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Students or Serfs: Is Mandatory Community Service a Violation of the Thirteenth Amendment

Bradley H. Kreshek

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STUDENTS OR SERFS? IS MANDATORY COMMUNITY SERVICE A VIOLATION OF THE THIRTEENTH AMENDMENT?

It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.¹

I. INTRODUCTION

"Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."² With the ratification of the Thirteenth Amendment in 1865,³ these words and their “declaration of the personal freedom of all the human race within the jurisdiction of the government”⁴ became part of the Constitution of the United States.

In recent years, however, the Thirteenth Amendment and its guarantee of personal freedom has been under attack as the nation’s high schools and graduate schools have implemented “mandatory community service” programs.⁵ These mandatory community service programs require students to perform an average of forty to sixty hours of community service⁶ for “approved”

3. The Thirteenth Amendment was passed by Congress in January 1865 and ratified by the states in December of that year. See Peter Kolchin, American Slavery: 1619-1877, at 207 (1993).
5. See Cynthia L. Brennan, Comment, Mandatory Community Service as a High School Graduation Requirement: Inculcating Values or Unconstitutional?, 11 T.M. COOLEY L. REV. 253, 253-54 & n.6 (1994) (discussing the growing trend of including mandatory community service requirements in high schools); see also Stephen F. Befort & Eric S. Janus, The Role of Legal Education in Instilling an Ethos of Public Service Among Law Students: Towards a Collaboration Between the Profession and the Academy on Professional Values, 13 LAW & INEQ. J. 1, 5-6 & n.28 (1994) (indicating that of 177 ABA approved law schools, “17 schools had [pro bono] programs which are or soon would be ‘mandatory,’” and 31 schools reported pro bono programs which are “an elective component of the curriculum for credit”).
6. See, e.g., Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 457 (2d Cir. 1996)
nonprofit organizations. The schools compel this service by threatening to withhold a student's diploma.

As would be expected, mandatory community service is not without its critics. The arguments against mandatory community service include claims that mandatory community service programs violate students' rights under the First, Ninth, Thirteenth and Fourteenth Amendments of the United States Constitution and also interfere with parents' rights to raise their children.

Within the past five years, three separate lawsuits, Steirer v. Bethlehem Area School District, Immediato v. Rye Neck School District, and Herndon v. Chapel Hill-Carrboro Board of Education, have questioned the constitutionality of mandatory community service. For a variety of reasons, the courts in each case held that a mandatory community service requirement does not violate the Thirteenth Amendment.

(requiring 40 hours of community service in order to satisfy graduation requirement).


8. The threat of losing one's diploma is a very effective means by which a school can coerce a student to perform labor. Consider that in a recent Census Bureau report it was found that, "while a high school grad can expect to earn $821,000 over the course of a working life—age 25 to 64—a bachelor's degree recipient can expect to earn more than $1.4 million, and a professional degree recipient more than $3 million." Michelle Healy, Time (In School) Is Money, USA TODAY, July 22, 1994, at 1D. In addition, according to the Bureau of Labor Statistics, workers without college degrees face much higher levels of unemployment—20.3 percent versus 5.8 percent for 1994 graduates—and rapidly decreasing real earnings—the average inflation-adjusted earnings of high school graduates dropped 30 percent between 1973 and 1990. Therefore, a high school student who refuses to do 40 hours of community service may lose the potential to increase lifetime earnings by an estimated minimum of $600,000, a cost of approximately $15,000 for each hour of community service not performed.

9. As Justice Jackson stated: "Probably no deeper division of our people could proceed from any accusation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).


14. See, e.g., Immediato, 73 F.3d at 460 (holding that the program is not so exploitative as to constitute involuntary servitude); Steirer, 987 F.2d at 1000 (holding that there is "no basis in fact or logic" to conclude the program is involuntary servi-
This Comment argues that mandatory community service programs offend the spirit of the Thirteenth Amendment’s prohibition against involuntary servitude. Part I of this Comment examines the legislative purpose behind the ratification of the Thirteenth Amendment. Part II describes how the courts have struggled to define the meaning and conditions of the term “involuntary servitude.” Part III explains the “public service exception” to the Thirteenth Amendment. Part IV discusses the Steirer, Immediato, and Herndon decisions and criticizes the courts’ rulings as improper, unfounded, and offensive to the spirit of the Thirteenth Amendment. Part V discusses the difficulty of developing any particular definition expanding the meaning of involuntary servitude but suggests some criteria for courts to consider when deciding future cases. Finally, Part VI concludes that mandatory community service should be prohibited by the courts.

II. THE THIRTEENTH AMENDMENT

Slavery was a major factor leading up to the Civil War. The war, which ended four years to the day after it began, was the bloodiest conflict in American history, resulting in the death of

[B]y 1819 the number of free and slave states was evenly balanced at eleven each. Since each state, no matter what its size, had equal representation in the Senate, the more powerful of the two legislative bodies that comprised Congress, a united South could effectively block or at least delay legislation from the lower House of Representatives, where representation was based on population. This parity in the Senate was enormously important to the South, particularly when the North’s superiority in numbers had given the non-slave states a clear majority in the House of Representatives.  

Id. at 14-15.

"As long as it maintained its parity in the Senate the South could thwart the passage of legislation considered harmful to its interests." Id. at 32.

"By... 1848 the tally of free and slave states was fifteen each." Id. Thereafter, as the nation expanded—with the addition of California in 1850, Minnesota in 1858, and Oregon in 1859 as non-slave states, id. at 39—and a growing anti-slavery sentiment began to prevail, especially with regard to the status of future states, id. at 44, "Southerners feared being condemned to a perpetual minority, their influence forever in decline, and hence began to consider whether their interests might be better served outside the Union than within it." Id.

16. See id. at 196.
620,000 soldiers—360,000 Union and 260,000 Confederate.17 “On every level the war changed the United States radically.... But the greatest impact was the ending of slavery and with it the total change in the Southern way of life.”18 Thus, the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest.... [T]hey determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument.19

The Thirteenth Amendment is but the first of what are commonly known as the “Civil War Amendments,”20 which were required to be ratified by each of the former rebel states as part of the Reconstruction of the Union.21

It has been argued that the Thirteenth Amendment’s sole purpose was to rid the United States of the slavery practiced in the southern states prior to the conclusion of the Civil War.22 However, had Congress intended only to rid the country of southern slavery, Congress need not have included the words “involuntary servitude” in the text of the Amendment.23 Because the broader scope of the prohibition includes involuntary servitude, it is clear that the amendment was more than just a “one-idea proposition.”24

17. See id. at 198.
18. Id. at 199.
22. See VanderVelde, supra note 21, at 476-78.
23. See id. at 448-50.
24. Id. at 449 n.67. VanderVelde has postulated that although both terms were included in the language of the Amendment, the terms “slavery” and “involuntary servitude” developed their meanings at separate times: “[A]bolishing ‘involuntary servitude’ was more forward-looking than abolishing ‘slavery.’” The term
Legislator's comments during the debates both prior and subsequent to the Amendment's ratification strongly support this theory.\textsuperscript{25} Thus, it appears that in ratifying the Thirteenth Amendment, Congress envisioned that the Amendment would serve to "maintain a system of completely free and voluntary labor throughout the United States."\textsuperscript{26}

A. What is Involuntary Servitude?

"[T]he Thirteenth Amendment is a skimpy collection of words . . . ."\textsuperscript{27} Yet, while the purpose of the Thirteenth Amendment appears clear from its brief language, the courts, in applying the language of the Amendment, struggle when attempting to determine the exact definition and conditions that create an "involuntary servitude."\textsuperscript{28} As recently as 1988, the Supreme Court acknowledged that, "[w]hile the general spirit of the phrase 'involuntary servitude' is easily comprehended, the exact range of conditions it prohibits is harder to define."\textsuperscript{29}

1. Defining "involuntary servitude"

In the \textit{Slaughter-House Cases},\textsuperscript{30} Justice Miller, writing for the majority, stated, "[t]he word servitude is of larger meaning than slavery."\textsuperscript{31} However, Justice Miller limited this interpretation of the word "servitude" to extend only so far as to include "apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation."\textsuperscript{32} In dissent, Justice Field interpreted the language of the Thirteenth Amendment to have a much broader scope. He explained:

A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the

\begin{itemize}
\item \textsuperscript{25} See \textit{id.} at 453 (noting the theoretical shift in congressional debate pre- and post-passage).
\item \textsuperscript{26} Pollock v. Williams, 322 U.S. 4, 17 (1944).
\item \textsuperscript{27} Palmer v. Thompson, 403 U.S. 217, 227 (1971).
\item \textsuperscript{28} \textit{See} \textit{Kares}, \textit{supra} note 21, at 374-75.
\item \textsuperscript{29} United States v. Kozminski, 487 U.S. 931, 942 (1988).
\item \textsuperscript{30} 83 U.S. (16 Wall.) 36 (1872).
\item \textsuperscript{31} \textit{id.} at 69.
\item \textsuperscript{32} \textit{id.}
\end{itemize}
strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude.3

Thirty-four years after Slaughter-House, Justice Brewer, writing for the Court in Hodges v. United States,34 boldly stated that the meaning of the language of the Thirteenth Amendment "is as clear as language can make it. The things denounced are slavery and involuntary servitude . . . . All understand by these terms a condition of enforced compulsory service of one to another."35

Yet, despite Justice Brewer's opinion that the language of the Thirteenth Amendment was unmistakably clear, case history shows that for as many cases in which a claim of involuntary servitude is made, there are nearly as many interpretations of the term.36

In 1988, in United States v. Kozminski37 the Court once again visited the issue of involuntary servitude. In Kozminski, two defendants, Mr. and Mrs. Kozminski, were accused of holding two farm workers in involuntary servitude by "us[ing] various coercive measures—including denial of pay, subjection to substandard living conditions, and isolation from others—to cause the victims to

33. Id. at 90-91 (Field, J., dissenting).
34. 203 U.S. 1 (1906).
35. Id. at 16. Justice Brewer further stated: "A reference to the definitions in the dictionaries of words whose meaning is so thoroughly understood by all seems an affectation . . . ." Id. at 17.
36. See, e.g., Butler v. Perry, 240 U.S. 328, 332 (1916) ("compulsory labor akin to African slavery"); Bailey v. Alabama, 219 U.S. 219, 241 (1911) ("control by which the personal service of one man is disposed of or coerced for another's benefit"); Clyatt v. United States, 197 U.S. 207, 218 (1905) ("Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services."); Plessy v. Ferguson, 163 U.S. 537, 542 (1896) ("the control of the labor and services of one man for the benefit of another"); Slaughter-House, 83 U.S. (16 Wall.) at 50 ("much more than the abolition or prohibition of African slavery").
believe they had no alternative but to work on the farm." At trial, the jury found both Mr. and Mrs. Kozminski guilty of violating 18 U.S.C. § 241 and 18 U.S.C. § 1584, two federal statutes enacted by Congress to enforce the Thirteenth Amendment.

On first appeal, the Court of Appeals for the Sixth Circuit affirmed the verdict of the lower court, finding the Kozminskis guilty of violating both statutes. However, the court eventually reversed the conviction holding that "the District Court's definition of involuntary servitude, which would bring cases involving general psychological coercion within the reach of § 241 and § 1584, was too broad."

The Supreme Court granted review to resolve the conflict between the various circuits as to the meaning of involuntary servitude "for the purpose of criminal prosecution under § 241 and § 1584." The Court in *Kozminski* held that, for purposes of criminal prosecution under § 241 or § 1584, the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.

The Court reached this decision because "the language and legislative history of § 1584 both indicate that its reach should be limited to cases involving the compulsion of services by the use or threatened use of physical or legal coercion."

What is perhaps of most importance is the fact that the defini-

38. *Id.* at 936.
39. See *id.* at 937. Section 241, in relevant part, provides:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . . They shall be fined under this title or imprisoned not more than ten years, or both . . . .

18 U.S.C. § 241 (1994). Section 1584 provides: "Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1584 (1994). Congress is granted the power to pass such legislation by section 2 of the Thirteenth Amendment. See U.S. Const. amend. XIII, § 2 ("The Congress shall have the power to enforce this article by appropriate legislation.").
41. *Id.* at 939 (emphasis added).
42. *Id.* at 952 (emphasis added).
43. *Id.* at 948.
tion of involuntary servitude decided upon by the Kozminski Court was specifically intended for use in interpreting the statutes in question. Further, the definition of involuntary servitude accepted in Kozminski was by no means intended to serve as the exclusive reading of those words outside of the statutory context. As Justice O'Connor explained, "[t]he guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by [means other than the use of physical or legal coercion], such as psychological coercion. [However, we] draw no conclusions . . . about the potential scope of the Thirteenth Amendment."

2. What conditions constitute an involuntary servitude?

The determination of what conditions create an involuntary servitude is related to the attempt to define involuntary servitude. As with the definition of involuntary servitude, courts have taken different approaches in determining the conditions that are required.

In United States v. Shackney, the defendant contracted with a family of Mexican workers, in the United States on visas, to work on his farm in Connecticut. When the family wished to be released from their contract, the defendant threatened to use his influence to have the family or its individual members deported. The Second Circuit Court of Appeals stated that, for the purpose of evaluating 18 U.S.C. § 1584, "[t]here must be 'law or force' that 'compels performance or a continuance of the service.'" Therefore the court held that:

[A] holding in involuntary servitude means . . . action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement . . . not a situation where the servant knows he has a choice between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad . . . . While a credible

44. See id. at 944 (stating that the Court was interpreting the Thirteenth Amendment through "the narrow window that is appropriate in applying § 241").
45. Id. at 944.
46. 333 F.2d 475 (2d Cir. 1964).
47. See id. at 477.
48. See id. at 479.
49. Id. at 487 (emphasis added) (quoting Clyatt v. United States, 197 U.S. 207, 215-16 (1905)).
threat of deportation may come close to the line, it still leaves the employee with a choice...  

Absent compulsion either by law or force, the court concluded that a servitude could not be involuntary.

At least one court has expressed the view that the Thirteenth Amendment can apply to compulsion by means other than threat of legal coercion or force. In United States v. Mussry, a case similar to Shackney, the defendants were charged with unlawfully holding poor Indonesians against their will by withholding their passports and return airline tickets, and requiring them to work off the cost of their transportation to the United States. The district court dismissed all counts because there was no showing of compelled service by use of law or force. The Ninth Circuit Court of Appeals reversed, recognizing that "[c]onduct other than the use, or threatened use, of law or physical force may, under some circumstances, have the same effect as the more traditional forms of coercion—or may even be more coercive" thus constituting a violation of the Thirteenth Amendment. The Ninth Circuit, considering the Second Circuit interpretation in Shackney, believed that "the most reasonable interpretation of Shackney is that a holding in involuntary servitude may occur only when there is the use, or threatened use, of law or physical force," but reasoned that "a test that looks to the use of law or physical force attempt[ing] to draw a clear line between lawful and unlawful conduct... is too narrow to fully implement the purpose of the 13th amendment..."

Additionally, some courts have focused on the ability to escape the servitude as being the essential element of a Thirteenth Amendment violation. In Flood v. Kuhn, Curtis Flood, an out-

50. Id. at 486. The court went on to indicate that its decision was so rendered because it did not see "how [the court] could fairly bring [a threat of deportation] within [the criminal statute] without encompassing other types of threat, quite as devastating... as that of deportation... whose inclusion would make the statute an easy tool for blackmail and other serious abuse." Id. at 486-87 (emphasis added).
51. See id. at 487.
52. 726 F.2d 1448 (9th Cir. 1984).
53. See id. at 1450.
54. See id.
55. Id. at 1453.
56. Id. at 1452.
57. Id.
fielder for the St. Louis Cardinals baseball club, was traded to the Philadelphia Phillies baseball club.\textsuperscript{59} Flood refused to report to Philadelphia in violation of his contract and the "reserve clause" contained therein.\textsuperscript{60} Flood claimed that enforcement of the reserve clause, under which he was "forbidden to negotiate toward prospective baseball employment with any club other than the one to whom he is under contract," violated the Thirteenth Amendment's protection against involuntary servitude.\textsuperscript{61} In ruling that the reserve clause did not violate the Thirteenth Amendment, the court, quoting from its \textit{Shackney} decision, held that "[a] showing of compulsion is [a] prerequisite to proof of involuntary servitude."\textsuperscript{62} Therefore, although the choice Flood was confronted with, whether or not to continue in baseball, was "a consequence to be deplored,"\textsuperscript{63} the baseball reserve system was not a form of involv-

\textsuperscript{59} Flood, 316 F. Supp. at 271.

\textsuperscript{60} See id. In order to play major league baseball, all players were required to sign a Uniform Player's Contract, which included the reserve clause. See id. at 273-74. The reserve clause included "a number of baseball rules, regulations and uniform contract terms which together operate[d] to bind a player to a ball club and restrict[ed] him to negotiating with that club only." Id. at 272. It is interesting to note the similarities between the reserve clause and the practices of former slaveholders following the ratification of the Thirteenth Amendment. The former slaveholders, attempting to circumvent the effects of the Thirteenth Amendment, created a system of private and legal arrangements by which no former slaveholder would hire the ex-slave of any other slaveholder, effectively assigning ex-slaves to the former slaveholders. See VanderVelde, supra note 21, at 490-92. This system was widely condemned by Congress and the framers of the Thirteenth Amendment. See id.

\textsuperscript{61} Flood, 316 F. Supp. at 274. Flood also claimed that the reserve system as implemented violated federal antitrust laws. See id. at 272. The lower court, and later the Supreme Court, held that because Congress had exempted major league baseball from the antitrust laws, it was up to Congress to remove the exemption through proper legislation. See id. at 276-77 (citing Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953)); see also, Flood v. Kuhn, 407 U.S. 258 (1972) (citing Toolson and Federal Baseball Club v. National League, 259 U.S. 200 (1922)).


\textsuperscript{62} Flood, 316 F. Supp. at 281.

\textsuperscript{63} Id.
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... [H]e had the right to retire and to embark upon a different enterprise outside organized baseball."\(^{64}\)

Other courts have looked at the issue of compulsion and the ability to escape in a less restrictive way. In *United States v. Mussry*,\(^{65}\) the Ninth Circuit Court of Appeals held that "[t]he opportunity to escape, and even successful escape, is not enough in and of itself to preclude a finding that a person was held in involuntary servitude."\(^{66}\) Under *Mussry* the crucial factor in determining the existence of an involuntary servitude is not whether the complainant has an opportunity for escape but "whether a person intends to and does coerce an individual into his service by subju-

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\(^{64}\) Id. The court of appeals, reviewing the lower court's decision, stated that "[i]nasmuch as plaintiff retains the option not to play baseball at all, his Thirteenth Amendment argument is foreclosed by this court's decision in *United States v. Shackney*, a decision which we adhere to as sound." *Flood v. Kuhn*, 443 F.2d 264, 268 (2d Cir. 1971) (citation omitted).

The Second Circuit's decision in *Flood* directly reversed the earlier decision of *American League Baseball Club v. Chase*, 149 N.Y.S. 6 (1914), which was later cited with approval by the Second Circuit in *Gardella v. Chandler*, 172 F.2d 402, 410 (2d Cir. 1949).

In *Chase*, the New York Supreme Court held that an injunction preventing a baseball player from playing for any team other than the one with whom he had previously been under contract was involuntary servitude. *See Chase*, 149 N.Y.S. at 14.

The *Chase* court viewed the player's ability to escape quite differently than did the *Flood* court. The *Chase* court did not accept the escape argument, reasoning instead that a player "has no recourse" because "[h]e must either take the contract . . . or resort to some other occupation." *Id.* at 13.

In refusing to uphold the injunction the court stated:

If a baseball player . . . desires to be employed at the work for which he is qualified and is entitled to earn his best compensation, he must submit to dominion over his personal freedom and the control of his services by sale, transfer, or exchange, without his consent, or abandon his vocation and seek employment at some other kind of labor. While the services of these baseball players are *ostensibly* secured by voluntary contracts a study of the system . . . reveals the involuntary character of the servitude which is imposed upon players . . . is so great as to make it necessary for the player either to take the contract prescribed . . . or abandon baseball as a profession and seek some other mode of earning a livelihood. There is no difference in principle between the system of servitude [created by the contract], which as has been shown, provides for the purchase, sale, barter, and exchange of the services of baseball players . . . without their consent, and the system of peonage brought into the United States . . . The quasi peonage of baseball players . . . is contrary to the spirit of American institutions, and is contrary to the spirit of the Constitution of the United States.

*Id.* at 19 (emphasis added).

65. 726 F.2d 1448 (9th Cir. 1984).

66. *Id.* at 1454.
gating the will of the other person."\textsuperscript{67}

III. THE PUBLIC SERVICE EXCEPTION TO THE THIRTEENTH AMENDMENT

In deciding cases raising the issue of involuntary servitude, courts have been willing to make an exception for those instances in which the involuntary servitude complained of can be classified as a "public need."\textsuperscript{68}

The Supreme Court first discussed the "public service" exception to the Thirteenth Amendment in \textit{Robertson v. Baldwin}.\textsuperscript{69} \textit{Robertson} involved a number of seamen who had contracted to work for one year aboard a private vessel.\textsuperscript{70} The men abandoned ship and, pursuant to statute, were arrested and forced to return to work on the ship until they completed their contract.\textsuperscript{71} The Court reasoned that the statute under which the men were arrested and forced to complete their contract did not violate the Thirteenth Amendment's prohibition against involuntary servitude.\textsuperscript{72} The Court held that while the statute might fall within the letter of the Amendment, it was not "within its spirit, a case of involuntary servitude"\textsuperscript{73} because such service had existed prior to the ratification of the Thirteenth Amendment.\textsuperscript{74}

Justice Harlan, in dissent, recognized the flaw in the majority's

\textsuperscript{67} \textit{Id.} at 1453.
\textsuperscript{68} \textit{See} Kares, \textit{supra} note 21, at 393-94.
\textsuperscript{69} 165 U.S. 275 (1897).
\textsuperscript{70} \textit{See id.} at 275-76.
\textsuperscript{71} \textit{See id.}
\textsuperscript{72} \textit{See id.} at 287-88.
\textsuperscript{73} \textit{Id.} at 281. The Court first held that by entering into a contract for personal service, the seamen could not be considered to have entered into such service involuntarily. \textit{See id.} at 280-81.
\textsuperscript{74} The Court stated:

\begin{quote}
It is clear... that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards... To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.
\end{quote}

\textit{Id.} at 282. The Court went on to catalogue the immemorial history of compulsory maritime service, relying on such rules as the maritime law of the ancient Rhodians, the Rules of Oleron promulgated by Henry III, and the Marine Ordinance of Louis XIV. \textit{See id.} at 283-88.
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reasoning, stating, "It is a . . . serious matter when the clear reading of a constitutional provision relating to the liberty of man is departed from in deference to what is called usage which has existed, for the most part, under monarchical and despotic governments." While rejecting the majority's contention that the Thirteenth Amendment did not affect those services that had been treated as exceptional from time immemorial, Justice Harlan did, however, acknowledge a public service exception to the Thirteenth Amendment for military service.

Once the Robertson Court created a public service exception for those services that had existed from time immemorial, it was only a matter of time before subsequent courts found other immemorial public service exceptions to the Thirteenth Amendment.

The Court next recognized an exception to the Thirteenth Amendment for public service in Butler v. Perry. In Butler, the Court upheld a Florida statute requiring all able-bodied men between the ages of twenty-one and forty-five to work no less than sixty hours per year constructing roads and bridges throughout the state. The Court held that forced labor for the construction of roads was a public service, which had existed since Colonial times, and therefore was not within the prohibition of the Thirteenth Amendment.

75. Id. at 302 (Harlan, J., dissenting).
76. See id. at 282.
77. Justice Harlan stated:
The Army and Navy of the United States are engaged in the performance of public, not private, duties. Service in the army or navy of one's country according to the terms of enlistment never implies slavery or involuntary servitude. . . . Involuntary service rendered for the public . . . is not, in any legal sense, either slavery or involuntary servitude.
Id. at 298 (Harlan, J., dissenting).
78. See id. at 282.
79. 240 U.S. 328 (1916).
80. See id. at 329. It should be noted that the Florida statute allowed:
[P]ersons so subject to road duty. . . in lieu thereof may pay to the road overseer on or before the day he is called upon to render such service the sum of three dollars . . . the same to be placed to the credit of the road and bridge fund and subject to the order of the Board of County Commissioners for road and bridge purposes.
Id. at 329-30 (citing Chapter 6537, Laws of Florida (Acts of 1913, pp. 469, 474, 475)).
The Court could have viewed this provision of the statute as creating a tax for road construction that provided the option of allowing taxpayers to work instead of pay. Had the Court taken this approach, the Court would not have had to address the Thirteenth Amendment issue since the statute could have been upheld under the state's power to tax.
81. See id. at 331-33.
Shortly after Butler, the Court was presented with a number of cases involving the Thirteenth Amendment and compulsory military service. In the Selective Draft Law Cases, the Court, holding that compulsory military service was not a violation of the Thirteenth Amendment, stated:

As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. . . . [T]he authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion.

Further, the Court stated:

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

82. 245 U.S. 366 (1918). The Selective Draft Law Cases were a compilation of six cases, each challenging compulsive military service. See id. at 368.
83. See id. at 390.
84. Id. at 377-78. Congress derives its power to conscribe military service from Article I, Section 8 of the Constitution. Article I, Section 8 grants Congress the power to “raise and support Armies” and to “provide and maintain a Navy.” U.S. CONST. art. I, § 8. The Court reasoned that the Necessary and Proper Clause of Article I, which grants Congress the authority to “make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by [the] Constitution,” U.S. CONST. art. I, § 8, cl. 18, provided Congress the power to conscribe military service. Selective Draft Law Cases, 245 U.S. at 376-77.

The power of Congress to conscript manpower for military service has been upheld in numerous cases. See, e.g., United States v. Anderson, 467 F.2d 210 (9th Cir. 1972) (holding that a conscientious objector can be compelled to perform non-combat duties); Bertelsen v. Cooney, 213 F.2d 275 (5th Cir. 1954) (holding that doctors, dentists, and allied specialist categories may not be exempted from the draft on the grounds that the selection process is arbitrary or unnecessary); Heflin v. Sanford, 142 F.2d 798 (5th Cir. 1944) (holding that a conscientious objector can be compelled to perform non-combat duties).
the contention to that effect is refuted by its mere statement.\textsuperscript{85}

While this opinion does not mention a public service exception to the Thirteenth Amendment, in other draft cases courts have implied that such an exception exists. For example, in \textit{Heflin v. Sanford}\textsuperscript{86} the Fifth Circuit Court of Appeals noted that service in the military is work of national importance and that the Thirteenth Amendment "was never intended to limit the war powers of government or its right to exact by law public service from all to meet the public need."\textsuperscript{87}

Acceptance of the public service argument grew as several courts were quick to find many other activities included within the scope of the exception. Since \textit{Butler}, courts have held that under a public service exception, it is not a violation of the Thirteenth Amendment's prohibition on involuntary servitude to require a citizen to serve jury duty;\textsuperscript{88} to compel a witness to testify at a grand jury proceeding;\textsuperscript{89} or to require an attorney to represent a criminal defendant pro-bono.\textsuperscript{90} Of critical importance, however, is the fact that, as opposed to the public services in \textit{Robertson} and \textit{Butler}, each of these cases involves a public service that is specifically provided for in the language of the Constitution.\textsuperscript{91} Thus, it is clear that the text of the Thirteenth Amendment provides no public service exception. It is also quite certain that the Framers of the Thirteenth Amendment were aware of the government's powers to compel service under the various provisions of the Constitution and had the Framers so desired, they could have eliminated any or all such powers specifically. This concept is supported by the fact that the Amendment specifically makes an exception for

\begin{itemize}
  \item \textsuperscript{85} \textit{Selective Draft Law Cases}, 245 U.S. at 390.
  \item \textsuperscript{86} 142 F.2d 798 (5th Cir. 1944).
  \item \textsuperscript{87} \textit{Id.} at 800.
  \item \textsuperscript{88} \textit{See} Hurtado v. United States, 410 U.S. 578, 589 n.11 (1973).
  \item \textsuperscript{89} \textit{See} Blair v. United States, 250 U.S. 273, 281 (1919).
  \item \textsuperscript{90} \textit{See} Powell v. Alabama, 287 U.S. 45, 73 (1932); United States v. Dillon, 346 F.2d 633, 636 (9th Cir. 1965). \textit{But see} Lassiter v. Department of Social Serv., 452 U.S. 18 (1981). \textit{In Lassiter}, the Supreme Court held that compulsory representation only applies to criminal cases and that there is no power to compel representation in civil cases which do not involve potential prison confinement. \textit{See id.} at 25.
  \item \textsuperscript{91} The Sixth Amendment of the Constitution guarantees a person the right to "an impartial jury," "Assistance of Counsel," and a "compulsory process for obtaining witnesses." U.S. CONST. amend. VI. Similar to the argument for military conscription made by the Court in \textit{Selective Draft Law Cases}, 245 U.S. at 377, it would seem illogical for the Constitution to provide such guarantees while at the same time eliminating the means by which Congress or the courts may effectuate them.
\end{itemize}
“punishment for crime whereof the party shall have been duly convicted.” As the court in *Brooks v. Central Bank* reasoned:

[W]hat would be the point in excluding from the operation of those words the forced labor of a convicted criminal? Ex hypothesi, such forced labor would not be involuntary servitude anyway, so why make it an exception? It is a familiar rule of interpretation that language of exception implies that the thing excepted would otherwise be within the general language, or as expressed by Chief Justice Marshall in *Brown v. Maryland* [in 1827]:

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause, had the exception not been made, we know of no reason why this general rule should not be as applicable to the Constitution as to other instruments.

Thus, the fact that the Amendment’s Framers chose not to eliminate any of the previously recognized constitutional obligations is significant in that it clearly establishes that those obligations were intended to co-exist with the Thirteenth Amendment, rather than creating public service exceptions.

Allowing for public service exceptions that do not find support in the text of the Constitution opens a veritable Pandora’s box of other involuntary servitudes, like mandatory community service, which arguably fits under the exception. For example, courts have found that having students perform cafeteria duty provides a public service and is excepted from the Thirteenth Amendment’s protection because “cafeteria duty allows the State to reap a financial benefit, that is, the obviation of any necessity to hire, at great expense, professional employees.” Courts have similarly

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93. 29 Fair Empl. Prac. Cas. (BNA) 182 (N.D. Ala. June 14, 1982), overruled on other grounds by Brooks v. Central Bank, 717 F.2d 1340 (1983) (holding that the district court abused its discretion in addressing the constitutional issues sua sponte and not first attempting to resolve the issue on nonconstitutional grounds).
94. Id. at 184 (citation omitted).
95. In fact, even slavery was considered by some to be a public service, described as being “essential for [the slave’s] own good and for . . . the safety and security of the people . . . and their estates.” *Kenneth M. Stampp, The Peculiar Institution* 11 (1956).
held that being compelled to assist an officer in the course of the officer’s official duties is a public service for which an exception applies because “every citizen is bound to assist a public officer in making an arrest, when called upon to do so.” These public service exceptions to the Thirteenth Amendment demonstrate the truth of Justice Daniel’s pronouncement in Smith v. Turner: “Once let the barriers of the Constitution be removed, and the march of abuse will be onward and without bonds.”

IV. MANDATORY COMMUNITY SERVICE ON TRIAL: STEIRER, IMMEDIATO, AND HERNDON

Within the past five years, three separate lawsuits, Steirer v. Bethlehem Area School District, Immediato v. Rye Neck School District, and Herndon v. Chapel Hill-Carrboro City Board of Education, have questioned the constitutionality of mandatory community service. In each case the courts, for a variety of reasons, have held that a mandatory community service requirement does not violate the Thirteenth Amendment of the Constitution of the United States.

In ruling that mandatory community service is not involuntary servitude, the courts in Steirer, Immediato, and Herndon have relied on four principal arguments. The first argument is that the community service involved does not reach the level of offensive conduct against which the Thirteenth Amendment was meant to

97. Williams v. State, 490 S.W.2d 117, 121 (Ark. 1973). In Williams, the court was persuaded by the argument that the Arkansas statute requiring private citizens to assist police officers in the execution of their duties was constitutionally valid as a result of its having existed for a long period without question. See id. The court summarily rejected the argument that compelled assistance of a police officer was a violation of the Thirteenth Amendment, without ever examining the merits of the argument. See id. at 122. In the court’s opinion, “that the statute requires involuntary servitude... requires no discussion, except to say that surely the responsibilities of a citizen in this republic have not been so diminished and diluted that such a theory can be viewed as having any substance whatever.” Id.; cf. State v. Floyd, 584 A.2d 1157 (Conn. 1991) (upholding a similar statute on other grounds, never addressing the issue of involuntary servitude).

98. 48 U.S. (7 How.) 283 (1848).

99. Id. at 518.


103. See Immediato, 73 F.3d at 460; Steirer, 987 F.2d at 1000; Herndon, 899 F. Supp. at 1448-49; Immediato, 873 F. Supp. at 851; Steirer, 789 F. Supp. at 1345-46.
The second argument is that mandatory community service is not within the ambit of the Thirteenth Amendment's protection because the programs provide a public service. The third argument is that mandatory community service is not involuntary servitude because the program serves an educational purpose. Finally, proponents of mandatory community service argue that participation in a mandatory community service program is not involuntary servitude because the student's participation is voluntary; the student retains the right and ability to withdraw from the school thereby avoiding or escaping the servitude.

In the discussion which follows, it is clearly demonstrated that, with regard to mandatory community service, the arguments accepted by the courts either completely lack legal merit or misapply legal precedent.

A. Mandatory Community Service Is Not Involuntary Servitude Because It Is Not the Type of Conduct Against Which the Thirteenth Amendment was Meant to Protect

The courts in Steirer, Immediato, and Herndon primarily relied on the Kozminski definition of involuntary servitude in ruling that mandatory community service is not involuntary servitude. Their reliance on the Kozminski definition of involuntary servitude is, however, seriously misplaced. The Steirer, Immediato, and Herndon cases each sought injunctive relief against the respective school boards; no criminal statute was implicated. Reliance on a criminal standard in a civil case is improper in that it unnecessarily raises the standard by which the case will be decided.

105. See Steirer, 789 F. Supp. at 1345. This reasoning was not relied upon by the Third Circuit Court of Appeals. Steirer, 987 F.2d at 998.
106. See Steirer, 987 F.2d at 1000.
108. See Immediato, 73 F.3d at 459; Steirer, 987 F.2d at 998; Herndon, 899 F. Supp. at 1448; Immediato, 873 F. Supp. at 850; Steirer, 789 F. Supp. at 1342.
109. See Immediato, 73 F.3d at 454; Steirer, 987 F.2d at 989; Herndon, 899 F. Supp. at 1443; Immediato, 873 F. Supp. at 846; Steirer, 789 F. Supp. at 1338.
110. A major difference between a civil and a criminal case is the standard of proof required to determine the case. "In a civil case, the plaintiff . . . only has to show by 'a preponderance of the evidence' that the facts alleged are true. . . . In a criminal case, the prosecution has the much heavier burden of proving that the defendant is guilty 'beyond a reasonable doubt.'" THE COURT TV CRADLE-TO-GRAVE LEGAL SURVIVAL GUIDE 195 (Little, Brown and Co. 1995); see also SAMUEL W. MCCART, TRIAL BY JURY: A COMPLETE GUIDE TO THE JURY SYSTEM 48-49 (1964) (discussing burdens of proof).
It is true that mandatory community service is not the same as
that form of slavery practiced prior to the Civil War. However, a
mandatory community service program, in which a school board
dictates for whom the student will work and what wage the student
may earn, is very much like the "black codes" instituted subse-
quent to the emancipation of the slaves in an attempt to
"relegate[] blacks to a status somewhere between slave and free
[by] . . . restrict[ing] blacks’ occupations, ownership of property,
and access to the judicial system . . . [and] enable[ing] officials to
impose forced labor on ‘vagrants.’" Thus, with regard to manda-
tory community service "[i]t may be that it is the obnoxious thing
in its mildest and least repulsive form; but illegitimate and uncon-
stitutional practices get their first footing in that way, namely, by
silent approaches and slight deviations from legal modes of proce-
dure." Therefore, whether the court rationalizes that "[t]he
work required is not severe: students must perform only forty
hours of service in four years . . . [and] the nature of the work re-
quired and conditions under which it must be performed are
hardly onerous;" that "[t]he amount of service required, an aver-
age of 10 hours per year, and the flexible conditions under which
the service can be performed, do not appear ruthless;" or that
"[t]here is nothing . . . to indicate that the conditions under which
the students work are unreasonable or oppressive . . . [The stu-
dents] have a great deal of free time otherwise to do as they
wish," is irrelevant. It is the fact that performance is coerced
that violates the spirit of the Thirteenth Amendment.

111. See Immediato, 73 F.3d at 460 ("the mandatory community service program
is not, on the whole, ‘compulsory labor’ which ‘in practical operation’ produces
‘undesirable results’ analogous to slavery") (citation omitted); Steirer, 987 F.2d at
1000 ("There is no basis in fact or logic which would support analogizing a manda-
tory community service program in a public high school to slavery."); Herndon, 899
F. Supp. at 1449 ("The requirements of the Program are not ‘in any sense compara-
ble to the odious practice the Thirteenth Amendment was meant to eradicate.’ To
regard the Program, possessing none of the undesirable incidents of slavery, as vo-
lative of the Thirteenth Amendment would ‘trivialize the great purpose of that char-
ter of freedom.’") (citation omitted)).
112. KOLCHIN, supra note 3, at 209-10; see also BATTY & PARISH, supra note 15, at
205 (discussing the black codes).
114. Immediato, 73 F.3d at 460.
B. Mandatory Community Service Is Not Involuntary Servitude
Because It Provides A Public Service

Some courts have been willing to accept the argument that mandatory community service provides a public service and have used this reasoning to hold that mandatory community service is not a violation of the Thirteenth Amendment. The courts which have relied on the public service exception have relied on Bobilin v. Board of Education for their authority. In Bobilin, a public school required its students to wash dishes in the school’s cafeteria. Failure or refusal to wash dishes resulted in suspension or dismissal for one day. The district court first concluded that this requirement conferred a public benefit because having students wash dishes saved the state and its taxpayers the cost of hiring alternative labor. The court then compared the cafeteria duty to those servitudes that it catalogued as being public service exceptions to the Thirteenth Amendment and concluded:

Clearly a requirement of potentially no more than one day a month, or seven full days in one school year, a requirement which operates in reality to require a maximum of three hours per day, and which averages 60 to 90 minutes for most students, does not rise to the magnitude of involuntariness as dying unwillingly for one’s country, serving with little or no pay as a conscientious objector in a labor camp during wartime, or working on the highways without compensation.

Justifying a school’s forcing students to wash dishes because of the value of that service to the taxpayers, as the court did in Bobilin, demonstrates the truth of Justice Daniel’s proclamation. Acceptance of such attenuated logic to create an exception to a con-

117. Compare, e.g., Steirer, 789 F. Supp. at 1345 (accepting the reasoning that mandatory community service provides a public service because it saves the taxpayers money) with Steirer, 987 F.2d 998 (“Unlike the district court, we do not regard the reasoning of Bobilin as ‘persuasive,’ because we are unprepared . . . to accept the proposition that the Thirteenth Amendment is inapplicable merely because the mandatory service requirement provides a public benefit by saving the taxpayers money.” (citation omitted)).
120. See Bobilin, 403 F. Supp. at 1097.
121. See id.
122. See id. at 1104.
123. Id. at 1105.
124. See supra note 99 and accompanying text.
institutional amendment is a prime example of unrestrained judicial abuse of the Constitution.

**C. Mandatory Community Service Is Not Involuntary Servitude Because It Serves an Educational Purpose**

Throughout the nation's history the Supreme Court has generally allowed local school boards "broad discretion in the management of school affairs," and has refused to "intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Nevertheless, the Court has been firm in recognizing that there remain "certain constitutional limits upon the power of the State to control . . . the curriculum and classroom." For example, in *Meyer v. Nebraska,* the Court held unconstitutional a state statute that prohibited the teaching of languages other than English. In *Epperson v. Arkansas,* the Court held unconstitutional a statute that prohibited teaching of evolution theory.

Similarly, while the Court has acknowledged the "comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools," the Court has not hesitated to protect constitutional freedoms that are "nowhere more vital than in the community of American schools," adhering to the principal that "[n]either students [n]or teachers shed their constitutional rights . . . at the schoolhouse gate." As the Court has reasoned, the mere fact that schools "educat[e] the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strang[e] the

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125. Board of Educ. v. Pico, 457 U.S. 853, 863 (1982) (plurality opinion); see also, Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (holding that there are some aspects of education, whether public or private, that the state unquestionably may regulate).
128. 262 U.S. 390 (1923).
129. See id. at 390-91.
130. 393 U.S. 97 (1968). In *Epperson,* the Court had no doubt that banning the teaching of evolution theory was meant to promote biblical theories of Creationism in contravention to "the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution." *Id.* at 109.
133. Tinker, 393 U.S. at 506.
free mind at its source and teach youth to discount important principles of our government as mere platitudes."\textsuperscript{134} As a result, the Court has held it unconstitutional to prohibit students from wearing black armbands to protest a war;\textsuperscript{135} to deny a church group equal access to school premises;\textsuperscript{136} to allow a school to require participation in invocation and benediction prayers as part of a graduation ceremony;\textsuperscript{137} and, to require students to salute the American flag.\textsuperscript{138}

Also at issue is whether mandatory community service involves activities that are within the school’s power to control. As the Court stated in \textit{Board of Education, Island Trees Union Free School District v. Pico}, “[a school] might well defend [its] claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values. But... reliance on that duty is misplaced where... [it] attempt[s] to extend [its] claim of absolute discretion beyond the compulsory environment of the classroom.”\textsuperscript{139} Attempting, in a mandatory service program, to dictate a student’s employer and working conditions outside the schoolhouse gate is clearly beyond the authority of the school board.

Finally, mandatory community service is justified as being educational because the programs:

- help students learn about the significance of rendering service to their community;
- teach students about community organizations;
- teach students that their concerns about people and events in the community can have positive effects;
- [allow students to] develop intellectual development and academic learning in such areas as the expression of ideas, reading and record-keeping;
- promote higher-level thinking skills such as open-mindedness;

\textsuperscript{134} West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
\textsuperscript{135} See \textit{Tinker}, 393 U.S. at 503.
\textsuperscript{136} See Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that denial of equal access to school facilities to a church group for the showing of religion oriented films was speech discrimination in violation of the First Amendment).
\textsuperscript{138} See Barnette, 319 U.S. at 624.
\textsuperscript{139} \textit{Pico}, 457 U.S. at 869 (plurality opinion) (holding that a school’s removal of books from the school library was a violation of the First Amendment because student use of the library was not a curriculum related activity).
enhance the skills of learning from experience; [and]
[allow] students [to] learn about and be exposed to service-related skills.¹⁴⁰

Proponents claim that because mandatory community service provides such educational benefits it cannot be involuntary servitude.¹⁴¹ Assuming arguendo that mandatory community service is educational but is involuntary servitude in violation of the Thirteenth Amendment, there is simply no basis for a court to hold that mandatory community service is excepted from that Amendment’s prohibition because of its educational benefits.

D. Mandatory Community Service Is Not Involuntary Servitude Because the Student Has the Right to Attend a Private School or Take the GED¹⁴²

Proponents of mandatory community service argue that mandatory community service is not involuntary servitude because attendance at a school with a mandatory community service program is voluntary. They argue that a student retains the option to attend a private institution, engage in home schooling, or take the GED.¹⁴³ These options, however, are unrealistic. First, when one considers that for the 1993-94 school year, the average cost of a private high school education ranged from a low of $4,266 per student, per year for a Catholic school offering both elementary and secondary education, to a high of $9,525 per student, per year for a

¹⁴¹ See Dennis D. Hirsch, No: Public Service Programs are Nothing Like Slavery, A.B.A. J., Mar. 1996, at 51, 51 (stating that the Thirteenth Amendment is trivialized when applied to such a beneficial educational program). Such statements are overly simplistic and completely devoid of legal reasoning. If educational benefit were the sole criterion for finding a program or institution outside the protection of the Thirteenth Amendment, slave plantations, which some considered “the best schools yet invented for the mass training of that sort of inert and backward people,” STAMPP, supra note 95 at 11, would similarly fall outside the protection of the Thirteenth Amendment.
¹⁴² See Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 460 (2d Cir. 1996); Steirer, 789 F. Supp. at 1344. “The GED exam is the General Education Development exam taken by nonmatriculated secondary students or adults who hope to earn a high enough score on the exam to be awarded a high school diploma by the state department of education.” BORG HENDRICKSON, HOME SCHOOL: TAKING THE FIRST STEP 30 (1989).
non-sectarian school offering secondary education only,\textsuperscript{144} it becomes clear that the cost of private school may be so high as to effectively foreclose this option to many families.

Second, should the student decide to forgo high school altogether and engage in home schooling or obtain a GED, other difficulties may arise. The quality of the student’s education may be called into question by college admission boards or the student may be saddled with the stigma of being a dropout.\textsuperscript{145} Either reaction to the GED may result in serious economic difficulties for the student.

Finally, as the Court has utilized the “doctrine of unconstitutional conditions” to prohibit a state from conditioning the receipt of a state benefit upon a waiver of a constitutional right,\textsuperscript{146} so should the Court prohibit receipt of the benefit of a public education\textsuperscript{147} on a waiver of a student’s Thirteenth Amendment rights. As Justice Sutherland explained in \emph{Frost v. Railroad Commission}.\textsuperscript{148}

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same


\textsuperscript{145} See Hendrickson, supra note 145, at 31 (“[S]ome employers will hesitate to hire a GED graduate, because the employer may suspect that the graduate was a high school dropout, and ‘dropout’ has uncomplimentary associations for many employers.”).

\textsuperscript{146} See Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994). In \emph{Dolan} the Court held that a city may not condition the receipt of a building permit upon the waiver of a person's right to just compensation as guaranteed under the Takings Clause of the Fifth Amendment absent a showing of an essential nexus between the benefit of receiving the building permit and the condition exacted by the city. \textit{See id.} at 2316-17. Chief Justice Rehnquist, writing for the majority, stated: “Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right ... for a discretionary benefit.” \textit{Id.} at 2317. The doctrine also has its critics. In \emph{Dolan}, Justice Stevens explained: “Although it has a long history, the ‘unconstitutional conditions’ doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question.” \textit{Id.} at 2328 n.12.

\textsuperscript{147} See Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (stating that education, “where the state has undertaken to provide it, \textit{is a right.}”) (emphasis added); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 304 (1978) (stating that admission to a state medical school is a state-provided benefit).

\textsuperscript{148} 271 U.S. 583 (1926).
result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.\[149\]

V. DECIDING MANDATORY SERVICE CASES IN THE FUTURE

A. Involuntary Servitude Means More Than Work Compelled by Law or Force

Limiting a finding of involuntary servitude in civil cases to those instances "in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process,"\[150\] deprives the Thirteenth Amendment of its full force and effect.

That argument [that involuntary servitude exists when there is "compulsory labor" which, "in practical operation" produces "undesirable results" analogous to slavery\[151\]] may be good advocacy, since it builds on our natural tendency to view the Thirteenth Amendment in terms of the historical context in which it was enacted, but it is most assuredly not good law. The argument . . . is directly contrary to the settled principle that the Thirteenth Amendment's prohibition against involuntary servitude reaches every situation in which "a worker must labor

\[149\] Id. at 593-94.
against his will for the benefit of another.” As the Ninth Circuit acknowledged in United States v. Mussry, "the methods of subjugating people's wills have changed from blatant slavery to more subtle, if equally effective, forms of coercion." After examining Steirer, Immediato, and Herndon, it is painfully clear that a broader definition of involuntary servitude is needed so that "civil cases [may] enjoy a more realistic assessment of the coercive measures actually used ... to impose involuntary servitude."

B. A New Definition of Involuntary Servitude?

The task of creating a broader definition of "involuntary servitude" is "not an easy definitional question and it is one on which reasonable minds and federal circuits might differ." For example, in Kozminski, four different constructions for the meaning of involuntary servitude were offered, each focusing on a different aspect of the issue. The Government argued for a broad construction of involuntary servitude, focusing their inquiry on whether the victim is left with "no tolerable alternative but to serve the defendant or [is] depriv[ed] ... of the power of choice." Justice Stevens, in his concurring opinion, believed that a finding of involuntary servitude should be determined "in the common-law tradition of case-by-case adjudication." The jury, according to Justice Stevens, upon consideration of the "totality of the circumstances," should focus on "whether the victims' servitude was 'involuntary.'" Justices Brennan and Marshall believed that the focus should be on whether the coercion results in "slavelike" conditions. Justice Brennan explained that "[w]hile no one factor is dispositive, complete domination over all aspects of the victim's life, oppressive working and living conditions, and lack of pay or personal freedom are the hallmarks of [a] slavelike condi-
Finally, Justice O'Connor, writing for the majority, focused on the actions of the accused, explaining that an involuntary servitude "encompasses those cases in which the defendant holds the victim in servitude." Thus, as Kozminski demonstrates, the legislative task of "attempting to formulate an all-encompassing definition of the term 'involuntary servitude' . . . is not an easy one."

After researching numerous involuntary servitude cases and taking into consideration various approaches to redefining involuntary servitude, as suggested by the Justices in Kozminski, and various scholarly articles, it appears that attempting to create a single, all-encompassing, exact definition of "involuntary servitude" to be used in all cases is a Sisyphean task. This is so primarily because of the great variety of meanings and interpretations available for "involuntary" and "servitude." Stated another way, [t]he problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers

161. Id. at 963 (Brennan, J., concurring).
162. Id. at 952.
163. Id. at 965 (Stevens, J., concurring).
165. According to Greek mythology, Sisyphus [was a] King of Corinth, [who] saw a magnificent eagle bearing a fair maiden to an island. The fair maiden was the stolen Aegina, beautiful daughter of the river god Asopus, and the magnificent eagle was Zeus in disguise. Sisyphus immediately told Asopus what he had seen, but by doing so, he unfortunately incurred the wrath of Zeus. Zeus condemned Sisyphus to roll a large rock up a hill, whereupon the rock would roll down the other side of the hill, forcing Sisyphus to roll the rock back up the hill again, an endless task repeated in perpetuity.

The myth of Sisyphus has become a metaphor in modern times for utter futility . . . .

from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of individual thought to which is imparted the definiteness a single authorship can give.166

Therefore, rather than attempt the impossible, this Comment recommends that a broader meaning of involuntary servitude be developed through case-by-case adjudication as suggested by Justice Stevens in *Kozminski.*167 In applying the case-by-case method, courts should consider the following factors.

1. The focus should be on the conduct of the wrongdoer

Because “[t]he essence of a holding in involuntary servitude is the exercise of control by one individual over another so that the latter is coerced into laboring for the former,”168 it is the conduct of the individual attempting to exercise control, which should be the subject of concern.

Focusing on whether the victim had alternatives or whether the victim’s conduct was voluntary should be of no consequence. As Justice Brennan pointed out in *Kozminski*:

In some minimalist sense the laborer always has a choice no matter what the threat: the laborer can choose to work, or take a beating; work, or go to jail. We can all agree that these choices are so illegitimate that any decision to work is “involuntary.” ... [O]ur task is not to resolve the philosophical meaning of free will, but to determine what coercion Congress would have regarded as sufficient to deem any resulting labor “involuntary.” ... 169

Therefore, in a case like *Flood v. Kuhn,*170 it should be of no importance that Curtis Flood could “retire and... embark upon a different enterprise outside organized baseball.”171

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2. The conduct to be prohibited is the use of threats to coerce labor.

"A holding in involuntary servitude occurs when an individual coerces another into his service." Coercion is the act of "compelling by force or arms or threat." [The effect of [a] threat is that the recipient of [the] threat is much less inclined to act as she would have absent the threat—generally out of fear. Fear is the calculation of expected harm and the decision to avoid it. Reasonably prudent individuals will not, without a sufficiently expected possibility of gain, risk harm. The first thing wrong with... threats then is that, for the reasonable person, it ... takes a very good reason to resist the threat, whereas no such strength of reasoning was required before ... .]

The type of harm threatened can vary. Besides threats of physical or legal harm, the courts have, in other circumstances, recognized the coercive effect of a threat of economic harm. However, the harm threatened need not be "improper or wrongful" as suggested by the Ninth Circuit Court of Appeals in United States v. Mussry. Rather, the focus should be on the use of the threat to compel labor. To illustrate, consider Boblin v. Board of Education, in which the threatened harm was suspension from school for failure to perform cafeteria duty. A school has, within its disciplinary power, the right to suspend a student from school. However, when this non-wrongful action is used to compel a student to perform uncompensated labor, it should be prohibited. "The crucial factor [should be] whether a person intends to and does coerce an individual into his service by subjugating the will of the other person," not whether the threatened harm was or was not harmful.

172. Mussry, 726 F.2d at 1453.
175. See, e.g., Karabian v. Columbia Univ., 14 F.3d 773 (2d Cir. 1994) (holding that threatened economic loss is sufficiently coercive conduct to establish a prima facie case of sexual harassment under Title VII).
176. Mussry, 726 F.2d at 1453.
178. See id. at 1097.
179. Mussry, 726 F.2d at 1453.
3. There are no exceptions to the Thirteenth Amendment

The language of the Thirteenth Amendment stating that "[n]either slavery nor involuntary servitude . . . shall exist within the United States," is unconditional. It provides for no public service, educational, or other exception. "A judge must not re-write a statute, neither to enlarge not to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation." 81

The plain intent [of the Thirteenth Amendment] was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit. 182

When deciding cases, "the purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact . . . ." 183

VI. CONCLUSION

Whether slavery was considered a "'necessary evil'" 184 or a "'positive good'" 185 in the past, it is clear that today slavery and involuntary servitude in the United States, in all forms, are no longer to be tolerated.

This Comment should not be interpreted as arguing against voluntary community service; nor should this Comment be read to say that the goals of mandatory community service are not worthwhile. There may be value in teaching students practical skills and

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181. Frankfurter, supra note 166, at 533.
183. Frankfurter, supra note 166, at 539.
185. Id. See also James Oakes, THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS 5 (1982) (explaining that some anti-abolitionist southerners argued that slavery was "good for the slaves"). Pro-slavery advocates attempted to justify the existence of slavery on a number of grounds, including such arguments as: slavery was a positive good providing food, shelter, and rescuing slaves from the "savage ways" of their homeland, see DELIA RAY, A NATION TORN: THE STORY OF HOW THE CIVIL WAR BEGAN 33 (1990); STAMPP, supra note 95, at 11; slavery was constitutional, see William Ingersoll Bowditch, THE U.S. CONSTITUTION SUPPORTS SLAVERY, IN SLAVERY: OPPOSING VIEWPOINTS 213 (William Dudley, ed. 1992); and that slavery was sanctioned by the Bible, see BATTY & PARRISH, supra note 15, at 21.
allowing them to gain “real life” work experience. These goals, however, can and must be achieved without violating the tenets of the Constitution. No matter how laudable the ends to be accomplished, they cannot be accomplished through illegal means.186

What this Comment argues is that mandatory community service, a system by which a school forces its students to perform uncompensated labor for approved groups—hallmarks of “slavelike conditions”187—by threatening to withhold a student’s diploma, is obnoxious and repulsive to the spirit of the Thirteenth Amendment and its prohibition against involuntary servitude. A court, giving full recognition to the Thirteenth Amendment’s protections, must hold that mandatory community service is involuntary servitude and thus that mandatory community service is illegal.

Bradley H. Kreshek*

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186. Presumably, a school may fashion a program that does not run afoul of the Thirteenth Amendment.

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