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Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine

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NOTES

THE UNLUCKY THIRTEENTH: A CONSTITUTIONAL AMENDMENT IN SEARCH OF A DOCTRINE

INTRODUCTION

In 1992 two Pennsylvania high school students unsuccessfully sued their school district to contest a new high school curriculum requiring them to perform community service in order to graduate.[1] The students in *Steirer v. Bethlehem Area School District* claimed that this program violated the Thirteenth Amendment of the United States Constitution, which prohibits slavery and involuntary servitude.[2] The trial court used a balancing test that focused on the "servitude" involved.[3] The Third Circuit Court of Appeals, by contrast, used a standard of relief pioneered in criminal cases to find that the service was not "involuntary."[4] This Note discusses several cases that, like *Steirer*, fumble for an appropriate standard to consider Thirteenth Amendment-based civil rights claims. These cases show that *Steirer* is not anomalous; in fact, the Thirteenth Amendment is notable for its lack of a coherent jurisprudence.[5]

The absence of a uniform standard for finding involuntary servitude renders the rights of recourse available under the Thirteenth Amendment unpredictable and largely useless. This Note considers how Thirteenth Amendment jurisprudence could evolve to become a more meaningful source of individual rights. The Note begins with a description of the structure and content of the Thirteenth Amendment as interpreted by the courts. Next, the Note introduces the rights of recourse, both civil and criminal, that exist for an individual who asserts that her Thirteenth Amendment right to be free from involuntary servitude has been violated. The Note explains the stan-

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1 Steirer v. Bethlehem Area Sch. Dist., 789 F. Supp. 1337 (E.D. Pa.), *aff'd*, 987 F.2d 989 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 85 (1993). *See infra* notes 85-91, 120-25 and accompanying text.

2 The Thirteenth Amendment states, in its entirety:

> Section 1. 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.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

3 789 F. Supp. at 1345.

4 987 F.2d at 998-1000.

5 The *Steirer* Circuit Court opinion purports to follow the "general spirit" of the Thirteenth Amendment rather than attempting to define its reach. 987 F.2d at 998 (quoting United States v. Kozminski, 487 U.S. 931, 942 (1988)).

dards used by courts to find and remedy impositions of involuntary servitude. The cases that apply these standards reveal a confused doctrine sorely in need of a unifying vision.

This Note argues that a balancing test like the one used by the *Steirer* trial court is more useful and truer to the Thirteenth Amendment's vision of liberty than the criminal standard used by the appellate court. Consistent application of a balancing test would afford the Thirteenth Amendment a degree of elasticity and relevance that it now lacks. Finally, the Note proposes a new method for determining whether an individual's Thirteenth Amendment rights have been violated.

I
THE HISTORY AND PURPOSE OF THE THIRTEENTH AMENDMENT

A. The First Section: An Affirmative Declaration

The Thirteenth Amendment fulfilled the promise of the Emancipation Proclamation,[6] President Abraham Lincoln's Civil War order purporting to emancipate the slaves in the rebelling Confederate states.[7] Added to the Constitution in 1865, the Amendment borrowed

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[6] On January 1, 1863, after the Union's important victory at Antietam, President Abraham Lincoln issued a proclamation of emancipation for African-Americans held in slavery in Confederate states. Of course, since the states to which the Proclamation applied were in rebellion, the order carried no immediate effect. The Proclamation stated in pertinent part:

> That on the 1st day of January, A.D. 1863, all persons held as slaves within any State or designated part of a State the people whereof shall then be in rebellion against the United States shall be then, thenceforward, and forever free; and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.

President Abraham Lincoln, A Proclamation, *reprinted in* THE UNIVERSAL ALMANAC 42 (John W. Wright ed., 1989).

[7] The Thirteenth Amendment effectively altered the then-existing Constitution by shifting so much power to the federal government and by taking an explicit stand on the slavery issue. In fact, the original Constitution had prohibited Congress from legislating against the slave trade in an ambiguously worded provision: "The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. CONST. art. I, § 9, cl. 1.

The Thirteenth Amendment also overruled, along with the Fourteenth Amendment, the scandalous holding of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), which held that African-Americans were not citizens of the United States and therefore could not sue in federal court. *Dred Scott* saw blacks as "property" under the Constitution. As such, they could rightfully be held as slaves even in those states where slavery had been abolished by the Missouri Compromise of 1820. (The Missouri Compromise of 1820 was, as the name suggests, a legislative compromise allowing slavery in the new state of Missouri but forbidding it in the new state of Maine and in the outlying territories of the Louisiana

its wording from the Northwest Ordinance of 1787.[8] The first section of the Amendment states that "[n]either 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."[9] This announcement of the demise of slavery has been described as a "grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government,"[10] yet the complexity of Thirteenth Amendment doctrine belies this supposed simplicity.

The first section of the Thirteenth Amendment constitutionalizes the outcome of the Civil War by abolishing the southern institution of slavery, but it is unclear how the proscription of involuntary servitude in addition to "slavery" broadens the scope of the Amendment. By forbidding not only slavery but also factual situations that resemble slavery, the Framers expressed a view of personal liberty that extends beyond freedom from legal ownership by another person. The Framers intended the Amendment to reach conduct other than slaveholding as it existed before the Civil War. By including a term that requires judicial definition, the Framers gave the Amendment a prospective purpose beyond the commemoration of a military victory.

Purchase, of which Missouri had been a part. This Act perpetuated the balance between the slave states and the anti-slavery states. THE NEW AMERICAN DESK ENCYCLOPEDIA 778 (1984)). Thus, the Thirteenth Amendment dramatically changed, rather than supplemented, constitutional rights.

8 This ordinance prohibited slavery in the Northwest Territory, the area northwest of the Ohio River, later called the Indiana Territory:

> There shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: *provided*, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or services as aforesaid.

ORDINANCE OF 1787, AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO, art. VI, *reprinted in* ISAAC F. PATTERSON, THE CONSTITUTIONS OF OHIO 52 (1912).

Thomas Jefferson had used nearly identical words three years earlier, in a proposal made under the Articles of Confederation: "That after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crime whereof the party shall have been duly convicted to be personally guilty." COMMITTEE OF THE CONTINENTAL CONGRESS, A PLAN FOR THE GOVERNMENT OF THE REGIONS WEST OF THE APPALACHIAN MOUNTAINS, 24 JOURNALS OF THE CONTINENTAL CONGRESS 247 (1784), *quoted in* Howard D. Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 9 NAT'L B.J. 26, 48 (1951).

9 U.S. CONST. amend. XIII. Because the Amendment creates an exception when the party has been convicted of a crime, the doctrines discussed herein do not apply to prisoners. However, a growing body of case law explores the effect of the Thirteenth Amendment upon juvenile detention systems. Because youthful offenders usually are not "duly convicted," they may not be subject to involuntary servitude. *See* Donald C. Hancock, Comment, *The Thirteenth Amendment and the Juvenile Justice System*, 83 J. CRIM. L. & CRIMINOLOGY 614 (1992).

10 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1872).

However, nearly 130 years of judicial construction have failed to provide a uniform definition of involuntary servitude[11] and thus have failed to afford the Thirteenth Amendment a clear role in the shaping of civil rights law. Notwithstanding Justice Miller's statement in the *Slaughter-House Cases* that the Thirteenth Amendment could "hardly . . . admit of construction,"[12] that case was among many that have attempted to construe the term "involuntary servitude."[13]

One of the few common themes of Thirteenth Amendment jurisprudence is the overall restraint with which courts have defined the scope of the first section. One reason for this restraint is that the Thirteenth Amendment covers private conduct as well as state action.[14] Read literally, the Thirteenth Amendment touches any private action that results in personal slavery or involuntary servitude. To avoid taking the Thirteenth Amendment to its literal limits and allowing a tort action for anyone deprived of a Thirteenth Amendment right, courts have reduced the self-executing power of the Amendment's first section through limiting constructions.[15] At the same time, courts increasingly have deferred to Congress' power to enforce the Amendment through the enactment of legislation under the Amendment's second section.

B. The Second Section: A Blank Check to Congress

The second and final section of the Thirteenth Amendment states that "Congress shall have power to enforce this article by appro-

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11 *See* James H. Haag, Comment, *Involuntary Servitude: An Eighteenth-Century Concept in Search of a Twentieth-Century Definition*, 19 PAC. L.J. 873, 876-77 (1988).

12 83 U.S. at 69.

13 The *Slaughter-House Cases* considered a challenge to a Louisiana law that restricted the location and operation of slaughterhouses in the state, essentially creating a monopoly. *Id.* at 83 (Field, J., dissenting). The majority described the challengers' Thirteenth Amendment construction as "a microscopic search . . . to find in it a reference to servitudes, which may have been attached to property in certain localities." *Id.* at 69. Justice Field's dissent found the plaintiffs' Thirteenth Amendment argument more persuasive, though he would have decided the case under the Fourteenth Amendment. *Id.* at 93. Field stated that the restrictions placed upon butchers for the pursuit of their trade were onerous enough to call into mind involuntary servitude: "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." *Id.* at 90 (Field, J., dissenting). *See infra* part III for a discussion of the considerable case law on this issue.

14 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-13, at 333 (2d ed. 1988).

15 As developed *infra* part III, the primary devices used by courts to limit the scope of the Thirteenth Amendment consist of applying a criminal statutory definition of involuntary servitude and placing certain categories of conduct outside the Thirteenth Amendment's affirmative reach.

priate legislation."[16] In an early construction of the Amendment, the Supreme Court asserted:

> This amendment . . . is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit.[17]

The first section of the Amendment prohibits only conduct that falls within the narrow but nebulous territory of slavery or involuntary servitude. Under the aegis of the second section, however, Congress enforces the Thirteenth Amendment when it prohibits conduct or laws that subject individuals to the same type of degradation that slavery imposed.[18] These conditions are called the "badges of slavery," or sometimes "badges of servitude."[19] For example, soon after the Thir-

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16 U.S. CONST. amend. XIII. Congress' first statutory enactment of the Thirteenth Amendment's grant of liberty was the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. This Act was an immediate and important supplement to the Thirteenth Amendment. The constitutional amendment introduced only a vague ideal of liberty; the Civil Rights enactments made this ideal concrete by specifying the rights and privileges that Congress saw as essential to freedom from slavery. "The common denominator, settled in men's minds by thirty years of abolitionist proselytization . . . , was thus the concept of the equal protection of the laws for men's civil, i.e., natural, rights." Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CAL. L. REV. 171, 185 (1951). The Fourteenth Amendment reinforced the congressional mission by providing added support for this expansive view of the attributes of freedom. *Id.* at 201-02.

17 The Civil Rights Cases, 109 U.S. 3, 20 (1883).

18 Constitutional scholar Laurence Tribe calls this a grant of "affirmative authority" to Congress. TRIBE, *supra* note 14, § 5-2, at 300.

19 The phrase "badges of slavery/servitude" entered into Thirteenth Amendment doctrine during the congressional debates over passage of the Amendment. According to Senator Trumbull, one of the Amendment's framers, "any statute which is not equal to all, and which deprives any citizen of civil rights, which are secured to other citizens, is an unjust encroachment upon his liberty; and it is in fact a *badge of servitude* which by the Constitution is prohibited." CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866), *quoted in* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 92 (1872) (Field, J., dissenting) (emphasis added).

Use of the phrase "badge of slavery" in other contexts predates the Thirteenth Amendment. It can be found, for instance, in the defendant's brief to the Supreme Court in Williams v. Ash, 42 U.S. 1 (1843), an 1843 case declaring a former slave free pursuant to the testamentary instrument of his former owner. The defendant, who had imprisoned the former slave, stated that "[c]olour, in a slaveholding state is a badge of slavery." *Id.* at 5 (Mr. Bradley, for the defendant). In this sense, "badges" of slavery are equated with physical "indicia," rather than conditions of life.

Senator Trumbull's take on badges of slavery appeared in a Supreme Court opinion considering the Thirteenth Amendment-based Civil Rights Act of 1866. Blyew v. United States, 80 U.S. (13 Wall.) 581 (1871). In this case, the Supreme Court denied federal jurisdiction over a white defendant whose murder of several African-Americans was witnessed only by African-Americans and whose trial in state court would be subject to a Kentucky law forbidding African-Americans from giving courtroom testimony. The issue in the case was whether Kentucky's evidence rule violated the Civil Rights Act. If it did, then a

teenth Amendment was passed, several southern states enacted the Black Codes, which prevented blacks from enjoying the same privileges as whites, such as owning property or suing in courts of law. Congress designated these laws "badges of slavery."[20] Current examples of congressionally-defined badges of slavery include discrimination in the making or enforcement of contracts[21] and in the sale or lease of housing.[22]

In the years following ratification of the Thirteenth Amendment, the Supreme Court narrowly construed Congress' power under the second section by using a restrictive definition of the badges of slavery. In 1883, the *Civil Rights Cases*[23] struck down federal legislation purporting to create a claim for money damages on behalf of anyone denied equal access to "accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement."[24] The Supreme Court stated that actionable conduct under the Amendment included only "the *inseparable incidents* of the institution"[25] of slavery, such as "[c]ompulsory service of the slave for the benefit of the master, restraint of his move-

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federal court could try the case. The Supreme Court majority balked at creating a federal forum for criminal prosecutions it said were best left to the states. A dissenting Justice Bradley argued for federal jurisdiction. In Bradley's opinion, defining conduct as a badge of slavery was the first step in an expansive statutory construction. Since denial of federal jurisdiction in such a case severely affected the civil liberty of African-Americans, Justice Bradley observed that "[t]o deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a *badge of slavery*; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law." *Id.* at 599 (Bradley, J., dissenting) (emphasis added). Justice Bradley went on to say that the majority's rule "gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case. . . . [The majority takes] a view of the law too narrow, too technical, and too forgetful of the liberal objects it had in view." *Id.* The badge of slavery here was the denial of justice in the state courts.

20 These laws were a primary target of federal civil rights legislation passed under the Thirteenth Amendment's second section. The congressional debates over passage of the Civil Rights Act of 1866 included the following description of the Black Codes:

> Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the [Thirteenth] amendment.

General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 387 (1982) (alteration in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866)).

21 *See* 42 U.S.C. § 1981 (1988).

22 *See* 42 U.S.C. § 1982 (1988).

23 109 U.S. 3 (1883).

24 Civil Rights Act of 1875, ch. 114, § 2, 18 Stat. 336.

25 109 U.S. at 22 (emphasis added).

ments . . . [and] disability to hold property."[26] The Court reserved for itself the task of delineating the incidents of slavery, and exclusion from recreational facilities did not qualify.[27]

The restrictive construction found in the *Civil Rights Cases* contrasts with the deference courts now pay to Congress' Thirteenth Amendment power. The 1968 case *Jones v. Alfred H. Mayer Co.*[28] established the modern trend when it applied a federal civil rights law passed under the Thirteenth Amendment[29] to a case of private discrimination in housing sales. In *Jones*, an African-American plaintiff sued a realty company that had refused to sell him a home solely because of his race.[30] The defendant challenged the constitutionality of the statute underlying the plaintiff's claim, but the Court found that the Thirteenth Amendment's second section could support federal legislation against private discrimination. Unlike the *Civil Rights Cases*, *Jones* credited Congress with authority to define broadly the incidents of slavery.[31]

C. Treatments of the First and Second Sections Compared

Constitutional scholar Laurence Tribe opined that "[i]f *Jones* is read literally, Congress possesses a power to protect individual rights under the Thirteenth Amendment which is as open-ended as its power to regulate interstate commerce."[32] Indeed, this seems to be the case. Courts now test federal laws passed pursuant to the Thirteenth Amendment's second section using a "minimum rationality standard"[33] like the one used in Commerce Clause cases. By contrast, courts have placed many restrictions on the use of the Amendment's

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26 *Id.*

27 *Id.* at 24. The Supreme Court later found segregation of private facilities reachable under Congress' power to regulate interstate commerce. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

28 392 U.S. 409 (1968).

29 *Jones* applied 42 U.S.C. § 1982. According to the Court, this Act originally was part of the Civil Rights Act of 1866. 392 U.S. at 422. The Civil Rights Act of 1866 was re-enacted as the Enforcement Act of 1870, two years after the ratification of the Fourteenth Amendment, which reaches state action but not private action. In order to find that § 1982 reached private conduct, the Court stated that although the Fourteenth Amendment supported the re-enactment of the Civil Rights Act in 1870, it did not replace the Thirteenth Amendment as sole authority for the Act. *Id.* at 436.

30 392 U.S. at 412.

31 *Id.* at 440.

32 TRIBE, *supra* note 14, § 5-13, at 332.

33 Rhode Island Chapter, Ass'd Gen. Contractors of Am. v. Kreps, 450 F. Supp. 338, 364-5 (D.R.I. 1978) (upholding a federal statute requiring 10% of state labor contracts to go to minority-owned businesses on the theory that discrimination in contracting is a vestige of slavery). *See also* Runyon v. McCrary, 427 U.S. 160, 179 (1976) (finding that Congress has power to prohibit discriminatory admissions policies at private schools, so that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." (quoting Jones v. Mayer, 392 U.S. 409, 443 (1968))).

self-executing first section. When individual litigants press constitutional claims based on the denial of Thirteenth Amendment rights, the courts do not ask if their experiences were "minimally related" to slavery.[34]

Under the enumerated powers interpretation, the first section prohibits a narrow range of conduct, while the second section lays open to congressional regulation a broad field of human rights and relations. If this is true, the two sections might as well be separate amendments. The flaw in the enumerated powers model is that the *Jones* Court agreed with Congress that private discrimination in housing sales falls within the Thirteenth Amendment's reach, saying "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."[35] If the Supreme Court in *Jones* agreed with Congress that the inability to purchase property is a clear incident of slavery, why did it not fall within the Amendment's self-executing power? A possible explanation for this is that the relationship between the first and second sections of the Amendment offers a flexible amount of judicially-defined "give," much like an elastic waistband, subject if necessary to judicial belt-tightening.

Another view of the dichotomy between the judicial restraint in constructing the Amendment's first section and the liberal grant of power found in the second section is that the Court has abdicated its role as interpreter of the Constitution. The Court will not define involuntary servitude but will allow Congress to do so when it enforces the proscription on involuntary servitude. By allowing Congress to determine the reach of the Amendment's proscription, then, the *Jones* rule allows Congress to define its own power. Under this view, Congress may define behavior as incident to slavery even when the Court would not, and then legislate against it.[36] In effect, the Amendment's

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34 *See infra* part II.

35 *Jones*, 392 U.S. at 442-43. In support of its sweeping view of the incidents of slavery, the *Jones* Court turned to the intent of the Thirteenth Amendment framers. Senator Trumbull of Illinois, identified in the opinion as a proponent of the Civil Rights Act of 1866, declared that "the trumpet of freedom that we have been blowing throughout the land has given an 'uncertain sound,' and the promised freedom is a delusion. Such was not the intention of Congress, which proposed the constitutional amendment, nor is such the fair meaning of the amendment itself." *Id.* at 440 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 322 (1864)). As the *Jones* Court put it, "[s]urely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440.

36 A similar anomaly arose in connection with the Fourteenth Amendment. This amendment has an enforcement provision similar in scope to § 2 of the Thirteenth. It provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Supreme Court upheld congressional legislation passed pursuant to § 5 with-

prohibitive force can be tapped or left dormant by Congress. Under this view, however, behavior that Congress targets under the second section should be considered to be facially prohibited by the first section, per congressional construction. It is not clear that the *Jones* Court thought this was so.

This Note takes issue with construction of the Thirteenth Amendment as merely an enumerated power rather than a source of individual freedoms. It is true that *Jones v. Alfred H. Mayer Co.* breathed life into Thirteenth Amendment doctrine by construing liberally Congress' power under the Thirteenth Amendment. The *Jones* decision paved the way for more expansive federal statutes to remedy private discrimination. However, *Jones*' use of congressional intent as the measure of the Thirteenth Amendment's scope delegated the determination of constitutional rights to the shifting political process. Moreover, *Jones* places so much emphasis on the role of the Amendment's second section in delegating power to Congress that it essentially deprives the first section of any affirmative power.

II

RIGHTS OF RECOURSE UNDER THE THIRTEENTH AMENDMENT

A. Private Causes of Action Under Civil Rights Statutes

Judicial deference to Congress' role as interpreter of the Thirteenth Amendment creates a considerable barrier to plaintiffs seeking to vindicate Thirteenth Amendment-based rights. Although federal legislation may create a cause of action against conduct that Congress perceives to be a badge of slavery,[37] plaintiffs cannot challenge actions that they believe are badges of slavery in the absence of specific congressional authorization.[38] In one case, a court rejected the argument

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out making an independent determination as to whether the conduct targeted by the statute (English literacy requirements imposed on voters by the states) actually violated the Fourteenth Amendment. The Court framed the issue: "Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?" *Id.* at 649.

Commentators remarked widely upon the Court's approach in *Morgan*. *See* Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil Rights Amendments*, 67 MINN. L. REV. 299, 308 (1982) (citing several other scholars who saw the Court as leaving constitutional interpretation in the hands of the legislature); Daniel J. Leffell, Note, *Congressional Power to Enforce Due Process Rights*, 80 COLUM. L. REV. 1265, 1270 (1980) (explaining that, under *Morgan*, "Congress can independently apply tests formulated by the Court to invalidate practices that the Court itself might uphold").

The Supreme Court seems to have backed down somewhat from the expansive congressional power afforded by *Morgan*. Specifically, Oregon v. Mitchell, 400 U.S. 112 (1970), casts doubt on the continuing validity of *Morgan*. *See* Choper, *supra*, at 323-34.

37 *See, e.g.*, 42 U.S.C. §§ 1981-1982 (1988).

38 This Note addresses the barrier to litigation that arises when courts refuse to interpret "involuntary servitude" and instead leave construction of an affirmative constitutional

that a New York law requiring adoption records to be sealed imposed an incident of slavery.[39] The plaintiffs argued that, like slaves sold to strangers and separated from their families, adopted children stuffer harm by not knowing their biological parents' identities.[40] The court did not consider the validity of the plaintiffs' perception; instead, the court stated that it could not create new categories of badges of slavery at the urging of civil claimants.[41]

A plaintiff who claims that she was deprived of her right to be free from involuntary servitude may sue under one of two federal statutes that create causes of action based on the deprivation of constitutional rights. First, when the deprivation occurs "under color of state law,"[42] the plaintiff may sue under 42 U.S.C. § 1983.[43] Detailed discussion of

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right to the legislative branch. This Note forgoes consideration of some procedural barriers, such as sovereign immunity and the availability of implied rights of action. For a discussion of the former issue, see Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 817-25 (1993). For an example of the latter problem, see Turner v. Unification Church, 473 F. Supp. 367 (D.R.I. 1978), *aff'd*, 602 F.2d 458 (1st Cir. 1979) (refusing to recognize an implied cause of action under the Thirteenth Amendment and dismissing plaintiff's suit against the "Moonies").

39 Alma Soc'y Inc. v. Mellon, 601 F.2d 1225 (2d Cir. 1979).

40 *Id.* at 1237.

41 *Id. See also* City of Memphis v. Green, 451 U.S. 100 (1981) (declaring constitutional the closing of a street that connected a predominantly white neighborhood with a predominantly black one); Palmer v. Thompson, 403 U.S. 217, 227 (1971) (upholding against constitutional attack a town's decision to close its municipal pools rather than desegregate them. The Court left open the question of whether the Thirteenth Amendment's second section could reach this discriminatory action, saying only that the statute involved did not intend to cover such behavior.); NAACP v. Hunt, 891 F.2d 1555, 1564 (11th Cir. 1990) (finding that even if flying the Confederate flag above Alabama's capitol dome was a badge of slavery, plaintiffs could not challenge it without a statutory basis for their action); Atta v. Sun Co., 596 F. Supp. 103 (E.D. Pa. 1984) (finding no Thirteenth Amendment cause of action in employment discrimination case and pointing out the adequacy of the statutory remedy); Rogers v. American Airlines, 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding a workplace prohibition on "corn-rowed" hair, a style popular with African-Americans, and saying that the Thirteenth Amendment protects against discriminatory employment conditions only where the plaintiff is prohibited from leaving her job). Under the reasoning in *Jones*, Congress ostensibly could enact laws against the conduct involved in these cases.

42 The term "under color of state law" is treated as roughly equivalent to the state action requirement of the Fourteenth Amendment. *See* United States v. Price, 383 U.S. 787 (1966) (applying the "under color of law" provision of § 1983's criminal counterpart, 18 U.S.C. § 242 (1988)).

43 42 U.S.C. § 1983 (1988) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The doctrines of sovereign and qualified immunity limit the applicability of § 1983 in many cases. Detailed discussion of these topics lies outside the scope of this Note. Briefly stated, the sovereign immunity defense, rooted in the Eleventh Amendment, is not avail-

these issues lies outside the scope of this Note. Alternatively, section 1985(3) of the Ku Klux Klan Act[44] creates a cause of action against a private defendant who deprives another of the right to be free from involuntary servitude. Unfortunately for plaintiffs seeking redress under this statute, judicial unease over a comprehensive federal tort for dignitary wrongs has prompted an intimidating list of requirements.[45] The elements of a cause of action under § 1985(3) are not

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able in a state court action. Howlett v. Rose, 496 U.S. 356 (1990). In federal courts, where the Eleventh Amendment is effective, sovereign immunity protects the states themselves (who are not "persons" under the statute) from suit, but § 1983 actions still may be asserted against political subdivisions of the states. Moor v. County of Alameda, 411 U.S. 693, 717-21 (1973). State officials acting in their official capacities are protected by sovereign immunity, but when acting in their individual capacities may be sued. Hafer v. Melo, 502 U.S. 21 (1991). Sovereign immunity, however, does *not* prevent the imposition of prospective injunctive relief. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10 (1989). For a critique of the doctrine of sovereign immunity, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987). Qualified immunity does not bar suits altogether but does provide a defense for a government official who did not have reason to know that she was violating a constitutional or statutory right of the plaintiff. This common law doctrine is so liberally applied that, according to one writer, "[t]he only defendants remaining unimmunized are co-conspirators (who were never state actors) and counties and municipalities (which are hard to picture as persons)." A. Allise Burris, Note, *Qualifying Immunity in Section 1983 and Bivens Actions*, 71 TEX. L. REV. 123, 125-26 (1992).

44 42 U.S.C. § 1985 (1988). The Ku Klux Klan Act, 42 U.S.C. § 1985 (1988) is based on the Conspiracy Act of 1861, ch. 33, 12 Stat. 284, and the Civil Rights Act of 1971, ch. 22, § 2, 17 Stat. 13. *See* Janet A. Barbiere, Note, *Conspiracies to Obstruct Justice in the Federal Courts: Defining the Scope of Section 1985(2)*, 50 FORDHAM L. REV. 1210, 1240 n.59 (1982). The relevant provision, § 1985(3), states in pertinent part:

> If two or more persons in any State or Territory conspire, or go in disgnise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose or preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Because the Thirteenth Amendment reaches private action, plaintiffs can sue private entities under the Ku Klux Klan Act for deprivation of Thirteenth Amendment rights.

45 State law provides a remedy for the dignitary wrong of false imprisonment. According to the RESTATEMENT (SECOND) OF TORTS § 35 (1965):

> (1) An actor is subject to liability to another for false imprisonment if
> (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
> (b) his act directly or indirectly results in such a confinement of the other, and
> (c) the other is conscious of the confinement or is harmed by it.
> (2) An act which is not done with the intention stated in subsection (1)(a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasona-

set out in the statute itself but were defined by the Supreme Court in *Griffin v. Breckenridge*.[46]

In order to demonstrate a claim under § 1985(3), a plaintiff must show: (1) a conspiracy (2) for the purpose of depriving plaintiff of equal privileges and immunities, and (3) an act performed in furtherance of the object of the conspiracy, (4) which injured the plaintiff and/or deprived the plaintiff of a constitutional right.[47] The Supreme Court has analogized the second requirement to Fourteenth Amendment equal protection doctrine and therefore requires proof of a "racial, or perhaps otherwise class-based, invidiously discriminatory animus"[48] on the part of the defendant.

The requirement of a class-based animus most clearly links the right of action to its underlying constitutional justification. *Griffin* prevented § 1985(3) from upsetting the balance between the federal and state governments by applying a limiting construction.[49] Only when the defendant acts out of an arbitrary class prejudice of the sort the Constitution prohibits will federal courts provide a remedy.

Subsequent case law has further limited § 1985(3) by construing narrowly the class-based animus that will satisfy *Griffin*'s second requirement. In *Bray v. Alexandria Women's Health Clinic*,[50] plaintiff reproductive health clinics sought to prove that defendant protestors were motivated by a discriminatory animus towards women seeking

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ble risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

46 403 U.S. 88 (1971). The limitations this holding imposed on § 1985(3) attempted to restrict the creation of judicial torts from the fabric of the Constitution: "That the statute was meant to reach private action does not . . . mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." *Id.* at 101. It has been suggested that this rationale is ironic, if not disingenuous, and that the test is not entirely faithful to the wording of the statute itself. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 771 (1993) (Souter, J., concurring in part and dissenting in part).

47 403 U.S. 88, 102-03 (1971). Note that only actions based on deprivation of a Thirteenth Amendment right or the right of interstate travel may be brought against private defendants, as these are the only constitutional rights protected against private encroachment. *Id.* at 105. A § 1985 plaintiff must allege state action in order to enforce other constitutional rights, such as the First Amendment right to free speech.

48 *Id.* at 102. Countervailing against these stringent requirements is the stated judicial trend to "accord (to the civil rights statutes) a sweep as broad as (their) language." Richardson v. Miller, 446 F.2d 1247, 1249 (3rd Cir. 1971). As this Note demonstrates, it is difficult to see how courts have paid deference to this policy in their Thirteenth Amendment-based decisions.

49 The Court in *Griffin* stated that "[t]he constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, . . . [an] invidiously discriminatory motivation." *Id.* at 102. *But see* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 411-12 (1982) (Marshall, J., dissenting) (arguing that an intent requirement for § 1981 actions violates the legislative purpose of the Civil Rights Acts, which were enacted to remedy "not only flagrant, intentional discrimination, but also . . . more subtle forms of discrimination.").

50 113 S. Ct. 753 (1993).

abortions, or women in general.[51] The Court denied both these assertions, stating that pursuit of an activity opposed by the defendants cannot serve as the basis of class-designation.[52]

The effect of the limitations on § 1983, which applies only to state action, and § 1985(3), with its judicially-created elements, is that plaintiffs must overcome a variety of statutory hurdles to get into court with their Thirteenth Amendment claims.[53] This point becomes important when considered alongside the substantive hurdle confronted by litigants: the courts' narrow constructions of and broad expectations to the Thirteenth Amendment itself. This Note criticizes limiting interpretations of the Amendment when procedural devices exist to dismiss frivolous federal tort claims.

B. The Criminal Statutes

An analysis of the meaning of "involuntary servitude" in the civil context first requires discussion of the criminal statutes implementing the Thirteenth Amendment. The statutes codified at 18 U.S.C. §§ 1581-1588[54] criminalize the imposition of slavery or involuntary servitude as well as participation in the sale, seizure, or transport of slaves. Unlike § 1983 and the Ku Klux Klan Act, which offer rights of recourse for the general deprivation of constitutional rights, these criminal statutes explicitly refer to involuntary servitude.[55] Therefore, it is in the criminal cases that courts most frequently are forced to decide what the Framers meant by "involuntary servitude" as used in

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51 *Id.* at 759.

52 *Id.* The Scalia opinion borrows from equal protection doctrine the purpose/impact distinction in finding no class-based animus towards women in general. Even though women are the class affected by abortion opponents' actions, Scalia contended that an *effect* on a class will not satisfy the statute's *motivational* requirement. *Id.* at 761.

In his partial dissent, Justice Souter asserted that this limitation on § 1985(3) reached "the point of overkill." *Id.* at 772 (Souter, J., concurring in part and dissenting in part). Souter's reading of the relevant legislative history indicates that the statute was intended to reach discrimination based on such classifications as religious or political affiliation. Senator Edmunds opined that the statute could reach discrimination inflicted upon a plaintiff "because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter." Edmunds' statement refers to the Civil Rights Act of 1871, on which § 1985(3) is based. *Id.* at 773 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871)).

53 *Bray*'s effect can be seen in a recent case in which *Bray*'s fact pattern was reversed. In Amnesty Am. v. County of Allegheny, 822 F. Supp. 297 (W.D. Pa. 1993), plaintiffs, a group of anti-choice demonstrators, were arrested while blockading a clinic. The protestors unsuccessfully sued under § 1985(3) for involuntary servitude arising from their being forced away from the premises. The court dismissed the Thirteenth Amendment claims under § 1985(3), finding *Bray*'s definition of classes controlling. *Id.* at 300. The court also noted that the claims were without merit, *id.*, but the statutory requirements may fairly be said to perform a gatekeeping function.

54 18 U.S.C. §§ 1581-1588 (1969).

55 *But see* 18 U.S.C. § 241 (1988) (making it a crime for two or more persons to conspire to deprive another of a constitutionally-secured right).

the Thirteenth Amendment. Unlike courts hearing civil cases, which may invoke the strict requirements of the civil rights statutes to avoid reasoned elaboration of this crucial term, the criminal courts must look to the meaning of involuntary servitude to decide cases.

In addition to prohibiting involuntary servitude, the criminal statutes criminalize "peonage." Peonage is the compulsion of labor in payment of a debt.[56] Some courts have contended that the elimination of peonage was one of the goals of the Thirteenth Amendment,[57] and the Amendment has regularly been invoked in decisions condemning peonage.[58] In fact, peonage had been forbidden at common law by the time the Amendment was ratified.[59] The relevance of the Thirteenth Amendment to peonage cases, besides providing a convenient basis for congressional and judicial rulemaking power, is that it provides a standard by which to determine the voluntariness of labor performed pursuant to a debt.[60] This standard is potentially useful in fleshing out the meaning of involuntary servitude. The next section discusses the standard of voluntariness by which criminal courts have analyzed imposed servitudes.

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56 BLACK'S LAW DICTIONARY 1135 (6th ed. 1990). *See also* 42 U.S.C. § 1994 (1988) (declaring null and void all contracts effecting peonage).

57 Plessy v. Ferguson, 163 U.S. 537 (1896). This infamous case that sanctioned "separate but equal" accommodations for African-Americans counted among the Amendment's targets "Mexican peonage [and] the Chinese coolie trade." *Id.* at 542.

58 *See, e.g.*, Pollock v. Williams, 322 U.S. 4 (1944); Bailey v. Alabama, 219 U.S. 219 (1911); Clyatt v. United States, 197 U.S. 207 (1905).

59 Debtors' prisons were already a thing of the past when the Thirteenth Amendment was ratified, and specific performance was not allowed as a remedy for breach of a personal service contract. *See generally* American Broadcasting Co. v. Wolf, 420 N.E.2d 363, 366 (N.Y. 1981) (discussing courts' longstanding refusal to compel labor in fulfillment of a legal obligation).

60 The Thirteenth Amendment's mandate for "free and voluntary labor," *Pollock*, 322 U.S. at 17, supports the outcomes in cases striking down state laws imposing peonage. The distinction between peonage and voluntary labor in payment of a debt lies in the existence of a *choice*: "In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject, like any other contractor, to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service." *Clyatt*, 197 U.S. at 215-16.

One logically challenging aspect of the relationship between the Thirteenth Amendment and peonage doctrine is that the Amendment permits the compulsion of labor on the part of an individual who has been duly convicted of a crime. Thus, an early (and ironic) argument was that the Thirteenth Amendment could support the imposition of peonage. Under this argument, if a state criminalizes the failure to honor contracts, convictions under the applicable law would justify the imposition of mandatory performance as punishment. The Supreme Court has rejected this argument: "The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt." *Bailey*, 219 U.S. at 244. Under *Bailey*, state peonage statutes are unconstitutional under the Thirteenth Amendment. This case and the voluntariness rationale show that peonage and involuntary servitude may coincide on the continuum between slavery and valid employment.

III
JUDICIAL CONSTRUCTIONS OF INVOLUNTARY SERVITUDE

A. The Criminal Standard

Courts assessing criminal violations of the Thirteenth Amendment have shifted over time from examination of the conditions imposed to inquiry into the methods used to secure the services involved. A criminal case from 1947, *United States v. Ingalls*,[61] quoted several dictionary definitions of "slavery" and "servitude" before finding the defendant guilty of imposing involuntary servitude.[62] The court did not rely on the methods used by the defendant; the definitional approach depended upon the conditions imposed. Later cases found the central issue to be whether the service performed was voluntary, but disagreed over what forms of coercion were necessary to show that the defendant had deprived the victim of choice.[63] In 1988

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61 73 F. Supp. 76 (S.D. Cal. 1947). This case involved the criminal prosecution of a woman who held a 17-year-old girl in servitude. The girl, Dora Jones, was seduced, or perhaps raped, by the defendant Ingalls's husband, and the defendant pressured Jones into having an abortion. Over the next 25 years, Ingalls subjected Jones to increasingly abusive conditions, oppressive working hours, and, eventually, no pay. Jones was prevented from leaving Ingalls's employ by Ingalls's constant threat to turn Jones over to the authorities and to reveal Jones's participation in the adultery and abortion, both of which were illegal at the time. The district court convicted Ingalls under the then-current federal statute making it a crime to subject another to involuntary servitude. 18 U.S.C. § 443 (1940).

62 *Ingalls*, 73 F. Supp. at 79.

63 *See* United States v. Shackney, 333 F.2d 475 (2d Cir. 1964), which considered the criminal conviction of a chicken farmer who arranged for a Mexican family to immigrate to the United States to work on his farm. In a case that seems to have straddled the line between peonage and involuntary servitude, the defendant, Shackney, made Luis Oros sign promissory notes amounting to $1200 in order to cover Shackney's expenses in bringing the Oros family to Connecticut and providing their food and lodging. Shackney told Oros that he could arrange for the family's deportation if they sought to leave the farm. He claimed to possess the power and money to make sure the Oros's would never return to the United States.

Shackney was prosecuted under 18 U.S.C. § 1581(a) (making it a crime to subject an individual to peonage) and 18 U.S.C. § 1584 (1969) (making it a crime to place an individual in involuntary servitude). The district court convicted Shackney, but the circuit court reversed, finding that the methods used to retain the Oros family's services did not implicate the Thirteenth Amendment. The criminal context demanded a clear definition of what behavior could be punished. The court stated that whatever behavior might satisfy this demand, the threat of deportation as a means of coercing continued service did not. Such "psychological coercion" was too vague to form the basis of a criminal conviction. 333 F.2d at 486.

Compare United States v. Mussry, 726 F.2d 1448 (9th Cir. 1984), where defendants enticed Indonesian immigrants to come to the United States and work in exploitative situations. They were prosecuted under 18 U.S.C. § 1581 (1969) (criminalizing holding in peonage), § 1583 (1969) (criminalizing enticing into involuntary servitude), and § 1584 (1969) (criminalizing holding in involuntary servitude). The district court dismissed the case but the circuit court reversed and remanded, defining involuntariness as encompassing psychological coercion. 776 F.2d at 1453. The circuit court used an intent-based test, which asked whether the defendant intended to subjugate the will of the victim, and

the Supreme Court handed down a decision that set the standard for involuntary servitude in the criminal context.

United States v. Kozminski[64] involved a Michigan farm family that kept two unpaid laborers in involuntary servitude. The laborers, Robert Fulmer and Louis Molitaris, were both in their sixties, but were mentally and emotionally at the level of persons eight to ten years old. While on the defendants' farm, they received inadequate food, housing, clothing, and medical care and worked sixteen hour days, seven days a week. They were prevented from leaving the defendants' property, cut off from friends and relatives, and regularly beaten. The Supreme Court found that this treatment constituted involuntary servitude under the relevant federal criminal statutes.[65]

Justice O'Connor's majority opinion creates a bright-line rule that finds criminal involuntary servitude only when the victim is forced to work by a threat of either physical force or legal sanction.[66]

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whether a reasonable person in the victim's situation would believe that she or he had no choice but to do the defandant's bidding. *Id.* It was critical in this case that the victims spoke no English and that the defendants paid less than minimum wage. *Id.*

64 487 U.S. 931 (1988).

65 The Kozminskis were prosecuted under 18 U.S.C. §§ 241 and 1584 (1988). Section 241 makes it a crime to deprive an individual of his or her constitutional rights, while section 1584 directly implements the Thirteenth Amendment by making it a crime to subject another to involuntary servitude.

According to the reasoning in *Kozminski*, the requirements of the two statutes are the same. Section 241, by criminalizing a deprivation of constitutional rights, depends upon the interpretation of the constitutional provision involved, in this case the Thirteenth Amendment. 487 U.S. at 941. Section 1584, by using the language of the Thirteenth Amendment itself, relies for its application on the construction of the Amendment. *Id.* at 945.

18 U.S.C. § 241 (1988) states in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of 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;
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> . . .
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> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 1584 (1988) states:

> 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 not more than $5,000 or imprisoned not more than five years, or both.

66 487 U.S. at 952. The district court convicted the Kozminskis, citing their psychological coercion of the two men. *See id.* at 936-37 (describing lower court opinion). The court of appeals reversed, finding the test of psychological coercion too broad. Nonetheless, the Sixth Circuit focused on the victims' states of mind, finding that if they were "incapable of making a rational choice," their condition would amount to involuntary servitude. 821 F.2d 1186, 1212-13 (6th Cir. 1987). The Supreme Court, affirming the circuit court's reversal of the convictions but disagreeing with its test, focused on the defendants' actions.

The Court stated that "psychological coercion"[67] was not a criminal act under the statutes; such an interpretation "would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes."[68] Only physical or legal threats manifest the requisite criminal mindset under these statutes.

The most important rationale for *Kozminski*'s narrow meaning of involuntary servitude was the case's criminal context.[69] The Court noted that the Due Process Clause requires clear notice of what behavior will subject the actor to criminal liability.[70] "Case-by-case"[71] determination of criminal sanctions would not satisfy this constitutional notice requirement. Because the standards for criminal statutes must be constant, the Court reasoned that the term "involuntary servitude" must carry a fixed and predictable meaning when applied in criminal actions.

Kozminski did not purport to limit the reach of the Thirteenth Amendment itself. The opinion "draw[s] no conclusions . . . about the potential scope of the Thirteenth Amendment,"[72] in its interpreta-

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67 487 U.S. at 944. It is unclear exactly how the Court defines psychological coercion, especially in light of the fact that the majority standard takes into account the particular vulnerabilities of the victim. For example, the majority opinion hypothesizes that "a child who is told he can go home late at night in the dark through a strange area may be subject to physical coercion that results in his staying, although a competent adult plainly would not be." *Id.* at 948. The majority opinion goes on to say that threatening to deport an immigrant laborer could be considered a threat of legal action, "even though such a threat made to . . . [a citizen] would be too implausible to produce involuntary servitude." *Id.*

These hypotheticals blur the majority's supposedly bright line by expanding the definitions of "physical" and "legal." Furthermore, the hypotheticals look at the victim's, rather than the defendant's, mental state. By focusing on the mental state of someone other than the defendant, the majority ignored its own criminal context rationale. Finally, the idea that a threat may be too "implausible" to impose involuntary servitude introduces a clearly psychological element into the coercion involved, since the believability of a threat may be enhanced through mental and emotional manipulation. Justice Brennan's concurrence takes advantage of these inconsistencies. Of the "dark and strange neighborhood" hypothetical, Brennan wrote: "[L]abeling such coercion 'physical' is at best strained and . . . accomplishes little but the elimination of whatever certainty the 'physical or legal coercion' test would otherwise provide." *Id.* at 958 n.5 (Brennan, J., concurring).

68 *Id.* at 949.

69 *Kozminski* also cited several precedents in which the elements of physical coercion or threat of imprisonment were present. *Id.* at 943 (citing Pollock v. Williams, 322 U.S. 4 (1944); Taylor v. Georgia, 315 U.S. 25 (1942); United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911); Clyatt v. United States, 197 U.S. 207 (1905)). A case note written soon after the *Kozminski* opinion took exception with this use of precedent. Kenneth T. Koonce, Jr., Note, United States v. Kozminski: *On the Threshold of Involuntary Servitude*, 16 PEPP. L. REV. 689 (1989). The cases *Kozminski* cited were decided in the absence of an authoritative definition of the criminal standard; they explicitly awaited a Supreme Court decision defining the standard. Therefore, the Supreme Court's reliance on *their* decisions effects a rather ironic circularity. *Id.*

70 *Kozminski*, 487 U.S. at 949.

71 *Id.* at 951.

72 *Id.* at 944.

tion of the enforcing criminal statutes.[73] The Court never attempted to define involuntary servitude in its *constitutional* sense, though the opinion does reprint the often-quoted description of involuntary servitude as "labor akin to African slavery which in practical operation would tend to produce like undesirable results."[74] This description of the Amendment imputes to it no limitation on the possible methods of coercion. In fact, *Kozminski* explicitly granted to Congress the power to redraw the statutes according to a more expansive view of the Amendment's scope.[75]

Although the judgment of the Court was unanimous, the reasoning and bright-line rule espoused by the majority drew support from only five Justices.[76] Justice Brennan's concurrence takes issue with the majority's narrow reading of the criminal statutes,[77] pointing out that neither the Amendment nor the statute limited the methods by which involuntary servitude may be imposed. Brennan's opinion, joined by Justice Marshall, defines servitude with reference to the conditions imposed rather than the defendant's chosen strategy in imposing them: "Congress clearly intended to encompass coercion of any form that actually succeeds in reducing the victim to a condition of servitude resembling that in which slaves were held before the Civil War."[78] In other words, Brennan focused on the nature of the servitude rather than the form of coercion.[79]

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73 In its own words, the Court was compelled to interpret "the Amendment . . . through the narrow window that is appropriate in applying § 241." *Id.*

74 *Id.* at 942 (quoting Butler v. Perry, 240 U.S. 328, 333 (1916)).

75 [W]e have no indication that Congress thought that conditions maintained by means other than by the use or threatened use of physical or legal coercion were 'slavelike.' Whether other conditions are so intolerable that they, too, should be deemed to be involuntary is a value judgment that we think is best left for Congress.

Id. at 951.

76 Justices Rehnquist, White, Scalia, and Kennedy joined O'Connor's majority opinion; Marshall joined Brennan's concurrence; and Blackmun joined Stevens' concurrence.

77 Brennan concurred with the result reached by the Court because he agreed that the test used by the district court was too broad, but he did not agree with the test put forth by the majority. *Id.* at 953 (Brennan, J., concurring).

78 *Id.* at 962 (Brennan, J., concurring).

79 Yet another concurring opinion, filed by Justice Stevens and joined by Justice Blackmun, eschews the use of "hypothetical cases that are not before the Court." *Id.* at 967 (Stevens, J., concurring). The Stevens concurrence recommends a "totality of the circumstances" approach. *Id.* at 970 (Stevens, J., concurring). Stevens defended case-by-case analysis, since the majority's special attention to the circumstances of the victim would amount to this anyway. *Id.* at 968 n.1 (Stevens, J., concurring). Like Brennan, Stevens found the limitation of methods of coercion unjustified by either the statute or precedent. "The statute applies equally to 'physical or mental restraint,' . . . and I would not distinguish between the two kinds of compulsion." *Id.* at 969 (Stevens, J., concurring) (citing Chatwin v. United States, 326 U.S. 455 (1946)) (citation omitted).

B. The *Kozminski* Standard Applied in Civil Cases

Regardless of the tenuous support for the majority's rule and the unique nature of the criminal law requiring such a rule, lower federal courts frequently use the *Kozminski* standard in civil cases.[80] The use of the criminal standard in federal tort cases achieves the same effect as the stringent requirements for bringing civil rights actions under § 1985(3): it limits the availability of a constitutional tort. The apparent ease of application and recent vintage of the *Kozminski* rule make it an attractive tool for limiting litigation.[81]

Courts find the criminal standard especially attractive in cases involving employees challenging restrictions placed upon them by their employers.[82] Remember that in *Kozminski*, the defendants were found

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80 *See, e.g.*, Brogan v. San Mateo County, 901 F.2d 762 (9th Cir. 1990) (upholding a county vocational rehabilitation program against attack by a participant who alleged that the program's requirement of work in exchange for welfare eligibility violated the Thirteenth Amendment); Kaveney v. Miller, 1993 WL 298718 (E.D. Pa. 1993) (refusing to nullify an agreement whereby plaintiff performed labor for residential hotel in exchange for credit towards rent because plaintiff's agreement was voluntary under *Kozminski*).

81 Even before *Kozminski*, courts applied the criminal standard in civil cases. *See, e.g.*, Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971), *aff'd* 407 U.S. 258 (1972). In *Flood*, plaintiff baseball player who took issue with Major League Baseball's league-wide practice obligating draft picks to play for the first club to choose them (and, if necessary, to play for teams to which the player may be traded). The court cited a pre-*Kozminski* criminal case in reaching the conclusion that "inasmuch as plaintiff retains the option not to play baseball at all, his Thirteenth Amendment argument is foreclosed." 443 F.2d at 268 (citing United States v. Shackney, 333 F.2d 475 (2d Cir. 1964)). For a discussion of *Shackney*, *see supra* note 67.

82 *See, e.g.*, United States v. Martin, 710 F. Supp. 271 (C.D. Cal. 1989) (concluding that the Thirteenth Amendment did not invalidate defendant's contract with plaintiff National Health Service Corps, which loaned him tuition and living expenses for three years of medical school in exchange for his agreement to serve as a practitioner in an underserved region for three years after medical school; plaintiff had the option of invoking the contract's payback provision—allowing repayment of the loan at three times the original amount plus interest instead of serving); Apperson v. Ampad, 641 F. Supp. 747 (N.D. Ill. 1986) (upholding a restrictive covenant that prohibited the plaintiff from working in the paper goods supply business after leaving the defendant company, since plaintiff could choose to work in another business altogether); Audet v. Board of Regents, 606 F. Supp. 423 (D.R.I. 1985) (holding that plaintiff's transfer from his position as guidance counselor to position as science teacher in defendant school was not involuntary servitude, even though plaintiff attempted to revoke his certification as a science teacher prior to transfer; plaintiff could find work at another school if he wished to remain a guidance counselor); Keeler v. Consolidated Rail Corp., 582 F. Supp. 1546 (Special Court, Regional Rail Reorganization Act 1984) (noting that federal statute's pre-emption of collective bargaining agreement between rail workers' union and state regulatory committee did not subject workers to involuntary servitude by depriving them of established method of redressing hazardous conditions; alternate method of avoiding safety hazards existed, and plaintiffs were not compelled to stay in their jobs); Cummings v. Virginia Sch. of Cosmetology, 466 F. Supp. 780 (E.D. Va. 1979) (finding no involuntary servitude in the issuance of tuition credits by defendant school for plaintiffs' performing hairdressing services to those who agreed to have hair styled by students); Sellers v. Philip's Barber Shop, 217 A.2d 121 (N.J. 1966) (finding that court order requiring barber to cut hair of African-Americans did not subject him to involuntary servitude; plaintiff had the option of quitting the barber profession).

guilty because they deprived their workers of the fundamental option of leaving. Similarly, the general rule in the employment context is that "a claim under the Thirteenth Amendment cannot be sustained unless the plaintiff has *no option to work elsewhere.*"[83] When employees feel bound to their jobs because of social conditions such as poverty or a tight job market, courts will not hold employers liable for the "involuntariness" that employees perceive.[84] Employment cases focus on the level and types of control exerted by the employers over their employees.

Perhaps in an effort to draw a parallel between employment and education, the Third Circuit Court in *Steirer v. Bethlehem Area School District*[85] used *Kozminski*'s criminal standard in its analysis of the plaintiffs' claim. As discussed in the introduction of this Note, *Steirer* involved a suit by high school students Lisa Ann Steirer and David Moralis against their public high school. The students challenged the school district's mandatory community service program, which required each student to perform sixty hours of community service between the ninth and twelfth grades in order to graduate.[86] Both Steirer and Moralis believed that volunteerism should be truly voluntary and that the program impinged upon their right, guaranteed by the Thirteenth Amendment, to be free from involuntary servitude.[87]

Neither the district court nor the court of appeals agreed with the students' construction of the Thirteenth Amendment guarantee. The appellate opinion utilized *Kozminski*'s definition of involuntariness to determine that the community service was not "coerced."[88] Under this rule, "the critical factor . . . is that the victim's only choice is between performing the labor on the one hand and physical and/or legal sanctions on the other."[89]

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83 *Apperson*, 641 F. Supp. at 751 (emphasis added).

84 *See supra* note 82.

85 789 F. Supp. 1337 (E.D. Pa.), *aff'd*, 987 F.2d 989 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 85 (1993).

86 789 F. Supp. at 1338. Too recently to be discussed here, another case denied a Thirteenth Amendment-based challenged to a high school community service requirement. Immediato v. Rye Neck Sch. Dist., No. 94 Civ. 2831, 1995 WL 32016 (S.D.N.Y. Jan. 19, 1995). A third case on this issue is pending. Herndon Chapel Hill-Carrboro City Bd. of Educ., No. 1:94-CV-00196 (M.D.N.C. filed Apr. 19, 1994).

87 In fact, Lisa Ann Steirer claimed that she performed and enjoyed a variety of community service activities *until* her high school mandated such work: "I cringe at doing anything now . . . I don't get any enjoyment out of it if I'm forced." Lisa Ann Steirer, *quoted in* Aaron Epstein, *School Service Requirements Debated*, DETROIT FREE PRESS, Sept. 8, 1993, at 5A. For other articles discussing student reactions to community service requirements, see *Student Balks at School's Foreed Community Service*, CHI. TRIB., Nov. 13, 1994, at 23; Dennis Kelly, *Students Contest Civic Duty Mandates*, USA TODAY, Apr. 19, 1994, at 1D.

88 987 F.2d at 998. The court neglected to explain why the criminal rule should be binding in the civil context, though the parties apparently discussed this issue. 789 F. Supp. at 1343, n.4.

89 987 F.2d at 999.

The key to the *Steirer* decision was the existence of a choice. Plaintiffs had several options from which to choose, including: attending private school; taking a high school equivalency diploma in place of graduation; or foregoing high school altogether.[90] "The fact that these choices may not be appealing does not make the required labor involuntary servitude."[91] The court concluded that, as a matter of law, plaintiffs were not subjected to involuntary servitude by their required participation in the community service program.

C. Case Law Exceptions to the Thirteenth Amendment

The use of the *Kozminski* standard, as illustrated by *Steirer*, is just one way courts confront tort claims for involuntary servitude. In the past, courts have discussed Thirteenth Amendment claims in the following contexts: the military draft;[92] civil conscription of able-bodied men onto road crews;[93] sailors' contracts to work on seagoing vessels;[94] injunctions;[95] taxes;[96] and services "attached to land," such as landlord statutory obligations.[97] These are judicially-created exceptions to the Thirteenth Amendment. While these situations arguably involve involuntary servitude, courts have simply declared that the Thirteenth Amendment was not intended to reach the conduct being challenged.

These decisions focus on the type of servitude alleged, rather than whether the service was voluntary, to reach their decisions. In effect, they limit the facial scope of the Thirteenth Amendment by placing entire categories of conduct beyond its reach. The rationale behind the traditional exceptions, when offered, is that the conditions being litigated were so well-accepted at the time of ratification that the Framers could not have intended to displace them.[98]

When courts consider servitudes that did not exist at the time of ratification, they often employ an *analogy to* the traditional exceptions.

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90 789 F. Supp. at 1344.

91 987 F.2d at 1000.

92 Arver v. United States, 245 U.S. 366 (1918) (upholding United States draft system).

93 Butler v. Perry, 240 U.S. 328 (1916) (upholding Florida statute requiring roadwork from all able-bodied male citizens and punishing noncompliance as a misdemeanor).

94 Robertson v. Baldwin, 165 U.S. 275 (1897) (finding that the Thirteenth Amendment does not prohibit criminalizing desertion of a vessel on which sailor is contractually obligated to work).

95 *See* Robert S. Stevens, *Involuntary Servitude by Injunction*, 6 CORNELL L.Q. 235 (1921).

96 Abney v. Campbell, 206 F.2d 836, 841 (5th Cir. 1953), *cert. denied*, 346 U.S. 924 (1954).

97 Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921) (denying landlord's Thirteenth Amendment claim against a public emergency statute requiring temporary amnesty for holdover tenants).

98 These opinions overlook the irony of their own rationales—an irony that seems striking when one considers how well-established both slavery and racial prejudice (the "incidents" of slavery) were in 1865.

Recent cases have used this rationale to uphold mandatory pro bono services for indigent criminal defendants[99] and incarceration of material witnesses in a federal case.[100] The argument in these cases consists of enumerating tradition-based precedents and an implied assertion that the case at hand bears sufficient similarity to the traditional exceptions to merit exemption from the Amendment's rule.[101]

Sometimes courts create exceptions to the Thirteenth Amendment by citing the public need. These public need exceptions are similar in nature to the traditional exceptions. In fact, one may regard the traditional exceptions as implicitly relying upon a public need rationale.[102] Public need justifies many servitudes that might otherwise fall within the reach of the Thirteenth Amendment, such as: compelled child support payment;[103] pollution-control laws;[104] and police roadblocks.[105]

The public need cases depend upon the public benefit of the service rendered. One case, *Williams v. Arkansas*,[106] held that a police officer's arrest of a bystander who refused to assist in apprehending a suspect did not violate the Thirteenth Amendment. According to the Arkansas court, "the responsibilities of a citizen in this republic have

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99 Sharp v. Kansas, 783 P.2d 343 (1989), *cert. denied*, 498 U.S. 822 (1990) (requiring attorneys to represent indigent criminal defendants).

100 In Hurtado v. United States, 410 U.S. 578 (1973), the Supreme Court rejected the Thirteenth Amendment claim asserted by a group of illegal immigrants subpoenaed by the prosecution for the case against their United States employers. Unable to post the bond required by Federal Rules of Civil Procedure 46(b), the witnesses were held in prison and paid one dollar per day until trial. In their separate action the witnesses contested both the incarceration and the daily rate. The Supreme Court found "no substance" to their arguments. *Id.* at 589-90 n.11.

101 *See also* Myers v. Garff, 655 F. Supp. 1021 (D. Utah 1987), *aff'd in part, rev'd in part*, 876 F.2d 79 (10th Cir. 1989) (indicating in dicta that traditional exceptions might cover community service required of a man in debt to the state agency that cared for his child).

102 *See, e.g.*, Wilson v. Sandstrom, 317 So. 2d 732 (Fla.), *cert. denied sub nom.* Alder v. Sandstrom, 423 U.S. 1053 (1975) (denying kennel owner's challenge to a court order requiring him to supply greyhounds to racetrack. Although the court cited the traditional exception for injunctions, one rationale given for the exception was the state's reliance on parimutuel revenues.).

103 *See, e.g.*, Knight v. Knight, No. 92-35173, 1993 WL 210667 (9th Cir.), *cert. denied*, 114 S. Ct. 473 (1993) (denying plaintiff's claim for an injunction against the Wasbington State Attorney General and upholding Washington's child support statute, WASH. REV. CODE §§ 26.18-.19); Hicks v. Hicks, 387 So.2d 207 (Ala. Civ. App.) *writ denied sub nom.*, Ex Parte Hicks, 387 So. 2d 209 (Ala. 1980) (upholding award of defendant's property to plaintiff ex-wife in divorce proceeding).

104 United States v. Tivian Labs, 589 F.2d 49 (1st Cir. 1978), *cert. denied*, 442 U.S. 942 (1979) (upholding federal Water and Air Pollution Prevention and Control Acts against Thirteenth Amendment attack by chemical company required to produce company records to Environmental Protection Agency).

105 Boyle v. City of Liberty, 833 F. Supp. 1436 (W.D. Mo. 1993) (stating that public need justifies roadblock requiring motorists to stop and answer questions; roadblock was part of effort to capture criminal suspect).

106 490 S.W.2d 117 (Ark. 1973).

not been so diminished and diluted"[107] that forced participation in law enforcement may be seen as involuntary servitude.

Another case, *Crews v. Lundquist*,[108] justified the service involved by referring to the purpose of the Thirteenth Amendment: the protection of individual liberty.[109] The court interpreted a state statute that required public administrators to perform uncompensated estate services for deceased United States war veterans[110] as furthering the liberty of all citizens by making the government more "effective."[111] The court declared that, as a rule, the Thirteenth Amendment does not apply to laws requiring citizens to perform services for the benefit of the state.[112]

The focus on the servitude itself and the public need for it distinguishes these cases from both the *Steirer* circuit court opinion and the criminal cases, which looked at whether the service was involuntary. The criminal rule does not operate well when a state statute is challenged because a statute by its nature poses a threat of legal sanction for non-compliance, thus automatically satisfying *Kozminski*'s involuntariness test. Therefore, the cases considering whether a statute imposes involuntary servitude necessarily focus on the servitude rather than the involuntariness.

When courts look to the categorical exceptions described in this section and find that specific servitudes fall outside the reach of the Thirteenth Amendment, in reality, they are employing implicit balancing techniques. Reference to public need illustrates this hidden balancing. Some courts have utilized an explicit balancing test to determine whether conduct violates the Thirteenth Amendment. Balancing is more flexible than the *Kozminski* criminal standard or the categorical exceptions approach.

D. Balancing Test: A Focus on Servitudes

Several courts have implemented balancing tests to determine whether specific servitudes should be actionable. These tests vary in methodology, but most take into account the identity of the plaintiff and the nature of the service rendered. As with courts analyzing involuntary servitude under the *Kozminski* standard or the traditional exceptions, courts that use a balancing test attempt to limit recovery to situations that offend the ascertainable goals of the Thirteenth

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107 *Id.* at 122.

108 197 N.E. 768 (Ill. 1935).

109 *Id.* at 772.

110 Section 133 of the Administrative Act, ILL. ANN. STAT. ch. 3, para. 135 (Smith-Hurd 1933).

111 197 N.E. at 772.

112 *Id.* The court also noted that the plaintiff was free to leave his job.

Amendment. However, rather than attempting to harness the meaning of an intentionally vague constitutional provision within a strict standard or a narrow exception, these cases present holistic and policy-based analyses.

Jobson v. Henne[113] may well be the progenitor of the balancing test. This pre-*Kozminski* case concerned Warren Jobson, who had spent most of his life as an inmate at the New York State Newark School for Mental Defectives when, at age forty, he sued the school. Jobson claimed that the requirement that he perform chores at the institution constituted involuntary servitude. In determining that the plaintiff had stated a cause of action, the court of appeals did not use coercion as the touchstone for relief. Rather, "whether an institution's required program in any given case constitutes involuntary servitude would seem to depend on the nature of the tasks that are required of the inmate."[114] One of the determinative factors for the *Jobson* court in analyzing the program was whether it offered any genuine therapeutic value.[115]

The *Jobson* test remains popular in cases concerning mental patients and juveniles. For example, in *Bobilin v. Board of Education*,[116] public school students sued a Hawaii school board over mandatory cafeteria duty. The court determined that less judicial scrutiny is appropriate in the school context than in the mental home context and proceeded to weigh the competing interests with reference to the plaintiffs' identities.[117] The *Bobilin* court balanced the educational value of the duty required[118] against the fact that the benefit of the costs saved by the school was a public rather than private gain.[119]

The *Steirer* district court opinion follows the *Bobilin* balancing test[120] and comes out, like the circuit court opinion, in favor of the

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113 355 F.2d 129 (2d Cir. 1966).

114 *Id.* at 132 n.3.

115 *Id.* at 131. The fact that the patients' performance of the labor reduced the financial burden on the State was not really a factor. The court stated that normal housekeeping chores reasonably could be expected of the inmates if they contributed to the inmates' own upkeep. *Id.* at 131-32.

116 403 F. Supp. 1095 (D. Haw. 1975).

117 Because children spend only part of their day in school, while mental patients live at the hospital, and because parents and other adults are more likely to intervene on behalf of childrens' rights, the court afforded greater deference to the school's defense of their program. The court also noted the existence of legislative and administrative bodies concerned with regulating school programs and implied deference to these bodies. *Id.* at 1100.

118 *Id.* at 1098-99. The importance of this factor appears to be that education is a traditional exception to the Thirteenth Amendment. *Id.* at 1103-04.

119 *Id.* at 1104. The public benefit factor relates this test to the "public need" exceptions cases. *See supra* notes 103-13 and accompanying text.

120 789 F. Supp. at 1345 ("The Court concludes that the reasoning of *Bobilin* is persuasive."). However, on appeal, the circuit court considered *Bobilin*'s test but was "unprepared, at least at this time, to accept the proposition that the Thirteenth Amendment is

defendant school district. The court interpreted the term "involuntary servitude" in light of "the realities of modern life,"[121] pointing out that "the contours of slavery have shifted since the enactment of the Thirteenth Amendment."[122] The court's application of the test asked whether the plaintiff performed the type of service reachable under the Amendment and found that under the *Bobilin*'s factors the service involved in this case was not "servitude" under the Thirteenth Amendment.[123] Key factors included the educational value of the community service program[124] and the public benefit it conferred.[125]

In a case in which mental patients contested an institutional work program, *Weidenfeller v. Kidulis*,[126] the district court bifurcated its inquiry with a test that looked at involuntariness as well as the servitude involved. The court considered first whether there was coercion involved, and then whether the state interest in and therapeutic value of the program overcame the burden it imposed on the patients.[127]

The more common balancing test focuses only on the servitude. *King v. Carey*,[128] a case in which juveniles civilly committed to a youth rehabilitation center challenged the center's work program, balanced the "therapeutic and cost-saving purposes" against any excessive or non-therapeutic aspects of the program.[129]

When courts use a balancing test to determine whether a servitude falls within the intended reach of the Thirteenth Amendment, many question whether the service required is "akin to African slavery."[130] For example, in *United States v. Bertoli*,[131] the Third Circuit upheld a district court order requiring a law firm to provide "standby services" to a former client who had decided to continue his case *pro*

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inapplicable merely because the mandatory service requirement provides a public benefit by saving taxpayers money." 987 F.2d at 998. In fact, the public benefit is only a small part of the *Bobilin* test.

121 789 F. Supp. at 1342 (citing United States v. Lewis, 644 F. Supp. 1391, 1401 (W.D. Mich. 1986)).

122 *Id.*

123 *Id.* at 1343.

124 *Id.* at 1345.

125 *Id.* A more recent case considering whether community service requirements impose involuntary servitude applied both the balancing text and *Kozminski* to deny the plaintiffs' claim. Immediato v. Rye Neck Sch. Dist., No. 94 Civ. 2831, 1995 WL 32016, at *4-5 (S.D.N.Y. Jan. 19, 1995).

126 380 F. Supp. 445 (E.D. Wis. 1974).

127 *Id.* at 450.

128 405 F. Supp. 41 (W.D.N.Y. 1975).

129 *Id.* at 44 (quoting Jobson v. Henne, 355 F.2d 129, 132 (2d Cir. 1966)). Because the plaintiffs in *King* were not criminally convicted according to the requirements of due process, *id.*, they did not fall into the Amendment's built-in exception of "punishment for crime whereof the party shall have been duly convicted." U.S. CONST. amend. XIII.

130 Butler v. Perry, 240 U.S. 328, 332 (1916). *Kozminski* also adopted this description of the Amendment's reach. *See supra* note 78 and accompanying text.

131 994 F.2d 1002 (3d Cir. 1993).

se. There, the court adopted a "contextual" approach to find that the service rendered "does not evoke in our minds the burdens endured by the African slaves in the cotton fields or kitchens of the antebellum south."[132] The court in *Jane L. v. Bangerter*[133] ruled against a plaintiff who challenged Utah's restrictive abortion law by claiming that the limited availability of abortion services effectively forced her to carry her child to term, thus imposing involuntary servitude. The *Jane L.* court also compared the labor involved to African slavery and found that the Thirteenth Amendment analogy in this situation "strains credulity."[134]

Reference to the servitude involved implicates an important aspect of the Thirteenth Amendment: its labor vision. Cases that construe "servitude" situate the Amendment's purpose first among relevant factors.[135] Rather than emphasizing the methods used by a particular defendant to secure the plaintiff's services, these cases analyze the plaintiff's situation with reference to the specific degradations that servitude implies. *United States v. Shackney*,[136] a pre-*Kozminski* criminal case, described the Amendment's primary purpose as the elimination of "practices whereby subjection having some of the incidents of slavery was legally enforced."[137] Another case, *Bailey v. Alabama*,[138] described the Amendment as "a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag."[139]

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132 *Id.* at 1022.

133 794 F. Supp. 1537 (D. Utah 1992).

134 *Id.* at 1549. In a traditionalist argument, the court noted that abortion was illegal in most enacting states when the Thirteenth Amendment was adopted in 1865. *Id.* at 1548. The court also cited *Kozminski*'s involuntariness rule in its comment that the women challenging the law were free to travel to other states to obtain abortions. *Id.* at 1549 n.16. Although this court saw no merit in the plaintiff's claim that restrictions on the right to control one's reproductive system violates the prohibition of involuntary servitude, some scholars have adopted the plaintiff's argument. *See, e.g.*, Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. Rev. 480 (1990).

135 Another reason for the focus on servitudes in traditional exception, public need, and balancing cases is that many of these cases challenged statutes, which by definition pose a threat of legal sanction. If courts used the criminal standard to analyze challenges to statutes, the statutes often, but not always, would be found to violate the Thirteenth Amendment on this basis. Unable to rely on the criminal standard to deny a claim, courts turn instead to rationales such as traditionalism or public need and necessarily look at the servitude imposed.

136 333 F.2d 475 (2d Cir. 1964). For a discussion of the facts of *Shackney*, see *supra* note 67.

137 *Id.* at 485. This description seems to equate involuntary servitude with badges of slavery. Interestingly, *Shackney* attributed to Congress the same freedom in defining the reach of the Thirteenth Amendment that the badges of servitude cases do: "Whether or not the Thirteenth Amendment would permit passing this line, we are not convinced Congress has done so." *Id.* at 487.

138 219 U.S. 219 (1911).

139 *Id.* at 241.

The balancing test responds to these definitions. The *Jobson-Bobilin* test uses factors that highlight specific aspects of the slave experience, such as private economic benefit flowing from the labor,[140] absence of therapeutic benefit to the laborer,[141] and the physical demands and conditions of the labor.[142] The analyses in *Bertoli* and *Bangerter* take a less structured approach, looking at whether the complainant suffered a loss of personal freedom of the type suffered by the slaves. The next section explores how the different standards for involuntary servitude relate to the Amendment's purpose and how they succeed in effectuating it.[143]

IV
ANALYSIS

A. A Variety of Devices Limits Constitutional Torts

The preceding survey of Thirteenth Amendment jurisprudence depicts a variety of devices rather than a consistent methodology for denying civil causes of action. The dichotomy between the first and second sections of the Thirteenth Amendment limits litigation by reserving for Congress the job of determining exactly what conduct is prohibited by the Amendment in addition to actual slaveholding. The stringent requirements for accessing the federal tort statutes also limit Thirteenth Amendment litigation. A plaintiff who is able to surpass these obstacles and bring a claim for an alleged Thirteenth Amendment violation must then confront the categorical exceptions, which limit the substantive reach of the Amendment. If a court does not apply one of the exceptions, it can either perform the balancing test or apply the criminal standard. A court deciding an involuntary servitude case should choose the former: a uniform balancing test is more suitable to civil cases than the criminal standard.

B. The Criminal Rule Should Not Apply in Civil Cases

The *Steirer* circuit court opinion is significant in that it may represent the entrenchment of the *Kozminski* criminal standard in civil cases. The rule of *Kozminski* may be necessary in criminal cases because due process requires a rule that focuses on the defendant's con-

140 Bobilin v. Board of Educ., 403 F. Supp. 1095, 1104 (D. Haw. 1975).

141 King v. Carey, 405 F. Supp. 41, 44 (W.D.N.Y. 1975).

142 Jobson v. Henne, 355 F.2d 129, 132 (2d Cir. 1966).

143 An interesting postscript to this section on the importance of "servitude" is the case of New Jersey v. Marchand, 545 A.2d 819 (N.J. Super. Ct. 1988). The case involved the prosecution of a Drug Enforcement Agency agent who kidnapped a suspect's girlfriend and held her captive for several hours in an effort to get information about the suspect's whereabouts. The court found the state's criminal involuntary servitude statute to be inapplicable because there was no service or labor at all. *Id.* at 821 (applying N.J. STAT. ANN. § 2C:13-2(2) (West 1982)).

duct and provides adequate notice of prosecutable conduct. Furthermore, *Kozminski* seems destined to remain the rule in the criminal context, since the Supreme Court is unlikely to overrule its recent *Kozminski* decision. However, courts trying civil cases are not bound to follow *Kozminski* and should read before they sign.

The primary reason why *Kozminski* should not apply to civil cases is that, by its own terms, its holding is limited to the statutory construction of the criminal statutes involved, 18 U.S.C. §§ 241 and 1584.[144] The *Kozminski* court was defining involuntary servitude "through the narrow window that is appropriate in applying § 241."[145] In its construction of § 1584, the Court focused not on the history of the Thirteenth Amendment but on the history of § 1584's statutory precursors.[146] These federal criminal laws took into account a variety of factors not relevant to either the construction of the constitutional amendment or the wisdom of a private cause of action. Tort cases should not look to *Kozminski*'s analysis of the reach of these criminal statutes in order to discover the scope of the Thirteenth Amendment.

A second reason for courts in civil cases to bypass the criminal rule is that *Kozminski*'s central rationale was the need for clarity and notice in the criminal context. The Court interpreted and applied the relevant statutes by considering the requirements of due process.[147] In fact, *Kozminski* is cited most often for its espousal of a clear rule in criminal cases, not for its involuntariness test.[148] The narrow scope of the *Kozminski* rule thus supports the confinement of its standard to prosecutions for criminal involuntary servitude.

In addition, *Kozminski*'s rule is unpersuasive because of the special difficulties it presents in tort cases. *Kozminski*'s most glaring problem is that it purports to provide a bright-line rule, but nevertheless carves out a broad exception for cases in which the victim is a child or suffers from mental disability. When the victim is especially vulnerable, as in these cases, the involuntariness standard shifts its focus from

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144 The *Kozminski* court cited "sound principles of *statutory construction*" as the rationale for its definition of involuntary servitude. 487 U.S. at 951 (emphasis added). *See supra* note 69 for a discussion of these statutes.

145 *Id.* at 944.

146 According to the *Kozminski* opinion, § 1584 was based in part on the Slave Trade statute, formerly 18 U.S.C. § 423 (1940) (criminalizing participation in the slave market), and in part on the Padrone statute, formerly 18 U.S.C. § 446 (1940) (prohibiting the exploitative trade in young Italian boys as "apprentices"). *Id.* at 945-48.

147 *Id.* at 949-52.

148 *See, e.g.*, United States v. Chen, 913 F.2d 183, 188-89 (5th Cir. 1990); United States v. Palmer, 864 F.2d 524, 527-28 (7th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989); United States v. Waitt, 761 F. Supp. 108, 109 (D. Kan.), *vacated*, 1991 WL 261710 (D. Kan. 1991); New Jersey v. Dixon, 553 A.2d 1, 4 (N.J. 1988). According to these and other cases, *Kozminski* stands for the proposition that "criminal statutes should be resolved in favor of lenity." *Dixon*, 553 A.2d at 4.

the defendant's actions to the victim's state of mind.[149] Ironically, it is precisely a focus on the victim's state of mind that the *Kozminski* majority saw as violative of due process.[150] As *Kozminski*'s concurring Justices pointed out, this caveat could convert the majority standard into a case-by-case rule.[151] Because courts often will be forced to engage in case-by-case analysis anyway, a test designed for the civil context is more appropriate.

Kozminski also presents special problems in civil cases as a result of its focus on the method of coercion utilized rather than on the servitude imposed. A second look at the balancing cases, *Jobson v. Henne* and *Bobilin v. Board of Education*, illustrates this point. As discussed above, *Jobson* found that a cause of action would lie for mental patients forced to perform unreasonable amounts of labor, while *Bobilin* found no cause of action arising from the routine cafeteria duty imposed on grade schoolers. The courts looked at the duties and inquired whether they were reasonable. Contextual details, such as the nature of the duties and their value to the plaintiffs, guided the courts in determining whether the claims should be heard. If the courts instead had followed *Kozminski*, their deliberations would have focused on whether the institution's administrators threatened the patients or children with physical abuse or legal sanction. The fact that the mental patients could go to a private institution and that the children could attend private school would counsel strongly against the existence of a claim in either case. It would not matter how many hours per day the plaintiffs worked or whether the work benefitted the plaintiffs. This focus seems counterintuitive. An observer would surely see the conditions imposed as determinative and reach the same conclusions as the courts—that cafeteria duty is an acceptable part of the school curriculum but that forcing residential mental patients to perform maintenance chores may be unreasonable.

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149 487 U.S. at 948. Note that in several of the cases discussed herein, such as *Steirer*, *Jobson*, *Bobilin*, *Weidenfeller*, and *King*, the plaintiffs were either juveniles or mentally disabled persons. All of these cases, excluding the appellate opinion in *Steirer*, adopted a balancing test. Perhaps the courts' choices were motivated by the fact that the *Kozminski* standard would not have been as useful in light of its exception based on the special attributes of the plaintiff.

150 [A]s the Government would interpret the statutes, the type of coercion prohibited would depend entirely upon the victim's state of mind. Under such a view, the statutes would provide almost no objective indication of the conduct or condition they prohibit, and thus would fail to provide fair notice to ordinary people who are required to conform their conduct to the law.

487 U.S. at 949-50.

151 *See supra* note 73. Such a standard is found also in rape law, in which criminal liability depends upon the victim's perception of the use or threatened use of force as well as the defendant's perception of consent, and consent may depend upon factors such as the age of the victim and whether the victim is married to the defendant.

The final problem with the *Kozminski* rule is that its focus on voluntariness shortchanges the purpose and ambitions of the Thirteenth Amendment. The *Kozminski* approach mirrors contract methodologies, which probe the respective bargaining positions of players in a private exchange system but generally do not look at the substantive content of their dealings. In order for contract-based exchange systems to function efficiently, the participants must possess sufficient bargaining power to influence the market. A market model of the Thirteenth Amendment operates the same way, for "[w]hen the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve . . . unwholesome conditions of work."[152] Voluntariness is essential to a properly-functioning market, in which employers seek the best workers and the best workers seek the fairest and most rewarding employers.[153] *Kozminski*'s restrained interpretation of "involuntary servitude" follows this market model by using coercion as its touchstone.

The *Kozminski* standard may collapse the phrase "involuntary servitude" into the single criterion of involuntariness because it presupposes a view of "servitude" that is confined to that used in the market model for contracts cases.[154] That is, only labor with an established market value qualifies for Thirteenth Amendment protection. This characterization of "servitude" reflects an idea espoused by many of the Amendment's framers,[155] who envisioned not just freedom for the slaves but, prospectively, a genuinely free market for labor.[156] The Thirteenth Amendment provides the opportunity for every citizen "to till the soil, to earn his bread by the sweat of his brow and to enjoy the

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152 Pollock v. Williams, 322 U.S. 4, 18 (1944).

153 As one court put it, "the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers." Audet v. Board of Regents, 606 F. Supp. 423, 433 (D.R.I. 1985).

154 *Kozminski* epitomizes the view that "[t]he essence of slavery or involuntary servitude is that the worker must labor against his will for the benefit of another." Beltran v. Cohen, 303 F. Supp. 889, 893 (N.D. Cal. 1969) (holding that a levy on a taxpayer's wages to pay back taxes is not involuntary servitude; the taxpayer had the option of quitting her job).

155 *See* Lea S. Vanderwelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 453 (1989) (After abolition, "the entire spectrum of debate changed, as bondage dropped from view and the focus shifted to labor autonomy, the positive object."); ten-Broek, *supra* note 16, at 176-83.

156 Some Civil War era politicians complained that slavery impeded interstate commerce by creating different labor markets in slave and non-slave states. "Slavery was essentially a monopoly of labor, and as such locked the states where it prevailed against the incoming of free industry. Where labor was the property of the capitalist, the white man was excluded from employment." Letter from President Andrew Johnson to Congress (Dec. 4, 1865), *quoted in* G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (pt. 1), 12 HOUS. L. REV. 1, 5 (1974).

rewards of his own labor."[157] Thus, under this view, the Thirteenth Amendment is a constitutional mandate for paid, voluntary labor.[158]

The *Kozminski* standard works in labor cases, such as those involving migrant worker camps and employment contracts.[159] In these cases, courts can focus on voluntariness because the "servitude" is labor carrying a market value.[160] In a sense, the servitude already matches *Kozminski*'s vision. Furthermore, *Kozminski*'s contracts model serves well in the criminal context because defendants generally are private actors whose power over their victims can be assessed in terms of bargaining position. However, criminal and employment cases do not define the entire spectrum of Thirteenth Amendment applications; the blanket use of the *Kozminski* standard in all Thirteenth Amendment cases would be unduly confining as it would preclude Thirteenth Amendment protection for personal freedoms not carrying market value. For persons traditionally excluded from positions of power in the marketplace and in situations that do not follow patterns of bargaining, Thirteenth Amendment doctrine must take a more flexible approach.

C. The Correct Standard Should Focus on Servitude

The *Kozminski* definition of involuntary servitude presents a narrow view of the Thirteenth Amendment's purpose and effect. Analysis of the servitude involved, rather than of whether the service was coerced according to a narrow criminal standard, forces courts to confront the Thirteenth Amendment's broader significance. Rather than presupposing a market model, as under the *Kozminski* rule, courts instead may look to the attributes of the institution of slavery to give meaning to the term "involuntary servitude." Only by delving into the effects of slavery on personal liberty can courts appreciate the breadth of the liberty assured by the constitutional Amendment that abolished slavery.

The categorical exception cases and the balancing cases look at servitudes. The use of the categorical exceptions is unfortunate, however, because it goes against the plain meaning of the Thirteenth

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157 Rep. E.C. Ingersoll of Illinois. CONG. GLOBE, 38th Cong., 1st Sess. 2989-90 (1864).

158 The purpose of the Thirteenth Amendment was "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, which is the essence of involuntary servitude." Bailey v. Alabama, 219 U.S. 219, 241 (1911).

159 *See supra* notes 86-87 and accompanying text.

160 *See, e.g.*, Arnold v. Board of Educ., 880 F.2d 305, 315 (11th Cir. 1989) (finding no involuntary servitude on part of student who performed odd jobs for school officials in order to fund the abortion they urged his girlfriend to obtain; even if the school officials influenced the girl enough to obtain the abortion, this did not render involuntary the labor performed to pay for the abortion).

Amendment, thus alienating the text from its accepted legal meaning. It effectively rewrites the Amendment without a genuine rationale. The idea that the Thirteenth Amendment was not intended to reach certain conduct that was traditional at the time the Amendment was drafted is almost humorous. As two commentators quite aptly put it, "the Amendment was designed to challenge long-standing institutions and practices that violated its core values of personhood and dignity. Any exception to the Amendment's reach must be limited to those historic practices that are consistent with the Amendment's central thrust."[161]

The exception cases are more plausible when they invoke public need as a rationale, for then the carving out of exceptions is actually covert balancing. For example, the case finding that conscription of civilians onto road crews does not impose involuntary servitude[162] could hardly have found that the labor was voluntary. Instead, the Court decided that the specific form of labor required was acceptable under the Thirteenth Amendment. Finding the labor to be outside the scope of the Constitution is a daring example of judicial legislation and hardly seems justified. The only meaningful explanation for this rule is that the service required was permissible when the public need was balanced against the personal liberty promised by the Thirteenth Amendment. Ostensibly, the Court would not have been willing to uphold a law that required conscripted civilians to run in the Boston Marathon. Such a *servitude* would be unreasonable.

The balancing test, with its attention to where the benefit flows, the value of the work to the plaintiff, and the nature of the work involved, explains the meaning of servitude in more detail. It reaches rational results without the aid of inappropriate criminal rules or judicial alteration of the Amendment's scope. Furthermore, the balancing test takes a more complete look at the Thirteenth Amendment than does *Kozminski.* The slave experience encompassed more than the lack of bargaining power in the labor market: slaves endured sexual and reproductive exploitation,[163] legalized physical abuse,[164] and the loss of personal autonomy in all aspects of their lives. These non-market servitudes are recognized by the balancing test.

One might argue that the framers of the Thirteenth Amendment did not intend non-market servitudes to fall within its reach. How-

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161 Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1374 (1992).

162 Butler v. Perry, 240 U.S. 328 (1916).

163 *See* Joyce E. McConnell, *Battered Women, Involuntary Servitude and the Thirteenth Amendment,* 4 YALE J.L. & FEMINISM 207 (1992); Judith K. Shafer, *Sexual Cruelty to Slaves: The Unreported Case of* Humphrey v. Utz, 68 CHI.-KENT L. REV. 1313 (1993); Katyal, *supra* note 38.

164 Amar & Widawsky, *supra* note 161.

ever, the framers acknowledged such harms in their conception of freedom from slavery. Ratification-era opinions predicted that the Thirteenth Amendment would "bring the Constitution into avowed harmony with the Declaration of Independence"[165] and provide "an express guarantee of personal liberty and an express prohibition against its invasion anywhere."[166] In the years following ratification, Justice Harlan of the Supreme Court outspokenly supported a construction of the Thirteenth Amendment that would reflect its framers' concept of undiluted rights. In his dissent in the *Civil Rights Cases*,[167] Justice Harlan criticized the majority's restrictive view of the Amendment's scope: "My brethren admit that [the Amendment] established and decreed universal *civil freedom* throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property?"[168]

Today, several commentators argue for expansive views of the Amendment. For example, Professor Akhil Reed Amar espouses a view of the Thirteenth Amendment as a guarantee of "minimal entitlements"[169] such as food and shelter, on the model of the Freedman's Bureau promise of "forty acres and a mule."[170] Other writers have suggested the Thirteenth Amendment as: an express justification for the right to an abortion;[171] a tool to punish domestic violence;[172] a cause of action against police departments that refuse to prosecute pimps for forced prostitution;[173] and a mandate for state service agencies to protect the children they have treated from later abuse.[174]

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165 CONG. GLOBE, 38th Cong., 2d Sess. 154 (1865), *quoted in* tenBroek, *supra* note 16, at 179.

166 CONG. GLOBE, 38th Cong., 1st Sess. 1480-81 (1864), *quoted in* Buchanan, *supra* note 156, at 13.

167 109 U.S. 3 (1883).

168 *Id.* at 34 (Harlan, J., dissenting).

169 Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 10 HARV. J.L. & PUB. POL'Y 37 (1990).

170 *Id.* at 39. Amar's thesis depends on the proposition that democracy will not work unless each voting citizen has a stake in the system, and that minimal entitlement to property guarantees such a stake. Slavery purposely disenfranchised and disempowered those who lacked an economic stake in the system because power is dangerous in the hands of those who have no economic incentive to preserve the status quo. *Id.* at 38.

171 Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. REV. 480 (1990).

172 *See* McConnell, *supra* note 163.

173 *See* Katyal, *supra* note 38. *See also* Charles H. Jones, Jr., *An Argument for Federal Protection Against Racially Motivated Crimes*, 21 HARV. C.R.-C.L. L. REV. 689, 705-33 (1986) (proposing the use of the Thirteenth Amendment and its criminal implementing statutes to punish hate crimes).

174 *See* Amar & Widawsky, *supra* note 161.

D. The Badges of Slavery Should Not Swallow Up Involuntary Servitude

As discussed in Parts I.B and C, the "badges of slavery" are those forms of discrimination that Congress can prohibit through legislation, pursuant to the second section of the Thirteenth Amendment.[175] Since *Jones v. Alfred H. Mayer Co.* interprets this second section as a virtual blank check for Congress,[176] the badges of slavery are potentially a source of expansive individual liberty. However, this freedom is not available to individuals in the absence of specific legislation. Conduct that Congress could target as violative of the Thirteenth Amendment may not be so defined by individual litigants in civil rights cases.[177]

Commentators who support innovative applications of the Thirteenth Amendment call for more expansive definitions of involuntary servitude in the first section of the Thirteenth Amendment.[178] Based on the text and legislative history of the Amendment and studies of life under slavery, they find several harms of modern life—such as prostitution or continuous abuse—to be like slavery or actual slavery, and thus directly violative of the Amendment.[179] They do not call for congressional legislation, under the Amendment's second section, to remedy these harms; they do not, as the courts have, see legislative enforcement as the only way to expand the Amendment's scope.

By contrast, cases such as the *Steirer* circuit court opinion refuse to apply the Thirteenth Amendment's first section to conduct that does not fit the narrow *Kozminski* standard for involuntary servitude. The Amendment's potential for vast civil reform has been relegated to the second section's grant of enforcement power to Congress. Thus, the reigning judicial definition of involuntary servitude departs drastically from the expansive definition lurking within the phrase "badges of slavery." A more reasoned interpretation of the Amendment would confine the *Kozminski* model of involuntary servitude to the criminal statutes and place the constitutional right to be free from involuntary servitude along a continuum with the flexible badges of slavery.

This Note argues for the use of a balancing test for Thirteenth Amendment civil claims. This test emphasizes not involuntariness but servitude, thus allowing a broader interpretation of the types of conduct reachable under the Amendment. This approach situates invol-

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175 *See supra* notes 16-33 and accompanying text.

176 Courts may test legislative enactments under the Amendment with a standard similar to that used for the Commerce Clause: the statute must be rationally related to the prohibition of slavery. *See supra* note 33 and accompanying text.

177 *See supra* notes 47-57 and accompanying text.

178 *See supra* note 170 and accompanying text.

179 *See supra* note 170 and accompanying text.

untary servitude and the badges of slavery on a continuum. The former characterizes situations that are like slavery, such as the invasive and exploitative use of another's body. The latter should designate the forces and conduct often used to reinforce slavery or recreate its effects, such as devices that allow attorneys to strike minorities from juries[180] and arbitrary job requirements that prevent targeted groups from obtaining valuable employment. Alternatively, one might view slavery and involuntary servitude as the core of the Thirteenth Amendment prohibition, with the badges of slavery forming a penumbra in which only Congress may operate.

An over-expansive interpretation of involuntary servitude could upset this structure and transform the Thirteenth Amendment into a source of substantive due process rights enforceable against individuals. However, courts now engage in too sparing an interpretation of involuntary servitude, leaving too much of the work of enforcing the Constitution to Congress' discretion. To borrow from one writer, the Thirteenth Amendment's prohibition of involuntary servitude represents an "underenforced constitutional norm."[181] That is, judicial applications of the doctrine draw not on the logical boundaries of the language but on notions of federalism and institutional settlement.[182] Furthermore, this doctrine leaves the definition of constitutional freedoms to the majoritarian process.

Illustrative of the usefulness of a broader view of involuntary servitude is the case challenging a Utah law restricting women's abortion rights. In *Jane L. v. Bangerter*,[183] the district court scoffed at the idea that lack of reproductive choice makes women "akin to African slave[s]."[184] In asserting that preventing women from choosing not to bear children does not make them like slaves, the court ignored the

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180 *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990).

181 Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

182 Sager described the underenforcement of the Fourteenth Amendment's Equal Protection Clause as occasioned by considerations similar to those of statutory construction:

> Where a federal judicial construct is found not to extend to certain official behavior because of institutional concerns rather than analytical perceptions, it seems strange to regard the resulting decision as a statement about the meaning of the constitutional norm in question. After all, what the members of the federal tribunal have actually determined is that there are good reasons for stopping short of exhausting the content of the constitutional concept with which they are dealing; the limited judicial construct which they have fashioned or accepted is occasioned by this determination and does not derive from a judgment about the scope of the constitutional concept itself.

Id. at 1221.

183 794 F. Supp. 1537 (D. Utah 1992). *See supra* notes 140-41 and accompanying text.

184 *Id.* at 1549.

fact that the breeding and rape of female slaves were established elements of the slave system.[185] Perhaps the court meant only that the Thirteenth Amendment's ratifiers did not have this specific situation in mind. After all, a nineteenth-century, exclusively-male Congress could hardly have been expected to be motivated by exclusively-female concerns such as reproductive choice. Nonetheless, a view of the Thirteenth Amendment that ignores the experiences of women under slavery is unworkably narrow.[186]

The position taken by the plaintiff in *Jane L.* is strengthened by the fact that the ratifiers did foresee the extension of the Amendment's protections to women. One senator perceptively noted that, after ratification, "I suppose before the law a woman would be equal to a man, would be as free as a man. A wife would be equal to her husband and as free as her husband before the law."[187] Whether such a notion was palatable to every man in the room is a separate issue from whether the legislative history of the Amendment supports its application to servitudes beyond the market model.

E. A Proposal for a New Standard

The narrow interpretation of involuntary servitude and subsequent delegation to Congress of the real power under the Amendment weakens what might otherwise be a potent right of recourse. The Amendment's inclusion of private conduct within its prohibition gives rise to the fear that an expansive definition of involuntary servitude will create a broad basis for federal jurisdiction over ordinary tort actions.[188] As a result, courts ignore the purpose and language of the Amendment and look to a chaotic mix of devices to limit litigation. These devices, such as the categorical exceptions and the use of the

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185 *See* McConnell, *supra* note 163, at 218-20.

186 Even if Congress explicitly rejected the idea that the Amendment would reach the uniquely damaging aspect of slavery for women as a class, such a limitation on the charter of freedom could not stand up to current equal protection norms. The prospective and intentionally-vague wording of the Thirteenth Amendment assures its continuing relevance and consciously permits evolutive interpretations. *See* Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMAN. 471, 493 (1993) ("Legal interpretation is not an alternative to majority will, but a means equally indispensable to enforcing majority will or resisting it."); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 375-78 (1990) (criticizing *Kozminski*'s statutory interpretation and proposing "the case-by-case evolution of the statute to meet new problems and societal circumstances, and to meet new understandings of those problems and circumstances.").

187 Buchanan, *supra* note 156, at 9 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (statement of Senator Howard)).

188 *See, e.g.*, Turner v. Unification Church, 473 F. Supp. 367, 374 (D.R.I. 1978) (implying cause of action would "constitutionalize" much of state tort law), *aff'd*, 602 F.2d 458 (1st Cir. 1979).

criminal standard in civil cases, rob the Thirteenth Amendment of much of its force.

Rather than use artificial methods to limit the scope of the constitutional text, courts should rely on the statutes implementing the Amendment to ensure that litigation under the Thirteenth Amendment does not spiral out of control. This Note proposes expanding the definition of involuntary servitude while leaving in place the statutory hurdles to bringing a tort claim against a private actor. Under the proposed system, plaintiffs would be better able to obtain relief against state practices that violate the liberty ensured by the Thirteenth Amendment, but the adjudication of ordinary dignitary wrongs would continue to be under state laws.

1. *Federal Tort Claims*

A strong test for civil actions under the Thirteenth Amendment discerns those claims worthy of protection without unduly limiting the reach of the Amendment. Specifically, the requirement of a class-based motivation on the part of the defendant distinguishes constitutional torts from those that should be left to state law.[189] When a defendant imposes involuntary servitude upon a plaintiff, the initial determination that the defendant's motivation consisted of class prejudice against the plaintiff should suffice to bring the claim within reach of the federal law. Once this is established, the plaintiff will have stated a claim even if Congress has not targeted the specific conduct involved.[190]

2. *Challenges to State Laws*

A broad definition of involuntary servitude would ease the burden on plaintiffs who challenge state laws that threaten the liberty assured by the Amendment. When plaintiffs sue state agencies, as in *Steirer* or *Jane L.*, courts should engage in greater scrutiny of the challenged programs. The real usefulness of a more potent Thirteenth

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189 *See supra* notes 46-53 and accompanying text. This author agrees with the proposition in Jennifer Grace Redmond, Note, *Redefining Race in* St. Francis College v. Ali-Khazraji *and* Shaare Tefila Congregation v. Cobb: *Using Dictionaries Instead of the Thirteenth Amendment*, 42 VAND. L. REV. 209, 213 (1989) (supporting current doctrine that sees the classifications relevant to discrimination law in terms of sociopolitical affiliation rather than biology).

190 According to one interpretation, Thirteenth Amendment actions yield only injunctions, habeas corpus writs, or declaratory judgments, not money damages. *See* Bayh v. Sonnenburg, 573 N.E.2d 398, 411 (Ind. 1991), *cert. denied*, 112 S. Ct. 1170 (1992) (not apparent that Thirteenth Amendment would support an action for damages). This further erodes the idea that adjudication of Thirteenth Amendment claims will result in an eruption of federal tort claims.

Amendment may well be as an explicit source of the type of liberties previously attributed to "privacy."[191]

One obstacle to using the involuntary servitude doctrine as a limitation on state action is the enduring criticism of any broadening of federal power. This argument fails, however, because it is a criticism of the Thirteenth Amendment itself. The Reconstruction Amendments,[192] when taken as a whole, indicate a federally-centered scheme of government intentionally appropriating much of the power previously accorded to the states.[193] Using the federal courts as fora to test state action against a generous standard of liberty furthers, rather than violates, the purpose of the Thirteenth Amendment. At the time the Thirteenth Amendment was passed, the invalidity of all laws and private practices threatening personal freedom was recognized as part and parcel of the ban on slavery and involuntary servitude.[194] Thus, the potent threat to autonomy posed by a state law restricting individual choices is just the sort of action that the Thirteenth Amendment condemns.

3. *Elimination of the Criminal Standard in Civil Cases*

Kozminski's standard applies only to criminal statutes. The distinction between "physical and legal" as opposed to "psychological" coercion is difficult to apply in any context, but is undeniably the law in criminal cases. However, civil cases should enjoy a more realistic assessment of the coercive measures actually used by slaveowners to impose involuntary servitude. These measures include "splitting fami-

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191 *See* Koppelman, *supra* note 134, at 483. *See also* TRIBE, *supra* note 14, § 15-10, at 1354 ("A right to terminate one's pregnancy might . . . be seen more plausibly as a matter of resisting sexual and economic domination than as a matter of shielding 'private' transactions between patients and physicians from public control."). The Thirteenth Amendment also might support the freedom to engage in homosexual acts, since restricting an individual's sexuality effects a deprivation of self-determination like that imposed on the slaves. The application of the balancing test would dispense with the argnment that the State has an interest in preventing such behavior, as the State's interest would receive less deferential treatment than under the Fourteenth Amendment. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (declining to strike state law criminalizing sodomy). Furthermore, the Thirteenth Amendment's prohibition on interference with personal liberty is more applicable than "privacy" to issues of personal autonomy and familial intimacy. *See id.* at 191 (finding that the privacy rights protected by the Due Process Clause do not cover sexual conduct between consenting adults because there is "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other").

192 U.S. CONST. amends. XIII-XV.

193 One of the most vehement objections to the passage of the Thirteenth Amendment was that it "constituted an unwarrantable extension of the power of the central government." Buchanan, *supra* note 156, at 8.

194 The Thirteenth Amendment "vindicate[s] those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." Civil Rights Cases, 109 U.S. 3, 22 (1883).

lies, removing children, controlling food, water, and medical care, movement, formal education, religion, and family affiliation."[195] Attention to these methods makes the Thirteenth Amendment applicable in a variety of areas currently suffering from a lack of legal intervention, such as domestic abuse and prostitution. The *Kozminski* standard ignores these modern problems because it takes a narrow view of the Thirteenth Amendment. By eschewing use of this criminal rule in civil cases, courts could escape the limitation of *Kozminski*'s market-based definition of servitude and instead respond to commentators who call for an updated definition of personal liberty.[196]

4. *The Balancing Test*

The optimal construction of the Thirteenth Amendment would adopt the balancing test in all civil rights cases. Courts should analyze the servitude involved by comparing it to the types of servitude imposed upon human slaves. Relevant questions include: Who benefits? What sort of work is performed? What value does the work hold for the person performing it? In considering the specific servitude involved, courts must ask whether the work is "akin to" slavery or another *arbitrary* or *class-based* form; such an approach broadens the definition of liberty mandated by the Thirteenth Amendment. In cases against private defendants, courts also should consider the extent to which the plaintiff was deprived of autonomy, that is, the involuntariness. The methods of coercion employed will be key evidence of this. In cases against government defendants, courts should balance the servitude against a compelling public need. In these cases, involuntariness will be established by the potential sanction of the law contested.

In many of the cases discussed herein, application of the balancing test would reach the same result as another method. The *Steirer*

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195 McConnell, *supra* note 163, at 220. *See also* Ann Penners Wrosch, Comment, *Undue Influence, Involuntary Servitude and Brainwashing: A More Consistent, Interest-Based Approach*, 25 LOY. L.A. L. REV. 499, 499-500 (1992) (defining coercive persuasion as any coercive measure that causes harm and proposing a balance between the degree of autonomy lost and the benefit or harm to the self or society; harmful coercion may result from a physical threat on a short-term hasis or psychological coercion on a long-term basis).

196 One commentator sees the failure of courts to define expansively the Thirteenth Amendment's force as a result of our society's inability to see law from the perspective of the victim or "other":

> Seeing politics as inherently "difficult" for law to assimilate, constitutional theory has ignored the particular difficulty within our politics posed by the absorption of slaves into the polity that enslaved them. By denying that the past could ever speak persuasively to the present, constitutional theory has succeeded in maintaining a discreet silence about the . . . "original history" that makes our society's race relations record so singnlarly lacking in moral authority.

Binder, *supra* note 186, at 497.

district and circuit courts both found for the defendant school district, although one used the balancing test and the other followed *Kozminski*. The categorical exception cases, with their suggestion of implicit balancing, also reach logical results. For example, drafters of the Thirteenth Amendment decidedly did not intend to eliminate military conscription. A balancing approach to such matters of national security would reach the same conclusion as the traditional exception rationale.

There are several benefits, however, to a unified balancing test. A single standard offers simplicity and doctrinal integrity. Potential plaintiffs will be better able to assess their chances of success than is possible under the current scheme. Courts may dispose of cases more efficiently by simply applying the test rather than citing a litany of cases that all follow different tests and attempting to draw comparisons between them.[197] The balancing test is a stronger tool than *Kozminski* against oppressive private conduct because it applies to servitudes other than conventional labor and to methods of coercion other than violence or legal sanction. However, the requirement of a discriminatory motive distinguishes the balancing test from state law torts. Finally, the balancing test protects against a wider variety of state laws than *Kozminski* because it takes a broader view of the meaning of personal autonomy.

CONCLUSION

The *Steirer* circuit court collapsed "involuntary" and "servitude" into a single word, "involuntariness," rather than giving siguificance to each part.[198] It did this because the criminal standard it applied looks only at the method of coercion. This criminal standard utilizes an unduly narrow model of servitude and deprives the underlying constitutional provision of a meaningful construction. Had the court chosen to pigeonhole community service as yet another exception to the Thirteenth Amendment, it would at least have focused on servitude, although it still would have shortchanged the doctrine.

The balancing test used by the *Steirer* district court looks to the purpose of the Amendment and offers flexibility. The uniform adoption of this test could breathe life into "involuntary servitude" in the same way that an expansion of congressional power under the second section of the Amendment breathed life into the idea of "badges of slavery." The Thirteenth Amendment, by its own terms, grants liberty

197 *See, e.g.*, United States v. Tivian Labs, 589 F.2d 49, 54 (1st Cir. 1978), *cert. denied*, 442 U.S. 942 (1979).

198 "Under the guidance of *Kozminski*, we believe it is a mistake to dissect the pbrase 'involuntary servitude' into two components." Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 998 (3d Cir.), *cert. denied*, 114 S. Ct. 85 (1993).

to every citizen, and the Amendment's framers intended it to be an expansive and potent liberty. When the courts create a workable scheme for litigation under the Amendment we can finally begin testing and defining this liberty.

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