono services for lawyers).

209 *Immediato*, 73 F.3d at 459.

volume, only finding the conditions at issue to be "hardly onerous" and the forty hour requirement over four years to not be severe; the court did indicate approval as well of the options students had in terms of where and how to serve.[210] Arguments could be made that mandatory service reaches a "ruthless" volume; any such program would mandate full-time service for a period of time, probably one or two years, amounting to a significant portion of a young person's life. Perhaps the "ruthlessness" could be tempered by allowing flexibility in terms of when to serve.[211] The conditions would clearly not be "ruthless" if some sort of living stipend and other benefits, like training, were provided. Choice between types of service, based on interest and qualification, would further temper the onerousness of the conditions. Further, the Second Circuit did not indicate as to how these factors would be weighed against each other; it is possible that, despite a high volume of hours, conditions could be such as to not create a ruthless environment.

Finally, the Second Circuit warned against exploitative service programs.[212] In light of the somewhat ridiculous example the court provided—basically, high school students performing personal chores for teachers[213]—this limitation is not much of one. Proponents of mandatory service simply must avoid exploitation or the appearance of exploitation. In the national service context, this would seem to encompass anything from the ridiculous—chores for Congressmen—to the slightly more realistic—assigning of volunteers to states/jurisdictions as some sort of political favor. By relying on existing national structures—AmeriCorps and the National Parks, to name only two, as well as various private organizations—to place volunteers in legitimate service opportunities, this concern should be easy to avoid.

Using these limitations as guidance, a system of mandatory national service is clearly a close constitutional call under the Thirteenth Amendment's prohibition of involuntary servitude. Mandatory service is a type of labor distinct from the labor the amendment was ratified to prevent. However, it does not fit neatly into any of the specifically constitutional categories the Supreme Court has addressed. The closest issue is what the Second Circuit refers to as "ruthlessness." If a balancing test is employed, weighing conditions of work against volume of work, mandatory service should survive scrutiny. The draft was a novel concept at the time it was first adopted, and it has become so entrenched in our history that the Supreme Court has refused to hear further challenges as to its legitimacy. The power of the federal government is broad, allowing for adaptive measures to meet the evolving demands of an ever-changing world. One need look no further for a testament to this

210 *Id.*

211 For example, a program could allow inductees to choose between pre- and post-college programs, with service assignments of different character depending on education, interest, etc.

212 *See supra* notes 138–140 and accompanying text.

213 *Id.*

than the Supreme Court's recent health care decision.[214] While one cannot say definitively either way, a program of mandatory service, so structured as to avoid the pitfalls discussed above, could survive scrutiny under the Thirteenth Amendment.

## V. Conclusion: Answering President Kennedy's Call

This Note began with the words of then-Senator John F. Kennedy issuing a call to serve the less fortunate in foreign lands, stating, "the effort must be far greater than we have ever made in the past."[215] Since Kennedy initiated the Peace Corps as one of his first acts as president, hundreds of thousands of Americans have answered his call to serve, not only in the Peace Corps but in AmeriCorps and countless other local, national, and international organizations. These efforts are something to be admired, and creating more opportunities does not take away from what has already been accomplished. Scholars, politicians, and the public more broadly will continue to debate the normative merits of a system of mandatory national service. Political opposition may remain as a barrier to greater service opportunities; the Constitution should not.

214 *See generally* Nat'l Fed'n of Ind. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (upholding the health insurance mandate of "Obamacare" as an exercise of Congress's power to tax).

215 Kennedy, *supra* note 1.