

# THE CONSTITUTIONALITY OF MANDATORY PUBLIC SCHOOL COMMUNITY SERVICE PROGRAMS

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## I

### INTRODUCTION

Proposals for public service programs have long had currency in America, and may be gaining a certain millennium momentum in current public debate. While proposals for national public service programs of varying ambition and scope continue to be debated,<sup>1</sup> at the local level a growing number of U.S. public school districts are implementing community service programs for high school students.<sup>2</sup> Community service programs generally require students to complete a specified number of hours of service as a condition for graduation.<sup>3</sup> In a typical program, a student may be required to complete forty to sixty hours

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1. See generally Doug Bandow, *National Service—or Government Service?*, POL'Y REV., Sept.-Oct. 1996, at 33-36; Harris Wofford et al., *Americorps the Beautiful? Americorps Nat'l Service Program*, POL'Y REV., Sept.-Oct. 1996, at 28-32.

2. See generally RONALD T. HYMAN, *MANDATORY COMMUNITY SERVICE IN HIGH SCHOOL: THE LEGAL DIMENSION* (1999); NATIONAL CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *COMMUNITY SERVICE ACTIVITIES FOLLOWING HIGH SCHOOL* (1998); Mark Ferraraccio, *Mandatory Community Service Requirements in Public High Schools: Are They Constitutional?*, 27 J.L. & EDUC. 139 (1998); Stephen G. Giles, *Liberal Parentalism and Children's Educational Rights*, 26 CAP. U. L. REV. 9 (1997); Richard Kraft, *Service Learning: An Introduction to Its Theory, Practice, and Effects*, 28 EDUC. & URBAN SOC'Y 131, 136-37 (1996); Bradley H. Kreshek, *Students or Serfs? Is Mandatory Community Service a Violation of the Thirteenth Amendment?*, 30 LOY. L.A. L. REV. 809 (1997); Michael Wessely, *Learning to Serve?*, 27 UPDATING SCH. BD. POL'Y, Aug. 1996, at 1; Daniel Stefaniuk, Note, *No Service, No Diploma: Parental Rights Challenge to Mandatory Community Service in Immediato v. Rye Neck School District*, 14 T.M. COOLEY L. REV. 149 (1997); John Cloud, *Involuntary Volunteers*, TIME, Dec. 1, 1997, at 76; Kevin Johnson, *Schools Force Students to Learn Value of Service*, USA TODAY, May 4, 1998, at 6D; Linda Perlstein, "Serving" the Community—Without Leaving School, WASH. POST, June 28, 1999, at A1.

3. See, e.g., *Herndon v. Chapel-Hill Carrboro City Bd. of Educ.*, 89 F.3d 174, 176-77 (4th Cir. 1996), cert. denied, 519 U.S. 1111 (1997). In *Herndon*, the school system in Chapel Hill-Carrboro, North Carolina required students to complete 50 hours of community service during grades nine through twelve as a condition to receiving a diploma. The failure to complete the requirements rendered a student ineligible for graduation. No opt-out provision for students existed for those objecting to the performance of the community service. The community service required by the program had to be performed after school, on weekends or holidays, or over summer recesses. Students were required to perform a minimum of two different types of service—clerical and fundraising—each limited to eight hours each week. A school official maintained a list of approved agencies and organizations for whom students could work to satisfy the requirements. This extensive list included agencies and organizations with many different missions and philosophies.

of community service with organizations or agencies on an approved community service list during their high school years. There are often modest academic or introspective components to a community service program, such as a requirement that a student compose a paper reporting or reflecting upon his or her community service.<sup>4</sup>

As with all innovations in U.S. public life, such programs are inevitably challenged in the courts. At first blush, the challenges appear plausible: These programs are forced labor of sorts, an oxymoronic coerced volunteerism, the imposition of a particular philosophic vision of civic duty and community life on the whole student populace, and the cry that *this just can't be constitutional* is at least colorably serious.

Constitutional challenges to community service programs may be divided into two generic types—those raised by students or parents who object to the requirement of community service, and those raised by students, parents, organizations, or agencies who object to the selection criteria used to include or exclude organizations or agencies eligible to participate in community service programs. The first form of challenge will involve someone who claims to be a “conscientious objector” to compelled community service. The objection may be broadly articulated, contesting the entire idea of coerced community service, or it may be more narrowly conceived, claiming that for reasons unique to a certain student, participation in a community service program of a particular design violates the student’s constitutional rights. Broad objections are likely to be grounded in the claim that community service is a form of involuntary servitude prohibited by the Thirteenth Amendment, or a deprivation of the students’ or parents’ liberty protected under the substantive due process principles that have evolved from the Due Process Clause of the Fourteenth Amendment. More targeted challenges are likely to be grounded in First Amendment arguments, such as claims that for a particular student, participation in a community service program violates the student’s rights of freedom of association, freedom against forced speech, or the free exercise of religion.

Challenges to the selection criteria used to determine which groups are eligible for participation in community service programs may attack either a decision to keep a particular organization on or off of the “approved list” of participants, or a decision to include an organization or agency on the list. Thus, a service program operated by a local church might be excluded by a school board from participation on the ground that inclusion would violate principles of separation of church and state. The church might sue the school board, claiming that the exclusion of the church service program, when other similar programs run by secular organizations are not excluded, violates the Free Exercise Clause of the First Amendment. Or, imagine that a local chapter

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4. See, e.g., *id.* at 177 (discussing a program that required a student to prepare a paper reflecting on “memories or special feelings” gained from each service experience, and a final paper reflecting on the student’s overall service experiences).

of the Ku Klux Klan creates what purports to be a community service program, and a school board refuses to include the program, on the ground that the Klan's racist agenda renders it inappropriate for participation in any joint venture with public schools. The Klan might sue to challenge its exclusion, arguing that such ideology-based decisionmaking by the school board amounts to viewpoint discrimination prohibited by the Free Speech Clause of the First Amendment. Conversely, students, parents, taxpayers, or a local chapter of the American Civil Liberties Union might bring suit to challenge the inclusion of some organization or agency on an approved list, arguing that participation in a service program by a religious organization involves excessive entanglement between the religious group and the schools, constituting an aid and advancement of the religious group's mission that offends the Establishment Clause of the First Amendment.

## II

### CONDITIONS, COERCION, AND THE RIGHT-PRIVILEGE DISTINCTION

Before examining specific constitutional challenges to community service programs, one must contend with a broad issue that sweeps across all discussion of the constitutionality of such programs. The argument is that community service programs amount to nothing more than conditions attached to the "privilege" of a free public education and thus pose no constitutional problems whatsoever. While students may be forced by compulsory education laws into some accredited school until they reach a specified age, no student is literally forced to attend public schools. Those students who can afford the cost may attend private schools instead. This argument is a variant of one of the oldest and most perplexing issues in constitutional law, that posed by the "right-privilege" distinction and its doctrinal nemesis, the "doctrine of unconstitutional conditions."

The right-privilege distinction is an old constitutional theme.<sup>5</sup> The distinction is grounded in a dichotomy between "rights" and mere "privileges." In their classic conception, rights are interests held by individuals independent of the state. Rights exist prior to the state; individuals possess rights from birth, by virtue of their humanity, as entitlements of natural law, as endowments from the Creator, or as liberties enjoyed by man in his natural condition, before the creation of government. The framers of the Constitution, following the social contract theory of the philosopher John Locke, saw government as a voluntary compact entered into by individuals to provide security for their rights.<sup>6</sup> Having

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5. See generally William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

6. See generally JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Rights were thus not the creature of the state; rather the state was the creature, brought into existence by the people to secure rights they already possessed—in the words of Thomas Jefferson's Declaration of Independence, "to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

created the government to secure rights, the challenge is then determining how to keep the government from abusing its power and destroying the very rights it was founded to conserve.<sup>7</sup>

In contrast to rights, privileges are interests created by the grace of the state and dependent for their existence on the state's sufferance. Nothing in the U.S. Constitution requires a state or local government to operate public schools. On one level, the existence of free public schools is thus a privilege that the state is presumptively free to extend or not extend to its student-citizens as it pleases.<sup>8</sup>

The right-privilege distinction in U.S. constitutional law operated on the simple premise that government is entitled to grant citizens privileges on the condition that they surrender or curtail the exercise of constitutional freedoms that they would otherwise enjoy. Government, through the political process, generates privileges as a form of public largess, and the recipients of that largess have no grounds for complaint when it comes with strings attached: Beggars can't be choosers and gift horses are not to be looked in the mouth.<sup>9</sup>

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7. In Madison's words: "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself." THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

8. Privileges may take virtually any form. They may be economic interests, such as public jobs, welfare benefits, licenses to operate a business, offers of admission to a state university, or permits to dump pollutants into a river. Privileges may also be non-economic, such as permission to an alien to enter the country, early release from imprisonment through pardon or parole, transfer from one prison to another, or permission for an attorney to argue a case in a court other than in the state of his or her admission. See *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981) (discussing parole as not implicating any "underlying right"); *Leis v. Flynt*, 439 U.S. 438, 441-42 (1979) (characterizing *pro hac vice* practice as a "privilege of appearing upon motion" but "not a right granted either by statute or the Constitution"). See generally Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982).

9. Oliver Wendell Holmes is most famously associated with advancing this kind of "right-privilege" thinking. In *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895), *aff'd sub nom. Davis v. Massachusetts*, 167 U.S. 43 (1897), Justice Oliver Wendell Holmes, then on the Supreme Judicial Court of Massachusetts, upheld an ordinance that prohibited public speaking in a municipal park without a permit from the mayor. Holmes reasoned that because the city owned the park, it could establish rules for use of the park just like a private landlord could. If it wanted to, the city could exclude access altogether. The greater power to exclude access must include the lesser power to place conditions on access, and the city could thus condition public speaking on obtaining a permit from the mayor. Holmes did not think of this as a restriction on Mr. Davis's freedom of speech, for he was free to speak all he wanted. The First Amendment, however, guaranteed him only a right to speak, not a right of entry onto property that was not his. Holmes did not seem concerned that the government would abuse its power to place conditions on the receipt of benefits to achieve harsh or unjust results. For Holmes, these were economic transactions, governed by market forces, and not subject to moral concerns. The government was entitled to charge what the market would bear. In an opinion he wrote on the Supreme Court, for example, Holmes dealt with whether financial conditions placed on a corporation's permission to do business in Kansas were too burdensome. Holmes asked, "Now what has Kansas done?" His answer was: "She simply has said to the company that if it wants to do local business it must pay a certain sum of money." *Western Union Telegraph Co. v. State of Kansas* on the relation of C.C. Coleman, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting). Holmes was apparently unconcerned with Kansas's possible extortionate abuse of its power, for he stated that "[i]t does not matter if the sum is extravagant." In another opinion, he elaborated: "In order to enter into most of the relations of life people have to give up some of their [c]onstitutional rights. If a man makes a contract he gives up the [c]onstitutional right that previously he had to be free from the hamper that he puts upon himself." *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 497 (1927).

The tough-minded—if not downright mean-spirited—logic of the right-privilege distinction has never gone down easily in U.S. constitutional thought and has always been held in check by a counter-doctrine known as the “doctrine of unconstitutional conditions.”<sup>10</sup> Perhaps the most celebrated and often-quoted articulation of this doctrine is from a 1972 Supreme Court decision entitled *Perry v. Sindermann*,<sup>11</sup> in which the Court emphatically declared the following:

For at least a quarter-century, this Court has made clear that even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.<sup>12</sup>

The doctrine of unconstitutional conditions, however, is by no means a seamless per se rule that results in the striking down of government attempts to regulate speech in settings in which the government is using the fulcrum of attaching conditions to largess. The modern analysis is actually a reconciliation of the two competing doctrines—a reconciliation plagued, as most are, with a degree of ambiguity and tension. The philosophical pull of the right-privilege distinction against the philosophical pull of the competing doctrine of unconstitutional conditions might be imagined as gravitational bodies locked in bipolar orbit, each exerting its force on the doctrines that have evolved, resulting in the evolution of various compromise tests and principles tailored to the balance of interests in the various discrete areas of constitutional law in which they appear.<sup>13</sup>

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10. See generally Richard A. Epstein, *The Supreme Court, 1987 Term: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Smolla, *supra* note 8; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Van Alstyne, *supra* note 5.

11. 408 U.S. 593 (1972).

12. *Id.* at 597. The language in *Perry* expresses a principle particularly vital to open cultures in modern times, in which governmental activity permeates social life. In an open society, there must be an implicit “escalation clause” at work in the evolution of constitutional thinking. As the power of government to impinge on freedom increases, constitutional principles must escalate to meet the challenge, preserving the power of the citizen to fight back against the government’s incursions. See, e.g., *Katz v. United States*, 389 U.S. 347, 351 (1967) (holding that the Fourth Amendment’s guarantee against unreasonable searches extended to cover electronic eavesdropping, even though the framers of the Constitution could not have contemplated such an electronic search, because the Fourth Amendment was intended to protect “people, not places”); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring) (invalidating a federal statute requiring a written request from the intended recipient as a prerequisite to the delivery of overseas mail that contained Communist propaganda material and noting that the First Amendment may be violated by “inhibition as well as prohibition”); *American Communications Ass’n v. Douds*, 339 U.S. 382, 402 (1950) (noting that “the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect ‘discouragements’ undoubtedly have the same coercive effect upon the exercise of [First] Amendment rights as imprisonment, fines, injunctions or taxes.”). “To ‘abridge’ means not merely to forbid altogether, but to curtail or to lessen.” William W. Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 111 (1982).

13. See generally RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 170-219 (1992).

The best understanding of the modern reconciliation of the right-privilege notion and the doctrine of unconstitutional conditions is that the government may not simply cite the right-privilege shibboleth and smugly walk away, while claiming that it need not elaborate on its defense to the alleged constitutional violation because the challenge is merely to a condition attached to public largess.<sup>14</sup> On the other hand, the fact that the challenged provision is a condition attached to largess may be *relevant to the balance of interests* that ought to be considered in deciding whether the incursion on constitutional rights is justified. In assessing the balance of interests, relevancy is a key touchstone. In a wide variety of constitutional law contexts, courts examine the legitimacy of conditions placed upon the receipt of public largess by determining the degree to which there is a significant nexus between the condition being imposed and the benefit received. Gratuitous conditions—those that appear to advance some agenda entirely divorced from the benefit being dispersed or the mission of the government agency that is dispensing it—will often be struck down as unconstitutional. Conditions that bear some substantial relationship to the benefit, however, are more likely to be approved. The nexus required between the condition and the benefit must be bolstered by more than simply a minimally rational relationship: Courts will not indulge in the highly deferential rational basis standard of government scrutiny under which government programs are nearly always upheld against constitutional attack. However, courts will also not engage in strict scrutiny in examining the nexus, imposing highly rigorous standards of relevancy and narrow tailoring of the sort frequently used to strike down race-based discrimination or content-based regulation of speech.<sup>15</sup>

To place this in the specific context of challenges to community service programs, consider how the coloration of a constitutional challenge to community service might change as one moves from a free-standing general criminal law, imposing a community service obligation on all high school age children, to a community service program imposed on public high school

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14. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (“Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”) (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Ed.*, 391 U.S. 563, 568 (1968)).

15. See, e.g., *Dolan*, 512 U.S. at 391 (applying unconstitutional conditions doctrine in context of a Takings Clause challenge).

We think the “reasonable relationship” test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term “reasonable relationship” seems confusingly similar to the term “rational basis” which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as “rough proportionality” best encapsulates what we hold to be the requirement of the [Fifth] Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

*Id.*

students as a condition of graduation. Imagine that a state enacted a community service requirement for all children between the ages of thirteen and eighteen, requiring them to perform ten hours of public service each year with a qualifying service organization or entity. Imagine that this general public service law were enforced through a reporting mechanism requiring the filing of a “public service return,” much like a tax return, filed under oath, with a section to be completed by the service organization or agency for whom the service was performed. Non-compliance—or fraudulent returns—would be punished by criminal sanctions. A conscientious objector might argue that such a program violates the Thirteenth Amendment’s proscription against involuntary servitude, or is a deprivation of substantive liberty protected by the Fourteenth Amendment, or a violation of First Amendment guarantees of freedom of speech, association, or religion. In short, the universal public service requirement would be subject to challenge on exactly the same grounds as a service requirement imposed only on public school students as a condition of graduation.

While the grounds for the challenge would be the same, the balance of interests would not. The child making the challenge to the free-standing, universal, public service requirement may or may not prevail in the challenge, but the odds of success will be higher than the student challenging the school service program. This outcome is not because of any mechanical application of the right-privilege distinction, but because the government will have a wider array of arguments to defend the service requirement in the public school context than in the context of a sweeping public service duty imposed on all children. Courts will appropriately tend to show greater deference to the government making educational judgments in its capacity as educator than to the government operating as pandemic regulator of the public weal. Even if the incursion on constitutional liberties is the same in both contexts, the student has a relationship to the school board different in kind from the child’s relationship to the state legislature. If a court can be persuaded that the community service is indeed genuinely integrated with the function and mission of the schools and the concomitant benefits of public education the student is receiving, the court will be much more disposed toward approving the program. With this broad unconstitutional conditions framework in mind, analysis then turns to the specific constitutional freedoms implicated by community service proposals.

### III

#### COMMUNITY SERVICE AS INVOLUNTARY SERVITUDE

The Thirteenth Amendment abolished slavery and involuntary servitude 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.”<sup>16</sup> A

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16. U.S. CONST. amend. XIII, § 1.

student challenging a community service program would not be so brazen as to characterize such programs as literally akin to the peculiar institution of African slavery that was the historical impetus for the Thirteenth Amendment. However, the student might very well argue with a degree of surface verisimilitude that coerced public service *is* nonetheless both servitude and involuntary, and thus barred by the broader meanings that might be ascribed to the Amendment. Indeed, there are pronouncements from the Supreme Court that appear to invite such broader understandings of the Amendment's coverage.<sup>17</sup> Moreover, the concept of involuntary servitude is certainly capacious enough to encompass at least extreme forms of the impressment and exploitation of children, such as the reprehensible Italian *padrone* system.<sup>18</sup>

Yet if the term "involuntary servitude" is sufficiently pliable to embrace more than slavery or peonage to trigger the Thirteenth Amendment, the program must approximate slavery in its severity and intensity. The question is whether in its practical operation and function, the program being attacked is akin to the evils of slavery that the Thirteenth Amendment, at its core, was passed to abolish.<sup>19</sup> Unless there is a credible case that the program genuinely possesses the practical incidents of true slavery, courts are unlikely to find the Thirteenth Amendment an appropriate vehicle for striking down the program.<sup>20</sup>

The mere claim that some percentage of one's labor or wealth has been commandeered by a state for the benefit of others will not, standing alone, be understood as constituting involuntary servitude. Much of the modern welfare state is structured around the redistribution of income and wealth. At a broad conceptual level, to the extent one's income is taken by the state through taxes for distribution to others, an involuntary servitude is being placed on one's

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17. See *United States v. Kozminski*, 487 U.S. 931, 942 (1988) ("While the general spirit of the phrase 'involuntary servitude' is easily comprehended, the exact range of conditions it prohibits is harder to define."); *Clyatt v. United States*, 197 U.S. 207, 216 (1905) (holding that the Thirteenth Amendment "denounces a status or condition, irrespective of the manner or authority by which it is created").

18. See *Kozminski*, 487 U.S. at 957-58 (Brennan, J., concurring).

I agree with the Government that the background of both those statutes suggests that Congress intended to protect persons subjected to involuntary servitude by forms of coercion more subtle than force. The *Padrone* statute, for example, was designed to outlaw what was known as the "padrone system" whereby padrones in Italy inveigled from their parents young boys whom the padrones then used without pay as beggars, bootblacks, or street musicians. Once in this country, without relatives to turn to, the children had little choice but to submit to the demands of those asserting authority over them, yet this form of coercion was deemed sufficient—without any evidence of physical or legal coercion—to hold the boys in "involuntary servitude." . . . Given the nature of the system the *Padrone* statute aimed to eliminate, the statute's use of the words "involuntary servitude" demonstrates not that the statute was "aimed only at compulsion of service through physical or legal coercion," . . . but that Congress understood "involuntary servitude."

*Id.* (citing *United States v. Ancarola*, 1 F. 676, 682-84 (S.D. N.Y. 1880)).

19. See *Kozminski*, 487 U.S. at 942 ("[T]he phrase 'involuntary servitude' was intended to extend 'to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.'") (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916)).

20. See *United States v. Shackney*, 333 F.2d 475, 485 (2d Cir. 1964) (explaining that the ban on involuntary servitude "was to abolish all practices whereby subjection having some of the incidents of slavery was legally enforced").



labor. In a progressive taxation system, most citizens work some days for the government and some days for themselves. When tax dollars are redistributed, most citizens might be seen as working some days for the benefit of others. Yet this form of indirect labor transfer, and many other more direct impositions of labor for the service of others, have never been interpreted as violations of the Thirteenth Amendment and could not be interpreted as such without stretching the purpose of the Amendment wildly beyond its animating purpose and historical context.<sup>21</sup> Similarly, requirements that citizens perform certain civic duties, such as jury service, have not been construed as involuntary servitude.<sup>22</sup> The most gripping example is the military draft, a conscription that not only entails a complete deprivation of one's ordinary liberty, but the risk of crippling injury or death in the service of one's country. The military draft has been rhetorically attacked as a form of involuntary servitude that violates the Thirteenth Amendment,<sup>23</sup> but, despite the hyperbolic utility of the argument, it has never been taken seriously by the Supreme Court. As early as the 1918 *Selective Draft Law Cases*,<sup>24</sup> the Court stated that

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.<sup>25</sup>

Against this general backdrop, Thirteenth Amendment challenges to school community service programs should not be deemed viable. Community service programs are simply too far removed from anything that might be persuasively labeled as a badge or incident of slavery to run afoul of the Thirteenth Amendment. In three significant federal appellate decisions analyzing challenges to school public service programs—*Herndon v. Chapel Hill-Carrboro City Board of Education*,<sup>26</sup> *Immediato v. Rye Neck School District*,<sup>27</sup> and *Steirer v. Bethlehem Area School District*<sup>28</sup>—Thirteenth Amendment challenges to such programs were rebuffed through the application of such a contextual analysis.

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21. See *United States v. 30.64 Acres of Land*, 795 F.2d 796, 800-01 (9th Cir. 1986) (sustaining requirements that an attorney perform pro bono work); *United States v. Redovan*, 656 F. Supp. 121, 128-29 (E.D. Pa. 1986) (holding that, in an action brought by the government to recover damages from a physician who had not performed obligated service after participating in National Health Service Corps Scholarship Program, the action for damages did not threaten the physician with involuntary servitude), *aff'd*, 826 F.2d 1057 (3d Cir. 1987).

22. See *Hurtado v. United States*, 410 U.S. 578, 589 n.11 (1973) (holding that jury duty compensated at the rate of one dollar per day did not constitute involuntary servitude).

23. See *Schenck v. United States*, 249 U.S. 47, 50-51 (1919) (“The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the conscription act and that a conscript is little better than a convict.”).

24. 245 U.S. 366 (1918).

25. *Id.* at 390.

26. 89 F.3d 174 (4th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).

27. 73 F.3d 454 (2d Cir.), *cert. denied*, 519 U.S. 813 (1996).

28. 987 F.2d 989 (3d Cir.), *cert. denied*, 510 U.S. 824 (1993).

Public school service programs typically involve work that is not particularly severe in its physical demands or onerous in its sacrifice of time. Teenagers are usually forced to perform forty to sixty hours of work over several years. They generally have a wide range of service options, mitigating the likelihood of being forced into any program that is highly impalatable. The programs usually permit flexibility in scheduling, which is usually arranged by the student. Most importantly, the programs are designed primarily to benefit the student, through both the experience of public service and the introspection and analysis required by the accompanying academic exercises, such as writing papers describing or reflecting on the experience. This benefit is probably the single most important difference between community service and genuine involuntary servitude, for the overriding educational goal of community service programs largely defines the line between exploitation and education.<sup>29</sup>

#### IV

#### SUBSTANTIVE DUE PROCESS

Under the rubric of substantive due process, U.S. constitutional law shelters certain aspects of privacy and autonomy from governmental interference. In this century, the doctrine was once often invoked to strike down government legislation that interfered with property rights and entrepreneurial liberty, treating the Due Process Clause as the embodiment of laissez-faire economic theory.<sup>30</sup> Justice Oliver Wendell Holmes and others rebelled from this constitutionalization of laissez-faire economics.<sup>31</sup> This rebellion would ultimately prevail during the New Deal when the Supreme Court repudiated the invocation of substantive due process principles as a legitimate vehicle for overturning economic regulation.<sup>32</sup> However, substantive due process theory has had considerably more staying power regarding the regulation of non-economic aspects of life and has been the principal doctrinal device for the protection of individual privacy, particularly in the realm of procreation and reproduction.<sup>33</sup> Substantive due process principles may thus be invoked to

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29. See *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 460 (2d Cir. 1996) ("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."); *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 1000 (3d Cir. 1993).

[T]he community service program is primarily designed for the students' own benefit and education, notwithstanding some incidental benefit to the recipients of the services. An educational requirement does not become involuntary servitude merely because one of the stated objectives of the Program is that the students will work "without receiving pay."

*Id.*

30. See *Lochner v. New York*, 198 U.S. 45 (1905).

31. See *id.* at 75 (Holmes, J., dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer's *Social Statics*. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.").

32. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

33. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (reaffirming the "core" of abortion right recognized in *Roe v. Wade*); *Roe v. Wade*, 410 U.S. 113 (1973)

challenge abridgements of certain fundamental rights on the theory that such rights are protected against most forms of governmental interference by the direct force of the Due Process Clause.<sup>34</sup>

In the specific context of mandatory community service programs, those who invoke the substantive due process doctrine to attack such programs may plausibly point to a longstanding line of substantive due process cases that have paid particular solicitude to the rights of parents and children to make choices for themselves over matters relating to education and child-rearing. For example, a series of decisions in the 1920s established the constitutional rights of parents and teachers to instruct children in the German language,<sup>35</sup> the right of parents to send children to non-public schools,<sup>36</sup> and the right to send children to foreign language schools.<sup>37</sup>

Community public service programs, however, do not implicate the wholesale deprivations of autonomy and choice in child-rearing and education that this venerable line of substantive due process cases were created to vindicate. The devil is in the detail, if you will, and there is a world of difference between broad legislative enactments that forbid instruction in private schools or foreign languages and programs that impose specific educational requirements on students attending public schools.

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(establishing a constitutional right to abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a regulation limiting use of contraceptives).

34. “Substantive due process” challenges are to be distinguished from “procedural due process” attacks, which challenge the procedural fairness of a government proceeding or decision, claiming, for example, that some form of hearing is required before a government benefit, such as a welfare check, may be terminated. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970). A substantive due process challenge, instead, invokes the notion that the Due Process Clause bars “certain government actions regardless of the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Substantive due process challenges have come to be understood as meaningful only in the context of abridgments of “fundamental rights,” such as those deemed “implicit in the concept of ordered liberty,” *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), or “deeply rooted in this [n]ation’s history and tradition.” *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). When the right infringed is accepted by the court as “fundamental,” the “strict scrutiny” standard of judicial review is triggered, under which the government must justify its regulation with a “compelling” interest, and demonstrate that the regulation is “narrowly tailored” to effectuate that interest. *See, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993).

35. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (striking down a Nebraska law forbidding foreign language instruction).

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.*

36. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (finding that “interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control” violates the Constitution).

37. *See Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (overturning Hawaii restriction on foreign language schools and holding that “[t]he Japanese parent has the right to direct the education of his own child without unreasonable restrictions”).

Indeed, it is difficult to imagine how a court could find that a community service program violates substantive due process principles while not simultaneously jeopardizing the constitutionality of the entire notion of compulsory school attendance. Yet, the same cases from the 1920s that struck down limits on educational choices of parents also appeared to assume as beyond peradventure the supposition that the states had plenary power to enforce compulsory education laws. In *Meyer v. Nebraska*,<sup>38</sup> for example, the Court noted that

[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports."<sup>39</sup>

In more recent times, the Supreme Court in *Wisconsin v. Yoder*<sup>40</sup> explicitly acknowledged that "[t]here is no doubt as to the power of a [s]tate, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."<sup>41</sup>

If the state can normally force a child into school without violating the Constitution, the claim that community service programs violate the Fourteenth Amendment is reduced to an argument that community service is not school. If schools imposed community service programs for the utterly gratuitous and exploitative purpose of obtaining cost-free child labor, the disconnection between the educational function and the service requirement might be so stark that a court would be moved to treat the program as a violation of the Constitution. Of course, this will almost certainly never be the case. School districts impose community service programs not because they provide a convenient administrative device for securing a large pool of volunteer labor, but out of the conviction that community service will teach students the manifold, laudatory values of civic contribution and participation, and inculcate them with a greater sense of citizenship and social responsibility.<sup>42</sup> The interests that drive compulsory community service programs are thus but subsets of the interests that largely drive public education in general.<sup>43</sup> As the Supreme Court stated in *Brown v. Board of Education*,<sup>44</sup>

[t]oday, education is perhaps the most important function of state and local

38. 262 U.S. 390 (1923).

39. *Id.* at 402.

40. 406 U.S. 205 (1972).

41. *Id.* at 213; see also *Board of Educ. v. Allen*, 392 U.S. 236, 245-46 (1968) ("[A] substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.").

42. See generally Kraft, *supra* note 2.

43. See Philip Kurland, *The Supreme Court, Compulsory Education, and the First Amendment Religion Clauses*, 75 W. VA. L. REV. 213 (1973) ("It has long been an American dream that education affords a means for upward mobility in an open society. The Supreme Court . . . has framed much of the country's constitutional law on the unstated premise that formal education is the means by which American society remains fluid yet cohesive, pluralistic yet unitary, aspiring to be a democracy while being governed by a meritocracy.").

44. 347 U.S. 483 (1954).

governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed force. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>45</sup>

Once we are quibbling not about the power of the state to compel attendance at school, but rather the power of the state to define the terms and conditions of schooling, the force of any substantive due process attack is dramatically diminished, for we are no longer facing a fundamental incursion on individual liberty, but an individual's fundamental disagreement with a tenet of educational philosophy. Courts will routinely dismiss this sort of micro-level challenge to the particulars of a school system's educational choices, rejecting it based on the most minimal rational basis forms of scrutiny.<sup>46</sup>

This outcome is sound. If, after the bouillabaisse of debate over whether it is good or bad educational philosophy to expose children to community service through such mandatory programs, a political consensus emerges that it is good philosophy, there is no cogent reason for judicial second-guessing of that decision.<sup>47</sup> Public schools constantly make choices about policy that are controversial and vehemently contested within the community. Virtually no aspect of a public school system's decisionmaking is likely to please everyone within its constituency; there will always be students and parents who would like to opt out of heavy homework loads, physical education, courses in sex education, or any number of other curricular initiatives. The presumptive rule, however, is that the arguments against such programs must be vented and resolved in the political arena, and they are not subject to serious challenge merely on the general claim that the choices made impermissibly infringe on the broad liberty of parents to direct their children's education.<sup>48</sup> To the extent that parents direct their children's education by directing them to public schools, they forfeit the right of selective micro-management.

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45. *Id.* at 493.

46. *See* Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 177-79 (4th Cir. 1996), *cert. denied*, 529 U.S. 1111 (1997); *Inmediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461-62 (2d Cir.), *cert. denied*, 519 U.S. 813 (1996); *see also* Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 1000 (3d Cir.), *cert. denied*, 510 U.S. 824 (1993).

47. *See generally* Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169 (1996).

48. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

*Id.*

## V

## CONSCIENTIOUS OBJECTION BASED ON RELIGION OR IDEOLOGY

If sweeping claims that community service programs constitute involuntary servitude or violate due process are not persuasive, claims based on more carefully honed arguments may in some circumstances be more impressive. Such arguments are that the programs violate a particular student's First Amendment rights of free association, free speech, or the free exercise of religion.

It is useful to examine objections to mandatory community service predicated on religious or philosophical scruples under one heading because of the importance of a single Supreme Court decision, *Wisconsin v. Yoder*,<sup>49</sup> that speaks to both religion and philosophy, and helps at once to illustrate two critical points: General ideological objections to community service programs are not likely to prevail, whether cast as free speech or free association claims, and specific religious objections to such programs may be successful, but only in the relatively unlikely circumstance that no service alternative were available to a student that did not substantially interfere with his or her religious scruples.

In *Yoder*, the Supreme Court held that Wisconsin could not enforce its compulsory school attendance law to require members of the Amish Mennonite Church to send their fourteen- and fifteen-year-old children to Wisconsin public schools because such compelled attendance would substantially interfere with the free exercise of religion of the Amish children and their parents.<sup>50</sup> *Yoder* exists in some tension with the Supreme Court's subsequent landmark decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, in which the Court held that the Free Exercise Clause is not violated by neutral laws of general applicability that happen to place substantial burdens on religion.<sup>51</sup> *Smith* involved a Free Exercise Clause claim brought by members of the Native American Church who were denied unemployment benefits when they lost their jobs because they had ingested peyote in small amounts as part of a sacramental ritual within their church.<sup>52</sup> The church members challenged an Oregon criminal statute forbidding the use of peyote, claiming a constitutional right to a religious exemption from an otherwise applicable criminal law.<sup>53</sup> *Smith* followed a line of Supreme Court decisions adopting the view that the Free Exercise Clause did not require exemption from the application of generally applicable laws.<sup>54</sup> In *Reynolds v. United States*,<sup>55</sup> for example, the

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49. 406 U.S. 205 (1972).

50. *See id.* at 217-18.

51. 494 U.S. 872, 877-82, *reh'g denied*, 496 U.S. 913 (1990).

52. *See id.* at 872.

53. *See id.*

54. *See, e.g.,* *United States v. Lee*, 455 U.S. 252 (1982) (rejecting a claim by an Amish employer, on behalf of himself and his employees, seeking an exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs); *Gillette v. United States*, 401 U.S. 437, 461 (1971) (upholding the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular

Court rejected the assertion that criminal laws forbidding polygamy could not be constitutionally applied to persons who practiced polygamy pursuant to religious command.<sup>56</sup>

Before *Smith*, however, there were also several Supreme Court decisions, including *Yoder*, that seemed to endorse the principle that even neutral laws of general applicability substantially burdening a religious practice must be justified by a compelling governmental interest and be narrowly tailored to effectuate that interest.<sup>57</sup> In *Smith*, the Supreme Court resolved this split by opting for the line of precedent typified by *Reynolds*, holding that the Free

way on religious grounds); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (sustaining Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days); *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944) (holding that a mother could be prosecuted under the child labor laws for using her children to dispense religious literature in the streets, on the ground that there was no constitutional infirmity in excluding children of the religious adherent from doing what no other children could do); *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940) (noting that “[c]onscientious scruples have not . . . relieved the individual from obedience to a general law not aimed at the promotion or restriction or religious beliefs”); *Reynolds v. United States*, 98 U.S. 145 (1878) (sustaining application of anti-polygamy laws against persons who practiced polygamy out of religious convictions).

55. 98 U.S. 145 (1878).

56. *See id.* at 167; *see also* *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (noting that the Free Exercise Clause does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability”).

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

*Smith*, 494 U.S. at 879 (quoting *Frankfurter, J., Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940)). The Court’s quote from *Gobitis* was arguably ill-conceived overkill because since *Gobitis*, the Supreme Court applied Justice Frankfurter’s theory to sustain a school board’s power to discipline a Jehovah’s Witness child for failing to salute the American flag. *Gobitis* remained good law for only three years. It was overruled in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), where Justice Jackson wrote those famous lines: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Id.* at 642. The *Gobitis* Court erred in failing to see a distinction between “obedience to general law” when that law proscribes only action, such as polygamy—or, as in *Smith*, ingestion of a drug—and obedience to law requiring the affirmative profession of beliefs, political or religious.

57. A series of cases involving government benefits such as unemployment compensation, emanating from *Sherbert v. Verner*, 374 U.S. 398 (1963), seemed to require the application of the strict scrutiny standard even to neutral laws of general applicability that only indirectly burdened religion. *See Frazee v. Illinois Dep’t of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981). In *Sherbert*, a Seventh-Day Adventist was discharged by her private employer because she would not work on Saturday, the Sabbath day of her faith. In *Sherbert*, there was no law commanding the claimant to do that which was forbidden by her religion, or forbidding her from doing that which her religion commanded. Nevertheless, the Supreme Court held that the First Amendment could be violated even when the burden at issue was only indirect:

But this is only the beginning, not the end, of our inquiry. For “[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.”

*Id.* at 403-04 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)).

Exercise Clause imposed no heightened constitutional burdens on government when it sought merely to enforce neutral and generally applicable laws.<sup>58</sup>

[G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling . . . contradicts both constitutional tradition and common sense.<sup>59</sup>

However, the Court in *Smith* did not overrule *Yoder*, but instead sought to distinguish it on the ground that *Yoder* and similar cases did not involve "the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the rights of parents . . . to direct the education of their children."<sup>60</sup> In contrast, the Court in *Smith* explained that the case before it did "not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."<sup>61</sup>

This argument was not particularly satisfying, because the Court never explained why a hybrid constitutional claim should be stronger than a purebred one, or why the cases it purported to distinguish had seemed to quite self-consciously express their holdings in terms of protecting the free exercise of religion.<sup>62</sup> Indeed, *Yoder* was particularly problematic when measured against the *Smith* Court's argument, because in *Yoder*, the Court not only articulated its ruling entirely in Free Exercise Clause terms,<sup>63</sup> but also discussed extensively whether the objections the Amish had to sending their children to school were genuinely religious in nature, or were instead based on the non-religious elements of the Amish "way of life."<sup>64</sup> The Amish claimed the two objections were essentially inseparable,<sup>65</sup> but the Court delved more deeply into the

58. See *Smith*, 494 U.S. at 886-88.

59. *Id.* at 885 (internal quotation marks and citation omitted).

60. *Id.* at 881-82 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school); *Follett v. McCormick*, 321 U.S. 573 (1944) (striking down a flat tax on solicitation as applied to dissemination of religious literature); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (same); *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940) (striking down a permit requirement for solicitation of contributions as applied to Jehovah's Witnesses distributing religious literature); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down a law requiring children to attend public rather than private schools)).

61. *Id.* at 882.

62. See *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) ("Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment.").

63. See *Yoder*, 406 U.S. at 214.

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the [s]tate does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

*Id.*

64. *Id.* at 215-19.

65. See *id.* at 215.



matter, and made it clear that the success of the Amish's claim was dependent on it being grounded in religion, as opposed to a mere philosophical belief, such as the teachings of Henry David Thoreau:

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.<sup>66</sup>

The Court held that religious beliefs trumped the interests of the state of Wisconsin in enforcing its compulsory attendance laws only after assuring itself that the claims of the Amish were authentically religious in nature.<sup>67</sup> Thus, *Yoder* is unintelligible as a free speech claim or substantive due process claim. If the parents had merely asserted their rights to have their philosophical beliefs vindicated under the Free Speech Clause, or their rights to direct the education of their own children vindicated under the Due Process Clause, the Court

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We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forbears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent.

*Id.*

66. *Id.* (citing *Welsh v. United States*, 398 U.S. 333, 351-61 (1970) (Harlan, J., concurring in result); *United States v. Ballard*, 322 U.S. 78 (1944)).

67. *See id.* at 216-17.

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world. . . ." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community. The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge generally and great changes in education. The respondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call "life style" have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.

*Id.*

would have rejected their claim.<sup>68</sup> The injection of religious belief obviously made the difference. The Court in *Yoder* clearly thought that it made enough of a difference to require striking down the application of the Wisconsin law even though it was both of “general applicability”<sup>69</sup> and ostensibly “neutral.”<sup>70</sup> As significant as Wisconsin’s interests in enforcing its laws may have been, they were not enough for the *Yoder* Court and its almost nostalgic Americana sympathy for the uncomplicated and virtuous life of the Amish people.<sup>71</sup> *Yoder*, along with prior cases arising from substantive due process principles, instructs that in the absence of a plausible Religion Clause claim, courts should review challenges to school regulations under the relatively deferential standard of “reasonableness.”<sup>72</sup>

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68. *See id.* at 215.

[W]e must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations.

*Id.*

69. *Id.* at 220.

But to agree that religiously grounded conduct must often be subject to the broad police power of the [s]tate is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the [s]tate to control, even under regulations of general applicability.

*Id.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

70. *Id.*

Nor can this case be disposed of on the grounds that Wisconsin’s requirement for school attendance to age 16 applies uniformly to all citizens of the [s]tate and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.

*Id.*

71. *See id.* at 217-18.

As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards. So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student’s home and alien to his daily home life. As the record so strongly shows, the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict. The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

*Id.*

72. *See Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996) (noting that “[t]he Court has repeatedly stressed that while parents have a constitutional right to send

Courts faced with a free exercise of religion challenge to a community service program must first deal with this threshold tension between *Smith* and *Yoder*. One might think that *Yoder*, as the precedent more specifically germane to compulsory school requirements, would easily trump *Smith* in the context of school community service programs. However, this matter is not necessarily so simple. To the extent that no one can interpose a cogent substantive due process claim against such programs, a court might take the position that in reality they do not present a genuine hybrid claim at all, because the substantive due process claim is nothing but a cosmetic makeweight. Faced with a pure religion claim, a court might reason that it is actually *Smith* rather than *Yoder* that controls.

This whole analysis is nothing more than hair-splitting, indulging distinctions that as much as anything reveal the silliness of *Smith*'s hybrid-right concoction. *Smith*, moreover, has itself been highly unpopular. Congress attempted to overrule *Smith* by enacting the Religious Freedom Restoration Act of 1993.<sup>73</sup> This effort was rebuked by the Supreme Court when it struck down the Act on federalism grounds in *City of Boerne v. Flores*.<sup>74</sup> However, even in the Supreme Court, there are signs that a critical mass may be forming around the consensus that *Smith* should be reconsidered, and perhaps repudiated or modified.<sup>75</sup>

Even if courts select *Yoder* as the governing precedent, either because it remains distinguishable from *Smith* or because *Smith* is someday discredited, *Yoder*'s potency as a precedent in challenging community service programs ought to be limited. Even though the Amish in *Yoder* were able to mount a factually persuasive argument that the whole regime of compulsory public

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their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation") (citing *Yoder*, 406 U.S. at 213; *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 n.4 (1993) (Souter, J., concurring in part and concurring in the judgment) (holding that "[w]here parents make a 'free exercise claim,' . . . the *Pierce* reasonableness test is inapplicable and the State's action must be measured by a stricter test, the test developed under the Free Exercise Clause"))).

73. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb).

74. 521 U.S. 507 (1997). In *Boerne*, the Supreme Court struck down the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, in which Congress attempted to invoke section five of the Fourteenth Amendment to justify a federal religious freedom statute binding on state and local governments. The Court in *Boerne* struck down the law because the Court had already held that the standard Congress imposed on state and local governments was not required by the substantive provisions of section one of the Fourteenth Amendment. After *Boerne*, Congress may not use section five to "enforce" rights that are not recognized under section one of the Amendment. The Court in *Boerne* thus explained that section five grants Congress only a "remedial" power to make effective the "substantive constitutional prohibitions against the [s]tates" contained in section one. 521 U.S. at 522. Such "remedial" legislation, the Court emphasized, "should be adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against," unconstitutional action by the states. *Id.* at 532.

75. See *Boerne*, 521 U.S. at 544 (O'Connor, J., joined in part by Breyer, J., dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting). This was not the first time members of the Court have called for a reexamination of *Smith*. See *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 571-72 (Souter, J., concurring in part and concurring in the judgment); *id.* at 577-78 (Blackmun, J., joined by O'Connor, J., concurring in the judgment).

education in Wisconsin ran contrary to the fundamental values of Amish religion, it would not be so easy for any religious adherent to make a similarly persuasive claim with regard to a community service requirement. By hypothesis, any student who makes a religion-based attack on a community service requirement already will be attending public school. Thus, the general values and operation of the public schools would not, by hypothesis, be inconsistent with the student's attendance at public school. The student then would have to demonstrate that there was something *specifically* objectionable to coerced community service *over and above* attendance at public school generally. It is difficult to imagine what this objection might be, especially in light of the fact that many religious traditions share the beliefs of altruism, selflessness, service to one's larger community, and charity. Moreover, most community service programs will have so many service alternatives that are devoid of any palpable religious content that it will be difficult for any student to convince a court that no available service alternatives consistent with the student's religious belief structure exist. For any student who could not credibly make the claim that community service as such ran contrary to his or her religious beliefs, a free exercise challenge would therefore be ineffective.

If this analysis renders viable religion challenges to public service challenges statistically improbable, however, it does not render them mathematically impossible.<sup>76</sup> There may be religions grounded in what most would regard as the "dark side of the force" for which the entire idea of community service is heretical. To the extent *Yoder*—and not *Smith*—controls, and to the extent participation in any public service program is convincingly inconsistent with a student's religious beliefs, it is at least conceivable that application of the public service program to a specific student might violate the Free Exercise Clause. Only within these narrow and relatively unlikely parameters, however, would such a claim be potentially viable.

Outside of religion-based claims, conscientious objector attacks on community service programs are even weaker. Students challenging community service programs on forced speech or forced association grounds will have a difficult time explaining how the typical community service program genuinely implicates such First Amendment concerns at all. Again, of course, a student might object to the wholesale notion of forced volunteerism, arguing that the entire program indulges in a social philosophy antithetical to the student's beliefs. If disagreement with volunteerism as such is the student's real complaint, then under *Yoder*, the basis of the student's objection again becomes critical. Imagine a student who is an ardent disciple of the philosophies of Ayn

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76. See *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 996 (3rd Cir.), *cert. denied*, 510 U.S. 824 (1993).

Nonetheless, we do not discount entirely the possibility that a school-imposed requirement of community service could, in some contexts, implicate First Amendment considerations. Arguably, a student who was required to provide community service to an organization whose message conflicted with the student's contrary view could make that claim.

*Id.*

Rand, believing that the single-minded pursuit of individual self-interest is the only principled path to the good life.<sup>77</sup> This belief would likely be characterized as a philosophical objection and would not trigger the heightened scrutiny applicable to religion-based claims applied in *Yoder*. Moreover, to the extent volunteerism was deemed philosophically objectionable to the student, this claim would really not be a true forced-speech or forced-association claim at all. The student's objection would not be that he or she is being forced to say anything or support any message the student finds repugnant, or even to associate with causes or persons with whom the student does not wish to associate, but rather that the student is being forced to serve when the student does not choose to serve. Service, however, is not the same as speech.

There are powerful First Amendment doctrines that forbid forced speech, or forced association. These related notions often may be successfully invoked to avoid being coerced into supporting a cause or creed with which one disagrees. While the First Amendment is typically concerned with preventing government from restricting expression, it is also implicated when the government attempts to compel expression. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."<sup>78</sup> This statement reflects a core constitutional principle: Government action "that requires the utterance of a particular message favored by the [g]overnment, contravenes this essential right."<sup>79</sup> Such laws "pose the *inherent* risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or *manipulate the public debate through coercion rather than persuasion*."<sup>80</sup>

In an eloquent and celebrated passage, the Supreme Court declared in *West Virginia State Board of Education v. Barnette* that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."<sup>81</sup> The Court in *Barnette* struck down a compulsory flag-salute and recitation of the Pledge of Allegiance for school children when Jehovah's Witnesses objected to the compulsory flag-salute on religious grounds.<sup>82</sup> *Barnette* forbids persons from "being compelled to affirm their belief in any governmentally prescribed position or view."<sup>83</sup> Similarly, the Establishment Clause forbids public school officials from leading students in prayer at all in an academic setting.<sup>84</sup> Moreover, in *Wooley v. Maynard*, the Supreme Court held

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77. See generally AYN RAND, *ATLAS SHRUGGED* (1992); AYN RAND, *THE FOUNTAINHEAD* (1943).

78. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

79. *Id.*

80. *Id.* (emphasis added).

81. 319 U.S. 624, 642 (1943).

82. See *id.*

83. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 7488 (1980) (describing the holding in *Barnette*).

84. See *Lee v. Weisman*, 505 U.S. 577, 588-89 (1992); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962).

that a Jehovah's Witness could not be compelled to display the motto "Live Free or Die" on his New Hampshire license plates.<sup>85</sup> *Wooley*, like *Barnette*, is powerful authority for the proposition that the state cannot compel citizens to recite patriotic civic rituals or slogans. *Wooley* created a constitutional right for citizens to cover up the motto on their individual plates and more broadly underscored the importance of the right not to speak under government compulsion, emphasizing that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."<sup>86</sup> As the Court stated in *Pacific Gas & Electric Company v. Public Utilities Commission of California*, "all speech inherently involves choices of what to say and what to leave unsaid."<sup>87</sup> In *McIntyre v. Ohio Elections Commission*, the Court held unconstitutional an Ohio ban on anonymous campaign literature, emphasizing the First Amendment rights of speakers to make their own "decisions concerning omissions or additions to the content of a publication," and to choose for themselves what to "include or exclude."<sup>88</sup> In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Supreme Court, drawing heavily on *Turner Broadcasting System, Inc. v. Federal Communications Commission*, spoke eloquently of the centrality of this autonomy principle in our First Amendment tradition:

Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the [s]tate based on the content of what he says. The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.<sup>89</sup>

Similarly, the Supreme Court has recognized that freedom of association encompasses not merely the affirmative right to associate with those whom one seeks to join,<sup>90</sup> but a contrasting right not to associate with those one seeks to

85. 430 U.S. 705, 717 (1977).

86. *Id.*

87. 475 U.S. 1, 11 (1986).

88. 514 U.S. 334, 341, 348 (1995); *see also* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (noting that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming").

89. 515 U.S. 557, 579 (1995) (referring to 512 U.S. 622).

90. *See, e.g., NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 920 (1982).

Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.

*Id.*; *see also* *Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 294 (1981) ("[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . [B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost.");

avoid.<sup>91</sup> This right not to associate may be abridged by the state only with justifications that will withstand the rigors of strict scrutiny and its requirement that the law at issue be supported by a showing that it is narrowly tailored to serve compelling governmental interests.<sup>92</sup> Finally, cases which hold that individuals may not be taxed against their will to lend financial support to causes with which they disagree are related to both forced-speech and free association principles.<sup>93</sup>

Given this impressive array of precedent, one might mistakenly think that forced-speech or forced-association challenges to community service programs would have some appreciable chance of success. They do not. If the only way a student could fulfill the community service obligation were to support a message antithetical to the student's beliefs, or engage in objectionable association, a student might have a plausible forced-speech or forced-association claim. On the contrary, community service programs usually allow students to select from a wide array of service alternatives, including many organizations and agencies with no distinct ideological mission or identity.<sup>94</sup>

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*Scales v. United States*, 367 U.S. 203, 229 (1961) (noting that a "blanket prohibition of association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be impaired"); *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.").

91. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

*Id.*

92. *Id.* ("The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

93. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

*Id.*

94. When the group with which the student associates has no strong ideological imprint, courts are not likely to take seriously the claim that forced association implicates any strong First Amendment interests. In the *Jaycees* decision, for example, the Supreme Court was highly skeptical that the highly inclusive *Jaycees* possessed any strong associational interests. See *Roberts*, 468 U.S. at 625-28. Similarly, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545-47 (1987), a sequel to the *Jaycees* decision, the Supreme Court followed the framework of *Jaycees* and held that the First Amendment was not violated by a California law that required the Rotary Club to cease discrimination against women. The Court observed that

[a]s a matter of policy, Rotary Clubs do not take positions on "public questions," including political or international issues. To be sure, Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment. But the Unruh Act does not require the clubs to abandon or alter any of these activities. It does not require them to

The actual service tasks performed by the students may similarly be utterly devoid of any expressive message falling within the protection of the First Amendment. Cutting grass for the park district, painting a fence for a local school, picking up trash on a county highway, or feeding animals at an animal shelter are all forms of community service that could never be characterized convincingly as expressive activity, or as implicating any serious interests in avoiding unwanted forms of association.<sup>95</sup> As long as the program contains a reasonable degree of flexibility, it seems almost certain that virtually all students could find some form of community service they are able to perform without running against any deeply held ideological or associational beliefs. Indeed, community service programs typically contain provisions that allow students to seek approval of community service programs that they themselves have identified and that are not part of an established list.<sup>96</sup>

## VI

### ORGANIZATIONAL INCLUSION AND EXCLUSION

Mandatory community service programs may also be challenged on the grounds that they exclude certain groups and organizations that deserve to be included or include certain groups that ought to be excluded. For example, a program may choose not to permit partisan political groups to participate.<sup>97</sup> Alternatively, it may choose to exclude religious organizations. On the other hand, a program might include a pervasively religious organization, precipitating a claim that the inclusion of such a group violates the Establishment Clause.

In each scenario, neutrality is the guiding constitutional principle. Eligibility

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abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross section of the community. Indeed, by opening membership to leading business and professional women in the community, Rotary Clubs are likely to obtain a more representative cross section of community leaders with a broadened capacity for service.

*Id.* at 548-49 (citation omitted).

95. See *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment. Thus this activity qualifies neither as a form of “intimate association” nor as a form of “expressive association” as those terms were described in *Roberts*.

*Id.*

96. In *Herndon*, for example, students could receive credit for service performed for organizations that were not included on the school system's list of approved organizations, provided that the student received approval from a committee comprised of teachers, students, and members of the community organizations charged with administering the program. The student's high school principal was the final decisionmaker concerning community service credit. See *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 177 (4th Cir. 1996).

97. See *id.* (excluding political groups).



to participate as an approved service entity may rightly be conceptualized as a government benefit, and serious First Amendment concerns would be raised by any program that consciously excluded groups based on viewpoint alone, including religious viewpoint. Thus, if a community service program permitted students to satisfy their service obligations by assisting with feeding programs for the homeless, it would violate the First Amendment if the school district allowed students to work for feeding programs run by a secular organization dedicated to assisting the poor, but not for identical programs run by a local church.<sup>98</sup>

However, these neutrality principles are not quite so pristine when dealing with inclusive decisions. Certainly, it does not violate the Establishment Clause to include religious groups within a class of other non-religious organizations performing similar service functions. The flip-side of the principle that a school board would violate the First Amendment by discriminating against the religious soup kitchen is that a school board would not violate the Establishment Clause if it included such a kitchen.<sup>99</sup>

A far more difficult case, however, would exist if a school board decided to exclude a service program sponsored by a private group from participation on the ground that the private group's ideological mission ran directly contrary to the civic values of the school. Take, for example, the previously proffered hypothetical in which a local chapter of the Ku Klux Klan creates what purports to be a community service program, and a school board refuses to certify the program as a qualified public service organization on the ground that the Klan's racist agenda renders it inappropriate for participation in any joint venture with public schools. If the example seems farfetched, modern American life teaches that truth is often stranger than fiction, and that such a scenario is not at all beyond the range of possibility.

In such a case, the Klan would argue that schools cannot have it both ways.

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98. See *Rosenberger v. Rectors and Visitors of Univ. of Virginia*, 515 U.S. 819, 835-37 (1995) (holding that, in a case in which a student organization that published a newspaper with Christian editorial viewpoint was denied funding by the [u]niversity solely because of its religious perspective, the denial of funding amounted to viewpoint discrimination that violated the free speech provisions of the First Amendment); *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down a Tennessee law barring ministers of the Gospel or priests of any denomination whatever from serving as constitutional convention delegates on grounds that such a provision discriminated against religion and conditioned the free exercise of his religion or the surrender of the right to seek office).

99. See *Rosenberger*, 515 U.S. at 845-46.

To obey the Establishment Clause, it was not necessary for the [u]niversity to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the [s]tate by the separate Clauses of the First Amendment was compromised by the [u]niversity's course of action. The viewpoint discrimination inherent in the [u]niversity's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the [u]niversity's honoring its duties under the Free Speech Clause.

*Id.*

They cannot claim that participation by religious organizations does not offend the Establishment Clause because merely permitting such organizations to participate does not constitute the imprimatur or endorsement of the school, and, on the other hand, claim that entanglement with a hate group would in some sense sully the school's mission and function.

On balance, however, a convincing distinction does seem to exist. A school board that seeks to exclude a religious group would likely do so not out of particularized antipathy to the church group's theology or mission. Indeed, to the extent that a central tenet of the religious group's theology was the common religious one of assisting the less fortunate and loving one's neighbor, the religious mission and the secular civic value would generally coincide. Rather, a school's attempt to exclude a religious group would normally be based on its abstract concerns about too much entanglement between church and state. The Supreme Court's public forum cases, which hold that these generalized fears of entanglement do not rise to the level of an Establishment Clause violation, effectively answer and neutralize this argument.<sup>100</sup> The constitutional command "is one of neutrality rather than endorsement; if a [s]tate refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."<sup>101</sup> In short, the schools have no free-standing, case-specific reason not to include the religious group.

In contrast, a school that sought to exclude a Klan-operated public service program could make a sincere argument that any association between the school board and such a hate group would run so counter to the values of racial tolerance and human dignity fostered by the school that inclusion would defeat the very purposes of civic responsibility and good citizenship for which the community service program was originally designed. The school would argue that public service programs are not "public forums" in the conventional First Amendment sense, in which outside groups are permitted to use government programs or activities for private expression, but rather are adjuncts to the school's educational mission, in which private and public groups alike are tapped to place students for the educational mission of learning the values of service to the larger community. A hate group whose charter was devoted to advancing interests in racism, anti-Semitism, or even genocide hardly qualifies as a worthy repository of the school board's educational trust, and thus ought to be legitimately excludable.<sup>102</sup>

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100. See *Rosenberger*, 515 U.S. at 845-46; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); see also *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring in part and concurring in judgment) ("We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship.").

101. *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 248 (1990) (plurality).

102. See *Bethel Sch. Dist. No. 403 v. Fraser*, 378 U.S. 675, 681 (1986) ("These fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular.").

## VII CONCLUSION

In our federal system, decisions about school policy are presumptively the business of state and local governments and the school officials charged with implementing those policies, and not the business of the federal courts.<sup>103</sup> The political and administrative processes society employs to establish educational policies should resolve policy debates over the wisdom and utility of community service programs.<sup>104</sup> Community service programs are admittedly not value-neutral. They obviously reflect the community's philosophical and cultural judgments about the mission and function of public schools.<sup>105</sup> However, if community service programs are not value-neutral, nothing in the Constitution requires them to be. Arguments that community service programs constitute involuntary servitude or amount to deprivations of liberty within the meaning of our substantive due process tradition are really nothing less than attempts to transfer decisionmaking from a political to a judicial forum, and should be rejected. Arguments that community service programs in general violate either free speech, free association, or free exercise of religion principles are similarly unpersuasive, largely because most of these programs are sufficiently flexible to accommodate the needs of virtually any student who might have bona fide First Amendment objections to some forms of service. It is conceivable, but unlikely, that a student with sincere, religious scruples against any form of community service might have a First Amendment right to opt out of such a program, but such a factual scenario is difficult to imagine. When school officials decide whether groups should be excluded or included, they must be vigilant against any slippage into viewpoint-based discrimination, and take care not to exclude groups that would otherwise qualify as participants solely because of their religious or political identity. Decisions to exclude a group for ideologically neutral characteristics, however, raise no serious First Amendment difficulties. The constitutional prerogative of schools to exclude groups with a mission directly antithetical to the mission and function of the school is not entirely clear under existing doctrines. On balance, however, the sounder view should be that community service programs sponsored by groups with a mission directly contrary to that of the public schools, such as those with an avowed dedication to racial genocide, may be excluded from the ambit of participation without offending the First Amendment.

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103. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("This standard is consistent with our oft-expressed view that the education of the [n]ation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.").

104. *See Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our [n]ation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate constitutional values.").

105. *See generally* Salomone, *supra* note 47.