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AFTER LIBERALISM? USING PUBLIC SERVICE LAW TO ADVANCE PUBLIC GOODS

DANIEL R. CORREA*

Abstract

Incessant distrust impedes civic life in America. Core political principles fail to generate sustainable consensus among people with sincere and reasonable, though often incompatible, beliefs. By succeeding, the liberalism that promoted individual expression, choice, and autonomy failed, according to Patrick Deneen. In fact, the liberal democracy Americans champion relies on distrust—a feature James Madison hailed as fundamental to American constitutional design when he argued that the effects of factions could be controlled by extending the sphere.

But if liberalism failed, if it truly failed, then what comes after? Though Deneen leaves this question open, he expresses a desire for better political practices than those offered by liberalism. These better practices, he urges, should foster community and encourage civic participation.

This article assumes Deneen's conclusion and presents a pathway to forging among polity members' trust and a commitment to basic common goods via freedom's law, the Thirteenth Amendment. Thirteenth Amendment jurisprudence reveals an intimate and inseparable link between freedom and civic duty. Government at every level—local, state, and national—might more readily utilize its conscription

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> *power to promote civic cooperation, inculcating in the polity a commitment to communal well-being and a desire to promote public goods.*

I. INTRODUCTION

Fear grips Americans. An always uncertain future casts a looming cloud over a population whose experience with continued job loss and economic stagnation, sickness and death, wealth disparity, and race, gender, and sex inequality leaves them feeling helpless.[1] The political processes they long relied on to filter disagreement and reach meaningful consensus no longer appear responsive to their most pressing needs.[2] Government, it seems, lies beyond their control.

Anger motivates American politics. Economic inequality is driven and exacerbated by globalization policies that ship jobs overseas and automation that replaces human labor with self-service technology fuels discontent.[3] Upward mobility seems unobtainable for working-class Americans. Some viewed President Donald J. Trump's rise to political power as "an angry verdict" on global market policies that disproportionately benefit the most well-off in society.[4] A government non-responsive to its citizens' most pressing needs, in other words, fueled a politics of anger.

Distrust impedes civic life in America. People turn inward when gripped by fear, making civic engagement extremely difficult.[5] Anger causes people to lash outward, to see some "other" as an oppressive object or impediment to one's own peace, stability, and security.[6] Americans distrust

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[1] MARTHA C. NUSSBAUM, THE MONARCHY OF FEAR: A PHILOSOPHER LOOKS AT OUR POLITICAL CRISIS 1–4 (Simon & Schuster 2018).

[2] PATRICK J. DENEEN, WHY LIBERALISM FAILED 1–3, 7–9 (Yale Univ. Press 2018); MICHAEL J. SANDEL, THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD 3–6 (Farrar, Straus and Giroux 2020).

[3] DENEEN, *supra* note 2, at 9–10; SANDEL, *supra* note 2, at 18–19, 22–23, 197.

[4] *See* SANDEL, *supra* note 2, at 17–19, 197 (noting that the globalization policies grossly enriched executives and shareholders, while employee wages remained largely stagnant).

[5] NUSSBAUM, *supra* note 1, at 2, 60–62.

[6] *Id.* at 63.

their elected representatives, their government,[7] and each other.[8] Whatever the driving cause, distrust so permeates political and social life in the United States that many doubt that citizens possess the requisite fortitude to much longer sustain any true semblance of democracy in America or to even save the republic from its perceived present decline.[9]

Enigmatic as the problem may seem, a growing choir of scholars points to philosophical liberalism as the source of Americans' present discontent.[10] The sense of isolation and lack of control that engenders fear, anger, and distrust among the citizenry is the natural outcome of a political ideology committed to individual autonomy over community, personal rights over the common good, and self-interest over solidarity.[11] Liberalism, the critique goes, inaugurates a "false anthropology" that treats people as sprung from nothing and from nowhere, always free choosing individuals with no preexisting or deeply embedded cultural or relational commitments.[12] But these cultural norms and commitments shape a person's identity and foster an orientation toward the common good, rather than the selfish pursuit of individual desire.[13] Positive law, guided by philosophical liberalism, aims to free individuals from these cultural constraints and pre-existing commitments, and, in doing so, leaves citizens feeling only tenuously connected to each other, their elected representatives, and their government.[14]

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[7] *Public Trust in Government: 1958–2021*, PEW RESEARCH CENTER (May 17, 2021), https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/. ("Only about one-quarter of Americans say they can trust the government in Washington to do what is right "just about always" (2%) or "most of the time" (22%).").

[8] DENEEN, *supra* note 2, at 2.

[9] *Id.* (noting that many Americans believe the United States is in decline, some of whom believe that "we may be witnessing the end of the Republic unfolding before our eyes").

[10] *See* Kenneth L. Townsend, *Why Liberalism Persists: The Neglected Life of the Law in the Story of Liberalism's Decline*, 94 ST. JOHN'S L. REV. 457, 457 & nn.1–2 (2020).

[11] DENEEN, *supra* note 2, at 7–9; SANDEL, *supra* note 2, at 19–22; Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

[12] DENEEN, *supra* note 2, at 31–34, 72–82.

[13] *Id.* at 74–77.

[14] *Id.* at 7–9, 37–39, 82–88.

But if liberalism is the problem, then, as Patrick Deneen recently argued, the solution must lie somewhere other than the liberal tradition.[15] Americans must muster moral and political courage to institute better practices to forge civic trust, cultivate virtue, and prioritize the common good if they wish to preserve American democracy so it does not fade into history's dustbin as a failed experiment.[16] If Deneen correctly diagnosed the problem, though, it raises the question whether the American legal system offers any way to avoid what Deneen sees as an inevitable decline.[17]

This article takes Patrick Deneen's argument seriously and assumes for the sake of discussion that he correctly diagnosed the problem. Though law in the United States is largely built upon and informed by liberal assumptions, a legal pathway exists to prioritize the good over the right, the community over the individual, and, in doing so, to foster civic trust among citizens. Liberalism prioritizes rights over the good, individual freedom, and autonomy over community. The assumption, then, is that government, and therefore the law, must be neutral among its members' varying and competing conceptions of the good. However, law in the United States does not always require such neutrality. Courts have articulated an extra-textual exception to the Thirteenth Amendment—the amendment that announced "universal freedom" in the United States—that allows the government to force persons to perform public services. A close look at these cases in the context of the larger Thirteenth Amendment jurisprudence reveals an intimate and inseparable relationship between freedom and civic duty.

This article begins by briefly describing Patrick Deneen's argument against liberalism and his proposed resolution. Next, this article turns to the Thirteenth Amendment to show its polity-oriented outlook, looking to the amendment's text, scholarship on the amendment, and court cases interpreting the amendment, including courts' articulation of the "civic-duty exception." Thereafter, this article closely examines the rationale behind the

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[15] DENEEN, *supra* note 2, at 4, 41.

[16] *See* DENEEN, supra note 2, at 20, 41, 188–98; MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 261–69 (Farrar, Straus and Giroux 2009). In recent works, liberalism proponents also sense the need to work toward cultivating solidarity and an orientation toward the common good through education and other associational and institutional practices, or through public service. *See, e.g.,* Townsend, *supra* note 9, at 493–95; NUSSBAUM, *supra* note 1, at 241–43.

[17] Townsend, *supra* note 10, at 41 ("We can pursue more local forms of self-government by choice, or suffer by default an oscillation between growing anarchy and the increasingly forcible imposition of order by an increasingly desperate state.").

"civic-duty exception" to show that it is not an exception at all, but a complement to freedom itself. Finally, this article argues that state and local government, as well as the federal government, should use their conscription power to promote public service, which, in turn, provides a route to inculcate in citizens a commitment to communal well-being, civic trust, and a desire to promote public goods.

II. LIBERALISM'S SELF-DEFEAT AND ITS UNCERTAIN SUCCESSOR

Arguments against liberalism's basic assumptions are not new.[18] However, Patrick Deneen's recent work—*Why Liberalism Failed?*—managed to "capture the energies and anxieties of the age in a manner rare for a work in legal or political theory."[19] In his work, Deneen takes liberalism on its own terms and exposes it as an all-encompassing ideology that keeps its promise to liberate individuals from the constraints of the real world. In keeping its promise, liberalism fails by its own success.[20] A brief look at Deneen's argument will help frame the remainder of the discussion in this article.

Liberalism relies on a false anthropology as a means of liberating individuals from arbitrary rule, specifically unchosen personal constraints on a person. Deneen notes that liberalism arose as a response to aristocratic rule that once determined one's political and social life based on inherited traits and fixed social statuses, among other arbitrary factors.[21] Within the social contractarian tradition, beginning with Thomas Hobbes and John Locke and culminating in John Rawls' original position, people were reconceived as autonomous and wholly independent, non-relational beings who seek the greatest expression of personal liberty possible.[22] Thought experiments that abstract individuals away from personal bonds, communal relations, natural endowments, personal talents and traits, purporting to liberate persons from any constraints against free choice, replaced each person's real-world experience within the communities that shape their personal identity.[23]

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[18] *See*, *e.g.*, Micah Schwartzman, *Professor Fish – Why Are You Still Picking on Liberalism?*, 14 FIU L. REV. 721, 721 (2021); Townsend, *supra* note 10, at 458.

[19] Townsend, *supra* note 10, at 458.

[20] DENEEN, *supra* note 2, at 179.

[21] *Id.* at 135.

[22] *Id.* at 31–34, 47–51.

[23] *Id.* at 31–34, 72–82.

Given its reliance on a false anthropology, Deneen argues liberalism advances anticulture. Deneen describes culture as follows:

> Culture is the practice of full temporality, an institution that connects the present to the past and the future. . . . Culture educates us about our generational debts and obligations. At its best, it is a tangible inheritance of the past, one that each of us is obligated to regard with the responsibilities of trusteeship. It is itself an education in the full dimension of human temporality, meant to abridge our temptation to live within the present, with the attendant dispositions of ingratitude and irresponsibility that such narrowing of temporality encourages.[24]

By its false anthropology, liberalism deracinates individuals, treating traditions and norms within given communities as constraints against individual autonomy, against free choice, and therefore as obstacles to overcome.[25] Free of personal commitments and communal ties, liberalism creates rights-bearing autonomous and nonrelational selves, "defined by [their] liberty, but insecure, powerless, afraid, and alone,"[26] mirroring the Hobbesian state of nature wherein cultureless individuals in a war of all-against-all wrestle through a solitary, nasty, brutish, and short life.[27]

Shorn of culture and reconceived as insatiate free choosers, autonomous individuals turn to an all-powerful state to remove obstacles to personal liberty, much like people in Hobbes' state of nature seek security in an absolute monarch against an unstable environment.[28] Liberalism, whether employed by political conservatives or progressives, unites individualism and statism, Deneen argues.[29] Law becomes the vehicle through which individuals preserve and expand their personal freedom.[30] The state, then,

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[24] *Id.* at 77.

[25] *Id.* at 15–18.

[26] PATRICK J. DENEEN, WHY LIBERALISM FAILED 16 (Yale Univ. Press 2018).

[27] Thomas Hobbes, *Leviathan*, *in* ETHICAL THEORY: AN ANTHOLOGY 558, 559 (Russ Shafer-Landau ed., 2d ed. 2013).

[28] DENEEN, *supra* note 2, at 47–53, 82–88.

[29] *Id.* at 48–49.

[30] *Id.*

becomes the primary means by which individuals realize the "ideal of liberty."[31]

By orienting people's sense of self away from local settings and communities and toward personal expression and choice, liberalism trades organic modes of self-governance for an emaciated representative form.[32] Deneen points to Alexis de Tocqueville's observation of American democratic practices as an exemplar of true self-governance—an expression of liberty rightly understood as "free choice made on behalf of the good:"

> Democracy required the abridgment of the desires and preferences of the individual, particularly in light of an awareness of a common good that could become discernible only through ongoing interaction with fellow citizens. Indeed, Tocqueville held that the very idea of the self as an "individual" was fundamentally transformed through such interactions: "Feelings and ideas are renewed, the heart enlarged, and the understanding developed only by the reciprocal action of men upon one another."[33]

However, American constitutional design sought to constrain popular governance.[34] The framers viewed people as prone to illiberal impulses tutored by the local communities where their natural affections reside.[35]

James Madison promoted the ratification of the United States Constitution by pointing out two features that mitigate against local prejudices. First, public sentiment and will would filter through elected representatives who would possess greater wisdom than the multitude to promote the "'*true interest* of their country.'"[36] Second, as government's first objective is to protect the "diversity in the faculties" of individuals, that is, as Deneen puts it, "to protect the greatest possible sphere of individual liberty," extending the sphere wherein individuals seek their own self-interest would ensure mutual distrust among the citizenry, making it less likely that

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[31] *Id.* at 49.
[32] *Id.* at 154–55.
[33] *Id.* at 174-75.
[34] PATRICK J. DENEEN, WHY LIBERALISM FAILED 162–64 (Yale Univ. Press 2018).
[35] *Id.* at 162, 167.
[36] *Id.* at 163.

they would join in common motives that threaten other citizens' individual rights.[37] The result today has been a less popular influence over the policies that affect each person's life, and the government's turn toward a bureaucracy of unelected and unaccountable "experts" who create and administer public policy.[38]

Deneen warns that liberal policies cannot rein in the distant and unresponsive government that liberalism spawned. He suggests that "some form of populist nationalist authoritarianism or military autocracy seems altogether plausible an answer to the anger and fear of a postliberal citizenry."[39] To avoid such worse-case scenarios, Deneen calls for a patient move away from liberalism and from ideology altogether.[40] This requires that Americans build upon acknowledged achievements of liberalism, such as its focus on human dignity, and develop practices that "foster new forms of culture, household economics, and polis life."[41] He further suggests that such a move away from liberalism may begin by voluntary counter-cultures (or counter-anticultures) within the larger liberal society.[42] He ends by posing a challenge to "imagine, and build, liberty after liberalism."[43]

This article takes up Deneen's challenge by looking to positive law for a patient first step toward forging civic trust and an orientation toward the common good. Thirteenth Amendment jurisprudence may reveal a pathway for such an initial step forward.

III. THIRTEENTH AMENDMENT JURISPRUDENCE: AN INTIMATE AND INSEPARABLE LINK BETWEEN FREEDOM AND CIVIC DUTY

The Thirteenth Amendment plays an indispensable role in defining and enforcing American freedom. Before the Thirteenth Amendment, the United States failed wholly to embrace the self-evident truth that all persons are "created equal" and endowed with "unalienable rights," which include

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[37] *Id.* at 163–64.
[38] *Id.* at 8, 159–61, 177.
[39] *Id.* at 181.
[40] PATRICK J. DENEEN, WHY LIBERALISM FAILED 182–83 (Yale Univ. Press 2018).
[41] *Id.*
[42] *Id.* at 191–94.
[43] *Id.* at 198.

the rights to "[l]ife, Liberty and the pursuit of Happiness."[44] Drafted and ratified following the bloodiest war in America's history, the Thirteenth Amendment declared free all persons within the United States' jurisdiction—a declaration designed to free millions of slaves, and abolish the badges and incidents of slavery whether imposed by private actors or government.[45]

On its face, the Thirteenth Amendment admits only one exception: "[n]either slavery nor involuntary servitude, ***except as punishment for crime whereof the party shall have been duly convicted***, shall exist within the United States, or any place subject to their jurisdiction."[46] With government falling within the Thirteenth Amendment's prohibition, the scope of freedom became a central issue in challenges to government's authority to require persons to perform services against the person's will, as courts construed both slavery and involuntary servitude to cover all shades of compulsory service against a person's will for another's benefit.[47] Could government conscript a person for military service? Or compel one to serve as a juror in a criminal trial? Or coerce one into building public roads?

Courts answered these latter questions in the affirmative and, in doing so, developed a jurisprudence that intimately and inseparably links freedom to civic duty. Before turning to the civic-duty exception, however, a brief discussion of the Thirteenth Amendment's text and purpose is warranted.

A. The Thirteenth Amendment and its Great Purpose

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[44] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* Cong. Globe, 38th Cong., 2d Sess., pt. 1, 142–43 (1865) ("The effect of such amendment will be to prohibit slavery in these United States, and be a practical application of that self-evident truth, "that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness.").

[45] *See*, *e.g.*, Slaughter-House Cases, 83 U.S. 36, 69 (1872); United States v. Stanley, 109 U.S. 3, 20 (1883) ("By its own unaided force and effect [the Thirteenth Amendment] abolished slavery, and established universal freedom."); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439–41 (1968); Jacobus tenBrock, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 180-81 (1951); ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 104–05 (New York University Press 2004).

[46] U.S. CONST. amend. XIII, § 1 (emphasis added).

[47] Daniel R. Correa, *The Slavery Clause and Criminal Disenfranchisement: How the Thirteenth Amendment Informs the Debate on Crime-Based Franchise Restrictions*, 53 LOY. U. CHI. L.J. 89, 132–37 (2021).

The Thirteenth Amendment did more than pronounce universal freedom within the United States; it initiated a new polity. The amendment sought not simply to free enslaved people in the United States but also to integrate newly freed slaves into American society.[48] Congress made this latter fact evident in the Civil Rights Act of 1866, an early Act under its section 2 enforcement powers, which declared birthright citizenship, conferring citizenship status on every free person born within the United States.[49] Most judicial opinions and scholarship as to the scope of the Thirteenth Amendment focus on negative freedom, and the ways in which the amendment may combat impediments to individual freedom. Less attention is given to the positive expression of freedom for which the amendment stands as a polity-oriented provision.

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[48] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 41–42 (W. W. Norton & Company, Inc. 2019); TSESIS, *supra* note 45, at 41–46; *See* Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 195–200 (1951) (stating that the Thirteenth Amendment's drafters saw the amendment as "not just cutting loose the fetters which bound the physical person of the slave[,] but restoring to him his natural, inalienable and civil rights; or what was the same thing in other words, guaranteeing to him the privileges and immunities of citizens of the United States").

[49] Civil Rights Act of 1866, 14 Stat. 27 (1866):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

The amendment's "great purpose," according to the United States Supreme Court, is "liberty under the protection of effective government."[50] The amendment's drafters made clear their intention to end slavery and any form of involuntary servitude, as well as to combat all badges and incidents of slavery.[51] Courts have construed the protection afforded under the Thirteenth Amendment as more or less limited depending on whether the claim arises under section 1's self-executing prohibition against slavery and involuntary servitude[52] or under Congress's enforcement power under section 2.[53] Section 1 enables courts to enforce the amendment's ban on slavery and involuntary servitude, but courts construe "involuntary servitude" narrowly and have not extended section 1's self-executing reach to the badges and incidents of slavery.[54] Section 2, on the other hand, left to Congress the power "rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."[55]

Congress's power under section 2 provides the most straight-forward and effective means by which to promote the Thirteenth Amendment's great purpose. Yet, much Thirteenth Amendment scholarship focuses its attention on judicial enforcement via section 1, with, as George Rutherglen states,

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[50] Butler v. Perry, 240 U.S. 328, 333 (1916).

[51] *See* tenBroek, *supra* note 45, at 177–78.

[52] U.S. CONST. amend. XIII, § 1.

[53] U.S. CONST. amend. XIII, § 2 ("Congress shall have the power to enforce this article by appropriate legislation.").

[54] *See*, *e.g.*, Civil Rights Cases, 109 U.S. 3, 20 (1883) ("This amendment . . . is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances."); United States v. Kozminski, 487 U.S. 931, 942 (1988) (reiterating the self-executing nature of section 1 as articulated in the Civil Rights Cases, and noting that "the phrase 'involuntary servitude' was intended to extend 'to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.'") (quoting Butler v. Perry, 240 U.S. 328, 332 (1916)); George Rutherglen, *The Thirteenth Amendment in Legal Theory*, 104 CORNELL L. REV. ONLINE 160, 164–66 (2019); Alexander Tsesis, *Furthering American Freedom: Civil Rights & The Thirteenth Amendment*, 45 B.C. L. Rev. 307, 333–38, 344–49 (2004); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 240–42 (Cambridge Univ. Press 2001).

[55] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–41 (1968) (affirming statute that prohibited racial discrimination in the sale of real estate). The *Jones* opinion reaffirmed Congress' power to employ the Thirteenth Amendment to combat racial discrimination, the power of which the Court earlier denied in the Civil Rights Cases, 109 U.S. 3 (1883); *see also* Rutherglen, *supra* note 54, at 166–67; Tsesis, *supra* note 54, at 339–44.

"consequences that have been, at best, hit or miss."[56] Some scholarship focuses on what Congress could or should do under its section 2 power to combat discriminatory practices that inhibit or impede individual freedom, promoting what Jamal Greene calls "Thirteenth Amendment optimism," despite the near self-evident reality that, absent a congressional act, "it is quite unlikely that this or any conceivable Supreme Court will be moved even to entertain these questions." [57] With a few exceptions, Thirteenth Amendment scholarship focuses on the amendment's negative freedom, its aim to remove impediments to individual freedom, and not on how the amendment may promote positive, polity-oriented expressions of freedom.

A few of these exceptions are worth noting here. In his masterful work on the Thirteenth Amendment, Alexander Tsesis posits a civil-freedom account of the Thirteenth Amendment premised on a "federal polity" that must "protect the common good; that is, laws must aim to improve people's lives, as much as feasible, and to help them flourish as individuals with unique interests." [58] Tsesis views Thirteenth Amendment freedom as harmonizing negative freedom and positive freedom by prohibiting arbitrary dominion over one's self-determination and by promoting opportunities for individuals to make meaning and pursue one's vision of the good life.[59]

Another polity-oriented view raised collective self-determination as supported by the Thirteenth Amendment.[60] Seth Davis argues that the Thirteenth Amendment should be read to empower "communities *as communities* to participate in, if not control, lawmaking and policymaking meant to serve them."[61] Davis details governance in the slaveholding south, where plantation owners exercised quintessential local government police power to impose absolute dominion over Black residents, which served not only to deny their individual self-determination, but also their collective self-determination.[62] The Thirteenth Amendment, under this view, prohibits

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[56] Rutherglen, *supra* note 54, at 167.

[57] Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1733 (2012) (listing Thirteenth Amendment scholarship that reads the amendment to prohibit hate speech, child labor, domestic violence, and physician assisted suicide laws, among other practices).

[58] TSESIS, *supra* note 45, at 107.

[59] *Id.* at 107–08.

[60] Seth Davis, *The Thirteenth Amendment and Self-Determination*, 104 CORNELL L. REV. ONLINE 88 (2019).

[61] *Id.* at 91 (The argument Davis puts forth makes clear that it is "concerned with *communities* in particular places and spaces rather than a single *community*.").

[62] *Id.* at 99–104.

under section 1, or authorizes Congress to combat by legislation under section 2, "policing institutions that perpetuate the subordination of Black communities."[63]

These polity-centered accounts of the Thirteenth Amendment contribute a fuller appreciation and understanding of the amendment's great purpose than do negative freedom accounts. The Thirteenth Amendment initiated what Eric Foner aptly describes as "the second founding."[64] By its own force, Congress considered the amendment sufficient to undermine the United States Supreme Court's *Dred Scott* opinion, where the Court held Black persons could never be citizens of the United States because they were tainted by a badge of inferiority that excluded them and their descendants from membership in the national polity. [65]

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[63] *Id.* at 108–09.

[64] FONER, *supra* note 48, at 17–20.

[65] Scott v. Sanford (*Dred Scott*), 60 U.S. 393, 407, 449 (1857) (enslaved party). The Court's reasoning in *Dred Scott* was strained. It reasoned on the one hand that states possessed the sole power to determine within their own borders the status of a person as "free" or "slave," but no state could determine the interstate status of any person as "free" or "slave," nor could Congress. On the other hand, the Court also reasoned that Black persons were considered inherently unfree:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might just and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Id. at 407; *see also* MARK E. STEINER, LINCOLN AND CITIZENSHIP 73–87 (Southern Illinois Univ. Press 2021) (detailing the *Dred Scott* opinion and its public reception, including Abraham Lincoln's "paean to white supremacy" during one of his debates with Stephen A. Douglas, where Lincoln proclaimed that "there must be the position of superior and inferior" so long as "the white and black race" live together, with the "superior position assigned to the white race").

The Thirteenth Amendment rejected *Dred Scott*'s holding that the federal government lacked the power to prohibit slavery and involuntary servitude, thereby rejecting the notion that states had the sole right to declare a person free or slave within their own borders. Although the Thirteenth Amendment did not expressly address citizenship, the framers of the Thirteenth Amendment believed the federal government reserved the power to decide the issue of national citizenship.[66] The drafters saw the amendment as "not just cutting loose the fetters which bound the physical person of the slave[,] but restoring to him his natural, inalienable and civil rights; or what was the same thing in other words, guaranteeing to him the privileges and immunities of citizens of the United States."[67] The Civil Rights Act of 1866, enacted pursuant to section 2 of the Thirteenth Amendment, declared birthright citizenship. [68] The Citizenship Clause of the Fourteenth Amendment[69] cemented the new polity Reconstruction Congress envisioned, a polity that, absent the Fourteenth Amendment, remained on shaky ground given that the Civil Rights Act of 1866 required legislative override of President Andrew Johnson's veto, and given the very real political threat that the act could too easily be repealed by subsequent legislative acts.[70]

For all its faults, even the *Slaughter-House Cases* understood the Thirteenth Amendment to be more than simply some isolated announcement that slavery could no longer exist in the United States. The amendment informed the "unity of purpose" behind the Reconstruction Amendments, that is, to make all persons born in the United States free and equal citizens of both the United States and the state within which they reside.[71]

The Supreme Court understood the Thirteenth Amendment's great purpose to be "liberty under the protection of effective government," a

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[66] FONER, *supra* note 48, at 63–64 (noting that Reconstruction Republicans viewed the Thirteenth Amendment as empowering Congress and the courts to protect Americans' liberties); TSESIS, *supra* note 45, at 55–56.

[67] Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 200 (1951).

[68] Robert Longely, *The Civil Rights Act Of 1966: History and Impact*, THOUGHTCO. (Mar. 01, 2021), https://www.thoughtco.com/civil-rights-act-of-1866-4164345.

[69] U.S. CONST. amend. XIV, § 1.

[70] *See* FONER *supra* note 48, at 279; Correa, *supra* note 47, at 140–46 (2021).

[71] *Slaughter-House Cases*, 83 U.S. 36, 36, 67 (1872) ("The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning."); Correa, *supra* note 47, at 138–40 (2021).

purpose that undoubtedly compliments the "unity of purpose" behind the Reconstruction Amendments.[72] In articulating this great purpose, though, the Court created what some courts refer to as the "civic-duty exception" to the Thirteenth Amendment's involuntary servitude prohibition. A close look at the civic-duty exception's development, however, reveals that it is not really an exception, but a more complete expression of American freedom, one that extends beyond negative freedom.

B. The "Civic-Duty Exception" to the Thirteenth Amendment

The United States Supreme Court first articulated what eventually evolved into the civic-duty exception to the Thirteenth Amendment in *Robertson v. Baldwin*, [73] but the *Slaughter-House Cases* [74] laid the groundwork for its development.

In the *Slaughter-House Cases*, butchers challenged a Louisiana law that required them to slaughter animals outside the city limits in facilities run by a single corporation that could impose landing and slaughtering charges.[75] The butchers argued, in part, that the statute created an involuntary servitude by prohibiting them from owning and operating a slaughterhouse or by forcing them to bear the cost of travel to a single location, and pay the expenses imposed by a single corporation in order to practice their trade.[76] The Court rejected the butchers' involuntary servitude argument, reasoning that the term "involuntary servitude" applied only to people, not property.[77]

While the *Slaughter-House* Thirteenth Amendment opinion appears to rest on textual grounds, the Court expounded first on state police power before it interpreted and applied the amendment, portending its holding. In response to the butchers' claimed right to their labor and to use their land to practice their trade, the Court noted "the general and rational principle [ ] that every person ought so to use his property as not to injure his neighbors[,] and that private interests must be made subservient to the general interest of the community."[78] State police power, though difficult to define in scope, is necessary to secure social order and the comfort and health of citizens

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[72] Butler v. Perry, 240 U.S. 328, 333 (1916).
[73] Robertson v. Baldwin, 165 U.S. 275 (1897).
[74] Slaughter-House Cases, 83 U.S. 36 (1872).
[75] *Id.* at 59–60.
[76] *Id.* at 66–69.
[77] *Id.* at 69.
[78] *Id.*

(especially pressing in densely populated areas).[79] The Court added that no question could be made as to the state's power to so exercise its police power, and legislatures frequently, and necessarily, exercise this power to regulate the butchering trade, with its use of slaughterhouses and the subsequent distribution of meat to the public.[80]

Slaughter-House created a quandary. On the one hand, it admitted that some long-standing state practices could not reasonably be questioned but left open what those long-standing practices may be. On the other hand, it reasoned that the meaning of "involuntary servitude" is well-understood to apply to personal servitudes but did not clearly describe the scope of personal servitudes. What happens when, for example, a long-standing government practice imposes what, in a private context, would amount to personal servitude, considering the Thirteenth Amendment prohibits private and public involuntary servitude?

The Court first confronted the quandary in *Robertson v. Baldwin*.[81] There, the petitioners challenged a federal law that authorized a justice of the peace to detain, imprison, and then deliver back to the shipmaster any person who executes an agreement to perform a sea voyage and subsequently deserts.[82] The Court wrestled initially with the temporal conundrum posed by "involuntary servitude:" if servitude is "involuntary" whenever a person no longer consents to perform, rather than voluntary at all times with consent at the agreement's inception, "then no one, not even a soldier, sailor or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle."[83]

Rather than resolve the temporal issue, the Court in *Robertson* looked past the words in the amendment to its "spirit" and found that the Thirteenth Amendment did not intend to reach services "which have from time immemorial been treated as exceptional."[84] Military enlistments and the rights of parents to rear their children served as two examples of the types of relationships that the Thirteenth Amendment was not intended to disturb.[85] The examples admit exceptions to the Amendment's "general language," the Court reasoned, and since the Amendment did not distinguish between public

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[79] *Id.*
[80] Slaughter-House Cases, 83 U.S. 36 (1872).
[81] Robertson v. Baldwin, 165 U.S. 275 (1897).
[82] *Id.* at 277.
[83] *Id.* at 280–81.
[84] *Id.* at 282.
[85] *Id.*

and private services, exceptions may be found in either case.[86] The Court held that the Thirteenth Amendment's provision against involuntary servitude did not apply to the statute at issue, which enforced private seaman-merchant contracts like the one under consideration.[87]

Maritime nations historically have treated seaman-merchant agreements as exceptional relationships that require a sailor to surrender his personal liberty during the contract period, according to the *Robertson* Court.[88] Sea navigation required something more than civil remedies to deter desertion and ensure a safe and secure voyage for ship and crew, as "desertion might involve a long delay of vessel while the master is seeking another chew, an abandonment of voyage, and, in some cases, the safety of the ship itself."[89] To guarantee safe and successful sea navigation, maritime nations enacted laws to secure a crew's attendance aboard a ship and to punish sailors for desertion.[90]

In his dissent, Justice John Marshall Harlan rejected the majority's reliance on historical maritime law and reasoned that the Thirteenth Amendment plainly prohibited what the contested statute allowed. "The placing of a person, by force, on a vessel about to sail, is putting him in a condition of involuntary servitude, if the purpose is to compel him against his will to give personal services in the private business in which the vessel is engaged." [91] Justice Harlan, likewise, disagreed with the majority's

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[86] *Id.*

[87] Robertson v. Baldwin, 165 U.S. 275, 282–88 (1897).

[88] *Id.* at 282–83.

[89] *Id.*

[90] *Id.* In *NLRB v. Sea-Land Service, Inc.*, 837 F.2d 1387, 1393 (5th Cir. 1988), the court elaborated more fully on the importance of ships and sailors to the United States:

> The Congress, from its second session, was deeply concerned with the merchant marine of this very new republic. It recognized that without ships and ship operators – interests which needed protection – the young republic could neither grow nor thrive. But more so, the Congress was aware that, no matter how many, or how seaworthy, bottoms were available or current venturers to operate them, the merchant marine could not succeed without persons to man and navigate the vessels. Seamen, and their welfare, were a predominant interest of the Congress then, and, history reflects, still are.

[91] *Id.* at 292 (Harlan, J., dissenting).

example regarding enlistment contracts for Army soldiers and Navy sailors. As Justice Harlan viewed the matter, when one voluntarily agrees to perform services for the public, those services constitute public duties that must be rendered in accordance with statutory requirements whether or not the person continues to consent to perform such services.[92] Justice Harlan went even further, stating even wholly involuntary service rendered for the public pursuant to a statutory requirement constitutes neither slavery nor involuntary servitude.[93]

Justice Harlan's dissent raised an interesting question regarding public service: may government statutorily require one to perform public services absent a previous voluntary agreement? In *Butler v. Perry*, the Court held that the Thirteenth Amendment did not impair the government's power to compel citizens to render public services.[94] The petitioner in *Butler* challenged a state law requiring every able-bodied male over twenty-one years of age to work on roads and bridges for six ten-hour days per year.[95] The Court, citing the *Slaughter House Cases* and *Robertson*, opined that the Thirteenth Amendment "introduced no novel doctrine with respect to services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to this State, such as services in the army, militia, on the jury, etc."[96] The Court traced conscription for public works to Colonial times.[97] The Thirteenth Amendment's great purpose, the Court reasoned, is "liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."[98]

Though *Robertson* and *Butler* stated in dicta that military service did not fall within the Thirteenth Amendment's involuntary servitude prohibition, the Court directly addressed this issue in the *Selective Draft Law Cases*.[99] There, the Court affirmed compulsory military service against a Thirteenth Amendment challenge.[100] The petitioners argued, in part, that

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[92] *Id.* at 298 (Harlan, J. dissenting).

[93] *Id.* (Harlan, J. dissenting) ("Involuntary service rendered for the public, pursuant as well to the requirements of a statute as to a previous voluntary engagement, is not, in any legal sense, either slavery or involuntary servitude.").

[94] Butler v. Perry, 240 U.S. 328 (1916).

[95] *Id*.

[96] *Id.* at 332–33.

[97] *Id.*

[98] *Id*. at 333.

[99] Selective Draft Law Cases, 245 U.S. 366 (1918).

[100] *Id*.

mandatory military conscription conflicts with constitutionally guaranteed individual liberty.[101] But, the Court retorted, "a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need." [102] Without fully entertaining the petitioners' Thirteenth Amendment challenge, the Court simply stated that it could not "conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation . . . can be said to be the imposition of involuntary servitude."[103]

The Court further developed what came to be known as the "civic-duty exception" in *Hurtado v. United States*.[104] There, non-citizen petitioners challenged as unconstitutional a statutory payment scheme to material witnesses subject to pretrial incarceration.[105] The petitioners were detained following illegal entry into the United States and were required but could not afford to post bond to ensure their presence as material witnesses at the trial of those persons who smuggled the petitioners into the United States.[106] The statutory provisions at issue authorized one dollar per day payment to each person incarcerated under such circumstances and twenty dollars per confinement day when a "witness attending in any court."[107] The Court held that the petitioners were entitled only to one dollar per day of confinement for the period before the trial.[108] The Court cursorily dealt with the Thirteenth Amendment issue in a footnote, but its reasoning in the body of the opinion centered on the duty of every person within the United States' jurisdiction to provide evidence, whether or not compensated—"'[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.'"[109]

Lower courts applying the United States Supreme Court's Thirteenth Amendment jurisprudence routinely affirm the government's power to compel or coerce persons, both citizens and non-citizens, into performing public services and providing communal contributions to the general upkeep

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[101] *Id.* at 378.
[102] *Id.*
[103] *Id.* at 390.
[104] Hurtado v. United States, 410 U.S. 578 (1973).
[105] *Id.* at 590.
[106] *Id.* at 579.
[107] *Id.* at 580.
[108] *Id.* at 588.
[109] *Id.* at 589 & n.11 (quoting Blair v. United States, 250 U.S. 273, 281 (1919)).

of certain government institutions. For example, with respect to public services, lower courts have held that civilian labor, in lieu of compulsory military service, does not constitute involuntary servitude because "the Thirteenth Amendment has no application to a call for service made by one's government according to law to meet a public need."[110] Courts also have rejected Thirteenth Amendment challenges to community service requirements in public high schools as a prerequisite to graduation.[111] With respect to communal contributions, courts routinely reject Thirteenth Amendment challenges by pretrial detention inmates against performing general housekeeping duties—such as fixing meals, scrubbing dishes, doing laundry, and cleaning the building—with little to no pay, as these "responsibilities are not punitive in nature and must be routinely observed in any multiple living unit."[112]

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[110] Heflin v. Sanford, 142 F.2d 798 (5th Cir. 1944) (Compelled civilian labor in lieu of compulsory military service did not constitute involuntary servitude.); United States v. Hoepker, 223 F.2d 921, 923 (7th Cir. 1955) (holding conscripted civilian service does not violate Thirteenth Amendment as Congress has the power to conscript under its War Powers and every citizen owes a duty to serve, while conscientious objection exemption is merely a privilege); Howze v. United States, 272 F.2d 146, 148 (9th Cir. 1959) (holding compulsory civilian service in lieu of military service, even during peacetime and even absent a military emergency, is not prohibited by Thirteenth Amendment); United States v. Holmes, 387 F.2d 781 (7th Cir. 1967) (holding same); *see also* United States v. Boardman, 419 F.2d 110 (1st Cir. 1969) ("Congress may also require alternate service to avoid the difficulties implicit in granting a total exemption based on individual belief, such as the potential threat to the morale of the armed forces.").

[111] *See, e.g.,* Immediato v. Rye Neck Sch. Dist., 73 F.3d 454 (2d Cir. 1996) (40-hour community service requirement not involuntary servitude); Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996) (50-hour community service requirement not involuntary servitude); Steirer v. Bethleham Area Sch. Dist., 987 F.2d 989 (1993) (60-hour community service requirement not involuntary servitude).

[112] Bijeol v. Nelson, 579 F.2d 423 (7th Cir. 1978) (Pretrial detainee not subject to involuntary servitude when required, without pay and by threat of segregation, to clean his room, clean windows, wash heel marks off walls, vacuum general purpose area, and keep books in order.); Channer v. Hall, 112 F.3d 214 (5th Cir. 1997) (Federal government may require "communal contribution" from INS detainee in the form of housekeeping tasks, such as fixing meals, scrubbing dishes, doing laundry, and cleaning building.); cf Novoa v. Geo Grp., Inc., 2018 U.S. Dist. LEXIS 117129, ** 37–40 (C.D. Cal. June 21, 2018) (holding civic-duty exception did not apply to privately run immigration detention center, despite it contracting with the federal government, because the forced labor benefits a private entity, not government); Figgs v. GEO Grp., Inc., 2019 U.S. Dist. LEXIS 53991, ** 13–17 (S.D. Ind. March 29, 2019) (same).

In addition, courts affirm state power to compel or coerce persons into performing personal services for the benefit of other individuals under certain circumstances. In *United States v. Ballek*, the court held child support awards enforced against a parent by threat of imprisonment do not violate the Thirteenth Amendment.[113] While the court admitted the Thirteenth Amendment prohibits imprisoning one for failing to pay a debt, it reasoned that enforcing child care payment is "one of the most important and sensitive exercises of the police power—ensuring that persons too young to take care of themselves can count on both their parents for material support."[114] The *Ballek* court considered the matter not purely private. Parents assume a moral obligation to care for their children until emancipation.[115] When a parent neglects this obligation, it raises an issue "of vital importance to the community" that requires public intervention via the judiciary and that concerns "the public fisc."[116]

Similarly, in *Ule v. State*, the Indiana Supreme Court rejected a defendant's Thirteenth Amendment challenge to the state's hit-and-run law that required motorists involved in an automobile accident to report the accident and render assistance to an injured party.[117] The defendant struck a pedestrian and failed to stop and render aid and failed to report the accident.[118] The court, in rejecting the defendant's Thirteenth Amendment challenge, reasoned that the hit-and-run statutory provision constituted a valid "police regulation for the promotion of the general welfare and public good."[119] The court added that the Thirteenth Amendment was not "'designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people.'"[120]

While these cases, and present scholarship reviewing the civic-duty exception,[121] tend to focus on the scope of the government's power to enact

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[113] United States v. Ballek, 170 F.3d 871 (9th Cir. 1999).
[114] *Id*. at 874–75.
[115] *Id.* at 874.
[116] *Id.* at 874–75.
[117] Ule v. State, 194 N.E. 140 (Ind. 1935).
[118] *Id.* at 140–41.
[119] *Id.* at 142–43.
[120] *Id.* at 143 (quoting Barbier v. Connolly, 113 U.S. 27, 31 (1885)).
[121] *See, e.g.,* Andrew M. Pauwels, *Mandatory National Service: Creating Generations of Civic-Minded Citizens*, 88 NOTRE DAME L. REV. 2597 (2013); Jason Britt, *Unwilling Warriors: An Examination of the Power to Conscript in Peacetime*,

laws that promote public service without running afoul of the Thirteenth Amendment, they overlook or underappreciate that the Court's jurisprudence provides a positive expression of freedom that complements the Thirteenth Amendment's negative restriction on freedom.

IV. FULL EXPRESSION OF AMERICAN FREEDOM IN THIRTEENTH AMENDMENT JURISPRUDENCE

What lower courts refer to as the "civic-duty exception" to the Thirteenth Amendment really is no exception at all. A close look at the cases wherein courts affirm the government's power to employ its citizens and residents' services for the public good, whether they volunteer or not, affirms the civic obligations each person owes not merely in exchange for the liberty afforded by government protection, but also as an expression of liberty itself. This is the positive liberty Patrick Deneen identifies as "liberty understood as the consequence of self-discipline, and in particular, free choice on behalf of the good."[122]

A. The "Civic-Duty Exception" is Not an Exception to the Thirteenth Amendment.

The Thirteenth Amendment includes an express exception, which provides the first and most obvious sign that the "civic-duty exception" is not an exception to the amendment itself. By its plain words, the amendment states that slavery or involuntary servitude may be imposed as punishment for a crime of which one has been duly convicted.[123] The fact that Congress included this express and specific exception, one that invokes the government's penal power,[124] and not an exception for the exercise of

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4 NW. J.L. & SOC. POL'Y 400 (2009); Michael H. LeRoy, *Compulsory Labor in a National Emergency: Public Service or Involuntary Servitude? The Case of Crippled Ports*, 28 BERKELEY J. EMP. & LAB. L. 331 (2007).

[122] DENEEN, *supra* note 2, at 174.

[123] U.S. CONST. amend. XIII, § 1.

[124] After the requisite states ratified the Thirteenth Amendment, some southern states took advantage of the exception for criminal punishment and sold into slavery newly freed Black Americans for petty crimes. In response, the House of Representatives passed a resolution to disambiguate the exception so that it was clear that the only servitude allowed in the United States was "imprisonment or other restraint of freedom under the immediate control of officers of the law and according to the usual course thereof, to the exclusion of all unofficial control of the person so held in servitude," and made doubly clear the amendment "never intended chattel

government police power generally, or for service for the public good, strongly indicates that Congress did not intend any other exception to the Thirteenth Amendment.[125]

A second indication that the "civic-duty exception" does not constitute an exception to the Thirteenth Amendment stems from the Court's decisions articulating the interplay between liberty and effective government that motivated the Court's decision to affirm government power to coerce public service from persons within a given state's jurisdiction or the United States' jurisdiction. The *Robertson* Court did not invoke an extra-textual exception to the amendment but invoked the amendment's "spirit" in affirming the United States' power to force a person to complete a sea voyage for which he privately contracted.[126] In doing so, the Court noted the importance governments historically placed on regulating sea voyages to ensure the safety of crew and ship. But sea voyages were essential to the economic viability of maritime nations, the United States included, so treating contracts to perform a sea voyage served not only to discharge one's moral obligation to keep a promise and to act in a manner so as not to harm others, but also promoted a public good—the welfare of the nation and states that benefited from sea navigation and trade.[127]

Likewise, the Court did not invoke an exception to the Thirteenth Amendment in *Butler*, *Selective Services Cases*, or *Hurtado*. In holding that statutes that punish failure to build and maintain public roads do not impose involuntary servitude, even "without direct compensation," *Butler* noted that such public service was "part of the duty which [a person] owes to the public."[128] Military conscription did not constitute involuntary servitude, as it was a citizen's "supreme and noble duty [to contribute] to the defense of the rights and honor of the nation," the Court reasoned in the *Selective Draft Law Cases*.[129] And confinement pending a trial in order to provide testimony did not constitute involuntary servitude in *Hurtado* because every person

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slavery to be reestablished under any circumstances." *See* Correa, *supra* note 47, at 131–32. The Senate never voted on the resolution. *See* FONER, supra note 48, at 49.

[125] The legislative debates surrounding the Thirteenth Amendment's language suggest that Congress chose the amendment's language for political expediency. The language selected came from the Northwest Ordinance of 1787 and some Senators considered the language a safer bet to garner public support than language unfamiliar to the public and the judiciary. *See* Correa, *supra* note 47, at 127–30.

[126] Robertson v. Baldwin, 165 U.S. 275 (1897).

[127] NLRB v. Sea-Land Service, Inc., 837 F.2d 1387, 1393 (5th Cir. 1988).

[128] Butler v. Perry, 240 U.S. 328, 330 (1916).

[129] Selective Draft Law Cases, 245 U.S. 366, 390 (1918).

owes a duty to provide evidence, and any personal sacrifice in doing so "'is a part of the necessary contribution of the individual to the welfare of the public.'"[130]

None of these cases fully explicates the scope of duties any person owes the public or the state. *Butler* referred to the trinoda necessitas—a compulsory service doctrine dating back to 1550 composed of "the three-fold necessary public duties, viz., repairing bridges, maintaining castles or garrisons, and going on expeditions to repel invasions"[131]—but relied more heavily for its holding on the long-standing practice by the colonies (and later states in the United States) of exacting a person's duty to maintain and repair roads.[132] Moreover, trinoda necessitas does not inform, or explain, the Court's decision in *Hurtado*, or a host of lower court decisions applying the "civic-duty exception" to conscripted civilian labor in lieu of military service, even absent a declaration of war,[133] or to imprison a person for failure to pay child support.[134]

Nor does state police power alone explain the true source or scope of the civic duties invoked by the Court to bypass the Thirteenth Amendment's express language. The *Slaughter-House Cases* reaffirmed state police power retained by the government that could not be called into doubt even after the states ratified the reconstruction amendments.[135] This power, the Court announced, "is, and must be from its very nature, incapable of any exact definition or limitation."[136] Subsequent courts often reference the broad scope of police powers to affirm state exaction of public duties from persons within its jurisdiction. While the full scope of police power may be difficult,

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[130] Hurtado v. United States, 410 U.S. 578, 589 & n.11 (1973) (quoting Blair v. United States, 250 U.S. 273, 281 (1919)).

[131] Galoway v. State, 202 S.W. 76, 76 (1917).

[132] Butler v. Perry, 240 U.S. 328, 331 (1916).

[133] Heflin v. Sanford, 142 F.2d 798 (5th Cir. 1944) (Compelled civilian labor in lieu of compulsory military service did not constitute involuntary servitude.); Howze v. United States, 272 F.2d 146, 148 (9th Cir. 1959) (holding compulsory civilian service in lieu of military service, even during peacetime and even absent a military emergency, is not prohibited by Thirteenth Amendment); United States v. Holmes, 387 F.2d 781 (7th Cir. 1967) (holding same); see also United States v. Boardman, 419 F.2d 110 (1st Cir. 1969) ("Congress may also require alternate service to avoid the difficulties implicit in granting a total exemption based on individual belief, such as the potential threat to the morale of the armed forces.") (Citing Howze, 272 F.2d at 148).

[134] United States v. Ballek, 170 F.3d 871, 874–75 (9th Cir. 1999).

[135] Slaughter-House Cases, 83 U.S. 36, 62–63 (1872).

[136] *Id.* at 62.

and unwise, for courts to delineate ex ante, the power undeniably "extends to all matters affecting the public health or the public morals."[137] Yet, it must be admitted that state police power alone does not explain why government generally—including federal government to whom the U.S. Constitution reserved no police power[138]—may force a person involuntarily to perform a service as part of that person's "civic duty" without running afoul of the express language in the Thirteenth Amendment.[139]

Involuntary service for the benefit of another, a private person or the public, directly conflicts with the liberal conception of freedom. While it may be tempting to relax on the Court's narrow construction of the term "involuntary servitude" in other contexts as a way of reading public service outside the Thirteenth Amendment's reach, such an approach does not avoid the problem. After all, the Court built its narrow interpretation of "involuntary servitude" off a false narrative that Congress's intent in using "involuntary servitude" was clear when, in fact, there is little legislative history on what the drafters of the Thirteenth Amendment fully intended by including the term "involuntary servitude," but it is abundantly clear that the term is much broader than whatever the Court viewed as "African slavery."[140]

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[137] Stone v. Miss., 101 U.S. 814, 818 (1879).

[138] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535–36 (2012) (citing United States v. Morrison, 529 U.S. 598, 618–19 (2000)).

[139] Congress' War Powers also do not fully explain the imposition of involuntary service by government under all circumstances, such as jury duty, or providing testimony as a trial witness. *See* U.S. CONST. ART. 1, § 8, cl. 11. Further, even though lower courts have affirmed federal power to conscript citizens for civilian service in lieu of military service, even during peacetime, without imposing unconstitutional involuntary servitude, the issue is by no means without controversy. *See* Jason Britt, *Unwilling Warriors: An Examination of the Power to Conscript in Peacetime*, 4 NW. J. L. & SOC. POL'Y 400 (2009).

[140] Slaughter-House Cases, 83 U.S. 36, 69 (1872). The majority opinion in the *Slaughter-House Cases* pointed to no legislative history to support what it considered the "obvious purpose" behind "involuntary servitude" in the Thirteenth Amendment, and Justice Field called the majority out on this fact in his dissent:

> The words 'involuntary servitude' have not been the subject of any judicial or legislative exposition, that I am aware of, in this country, except that which is found in the Civil Rights Act. . . . It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of

Moreover, the Court did not invoke its limited interpretation of "involuntary servitude" when deciding the Thirteenth Amendment issues in *Robertson*,[141] the *Selective Draft Cases*,[142] or *Hurtado*;[143] rather, in those cases, the Court was far more sweeping in its reliance on civic duties for its decision.

Justice Harlan offered a promising approach to resolve the seeming conflict between freedom and involuntary public service. In his *Robertson* dissent, Justice Harlan suggested that statutorily prescribed public service is never involuntary servitude.[144] This answer reads mandatory public service as compatible with freedom. To read civic-duties as compatible with freedom without begging the question, though, requires theoretical support.

B. The Positive Side of Freedom and its Implications

Thirteenth Amendment jurisprudence reveals that courts place the good before the right when litigants challenge mandatory public service, or mandatory private services that impact the public wellbeing. This is the case even though the Thirteenth Amendment expressly prohibits forced involuntary service whether imposed by private persons or government. By its plain language, no state can coerce a person into involuntary service to benefit a third-party, which presumably would include the state itself, unless it is as punishment for a crime of which the person is duly convicted. A liberal conception of freedom does not reconcile the apparent conflict between freedom and duty here, especially considering liberal freedom centers on autonomy and individual sovereignty. But a common-good conception of freedom resolves any apparent conflict, as such a conception is polity-oriented.

Moral and political neutrality underwrite liberalism's conception of freedom. Freedom in the liberal tradition prioritizes the right over the good,

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> the terms. The abolition of slavery was intended to make every one born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to equally enjoy with them the fruits of his labor.

Id. at 90 (Fields, J., dissenting); *see also* FONER, *supra* note 48, at 43 (explaining Congress engaged in little discussion about the Thirteenth Amendment's impact on various forms of involuntary servitude).

[141] Robertson v. Baldwin, 165 U.S. 275 (1897).

[142] Selective Draft Cases, 245 U.S. 366 (1918).

[143] Hurtado v. United States, 410 U.S. 578 (1973).

[144] *Robertson*, 165 U.S. at 298 (Harlan, J., dissenting).

and individual autonomy over whatever the public may deem good.[145] Under this view, government must be neutral among its members' varying and competing conceptions of the good. Liberal neutrality proponents justify this principle in various ways, but each centers largely on individual autonomy.[146]

The liberal tradition posits a connection between freedom and duty, a duty derived from or tethered to autonomy, which reinforces the priority of right over the good. Immanuel Kant posited that rational beings exist as ends in themselves, and, as such, must never be used as means to an end.[147] As autonomous, self-legislating agents, rational beings express freedom by obeying the duties they impose on themselves, i.e., those duties that flow from their individual exercises of objective practical reason, reason that does not factor in personal interests or desires.[148]

John Rawls' original position tracks Kant's notion of freedom. The original position is an abstraction that seeks to identify the principles to which free and equal persons would agree, under fair conditions, to regulate their modes of cooperation and governance in a given society.[149] Parties hypothetically negotiate in ignorance of their natural endowments (like intelligence and strength), social contingencies (like wealth or class status), their personal conceptions of the good, and any other social or natural contingencies that would place any person in a disadvantageous or advantageous position in the bargain.[150] Without knowing where one will end up in society once the veil of ignorance is lifted, parties are imagined to

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[145] *See, e.g.,* JOHN STUART MILL, ON LIBERTY 68 (Penguin Books 1985) (1859) ("[T]he only purpose for which power can be rightfully exercised over any members of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."); SANDEL, *supra* note 16, at 218; DENEEN, *supra* note 2, at 174–75.

[146] *See, e.g.,* MILL, *supra* note 145, at 16 ("The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede efforts to obtain it . . . Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest."); SANDEL, *supra* note 16, at 214-17; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33 (Basic Books 1974) (arguing government neutrality between citizens' respective conception of the good follows from "the fact of our separate existences," and invoking some public good does nothing more than mask that society is using a person as a means to its own ends).

[147] SANDEL, *supra* note 16, at 119–22 (explaining Kant's categorical imperative and its relation to Kant's conception of justice and human freedom).

[148] *Id.* at 123–26.

[149] JOHN RAWLS, A THEORY OF JUSTICE 10–12 (Harv. Univ. Press rev. ed. 1999).

[150] *Id*. at 10–12, 118–23.

bargain rationally toward the two principles of justice to which Rawls posits all parties would agree.[151] Since the principles are the product of practical reason under fair conditions, parties, under the same original position constraints, would also choose to abide by natural duties, including the duty to "support and to comply with just institutions that exist and apply" to them.[152]

However, freedom defined in the liberal tradition as an autonomous exercise of rational choice detaches people from real-world experience and the external commitments derived therefrom.[153] Deneen views liberalism as anticulture because liberalism abstracts individuals away from real-time and place in order to give full expression to individual will and desire.[154] But, as Deneen argues, community is sustained by its culture, which consists of moderating base desires and inculcating virtuous habits by instituting customs and norms that educate its members "about [their] generational debts and obligations," making its members responsible for the community's long term well-being.[155] Liberalism treats cultivated and deeply-held commitments to a particular community with hostility,[156] as these

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[151] Rawls' posited that the following principles would result original bargaining position:

> (a) Each person has the same indefeasible claim to a fully adequate scheme of basic liberties, which scheme is compatible with the same scheme of liberties for all; and
>
> (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).

JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 42–43 (Erin Kelly ed., Harv. Univ. Press 2003).

[152] RAWLS, *supra* note 149, at 97–98, 293–95.

[153] DENEEN, *supra* note 2, at 69, 72-73, 77–80; MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 62 (Cambridge Univ. Press 2d ed.1998).

[154] DENEEN, *supra* note 2, at 64–67.

[155] *Id.* at 64–82.

[156] SANDEL, *supra* note 16, at 221 (explaining that liberalism's conception of freedom responded to past political theories "that consigned persons to destinies fixed by caste or class, station or rank, custom, tradition, or inherited status").

commitments rest on tradition and custom, both of which constrain individual will.[157]

Contrary to the liberal conception of freedom, human beings are not free-floating unencumbered selves. People are situated in communities composed of family, friends, and neighbors with whom they forge strong ties and commitments, and they are embedded in political cultures that claim their loyalty and allegiance.[158] People are bound by many "moral claims that arise from the communities and traditions that shape [their] identity."[159] Despite these prior moral claims, the exercise of one's duty under these circumstances does not render one unfree. As Deneen points out, Alexis de Tocqueville in *Democracy in America* described a freedom practiced in early American settlements that viewed liberty as "political and personal self-limitation" so as to act justly and for the common good.[160] This common good liberty required constant interactions with others within a given polity, which enabled people to see themselves not simply as individuals apart in a contingent locality, but as part of a specific community where members share an interest in and responsibility for each other's fate.[161]

A common-good conception of freedom better resolves the conflict between freedom and duty in those cases where courts affirm involuntary public service than does a liberal conception of freedom. The "civic-duty exception" cases rested largely on civic duty grounds under circumstances where the litigant expressly did not consent to perform any of the purported duties at issue. In these cases, the litigant's autonomy as a rational agent was

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[157] *Id.* at 218.

[158] *Id.* at 220-23.

[159] *Id.*

[160] DENEEN, *supra* note 2, at 174–76.

[161] *Id.* Michael Sandel offers a similar account of freedom as consistent with obedience to a community's claims, claims one may not have individually willed. Citing to Alasdair MacIntyre's narrative conception of the person, Sandel argues that moral deliberation requires one to interpret her life story so as to act in a way that best fits her narrative, which "'is always embedded in the story of those communities from which I derived my identity.'" SANDEL, *supra* note 16, at 220–23, 240–41 (quoting ALASDAIR MACINTYRE, AFTER VIRTUE 205 (Univ. of Notre Dame Press 1981)). Also, Adrian Vermeule offered a common-good definition of liberty as "the natural human capacity to act in accordance with reasoned morality." Adrian Vermeule, Beyond Originalism, the Atlantic https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

not respected and government used the litigant to benefit others.[162] Freedom as an act consonant with the common good resolves the conflict between freedom and civic duty in the cases at issue.

A common-good conception of freedom not only resolves the conflict between freedom and duty in the "civic-duty exception" cases but fits within the larger Thirteenth Amendment framework. Recall Alexander Tsesis's civic-freedom account, where he posits that the Thirteenth Amendment "balances autonomy with welfare" by prohibiting arbitrary impediments to one's autonomy and promoting opportunities for self-determination and for persons to contribute to the common weal.[163] Tsesis treats the Thirteenth Amendment as a polity-oriented provision, intended to bring Black Americans into the national polity.[164] As such, he harmonizes the Thirteenth Amendment with the Preamble to the Constitution, which states that the people formed the United States to, among other goods, "promote the general welfare."[165] Under this formulation, Congress determines how the balance between autonomy and welfare is struck, subject to the arbitrariness constraint.

Notice that the particular charge to Congress within Tsesis's formulation requires Congress to legislate in accordance with moral principles, i.e., those conducive to the common good.[166] Congress may

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[162] Robert Nozick articulates the rights violation that occurs under these circumstances within the liberal tradition:

> There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his life is the only life he has. *He* does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him—least of all a state or government that claims his allegiance (as other individuals do not) and that therefore scrupulously must be *neutral* between its citizens.

ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33 (Basic Books 1974).

[163] TSESIS, *supra* note 45, at 107.

[164] *Id.* at 104.

[165] *Id.*; *see also* U.S. CONST. pmbl.

[166] *Id.* at 104.

choose to promote the common good by mandating public service equally for all and on equal terms in order to cultivate civic solidarity among citizens.[167] This choice respects autonomy by promoting the autonomy each person experiences as an individual whose identity is intimately tied to the roles she played within particular communities and by the norms, customs, and traditions fostered by particular communities of which she was a part.

Consider also Seth Davis's collective self-determination account of the Thirteenth Amendment.[168] Seth Davis argues that the Thirteenth Amendment should be read to empower "communities *as communities* to participate in, if not control, lawmaking and policymaking meant to serve them."[169] He recounts the many efforts southern plantation owners expended to disempower Black residents and to completely diminish their social and political efficacy.[170] These efforts also included destroying familial and communal bonds by separating husbands from wives, and parents from their children through forced sales for profit or to punish obstinacy.[171] These efforts to displace and disempower Black residents, Davis argues, form part of the historical badges and incidents of slavery. And these practices persist today in the form of mass incarceration and discriminatory police-enforcement practices that create cycles of poverty that promote recidivism.[172] But Davis also recognizes that overemphasis on a single "unified community" too easily abstracts away from the particular needs of

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[167] MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO 263–68 (Farrar, Straus and Giroux 2009).

[168] Davis, *supra* note 60, at 88.

[169] *Id.* at 91 (The argument Davis puts forth makes clear that it is "concerned with *communities* in particular places and spaces rather than a single *community*.").

[170] *Id.* at 99–101.

[171] *See, e.g.*, Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property*, 18 CARDOZO L. REV. 473, 522 (1996) (explaining that public slave auctions took place "on the courthouse steps conducted by legal officials in front of the community," representing "[s]outhern commitment to slavery as a social, economic, and legal institution"); Pamela D. Bridgewater, *Un/Re/Discovering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE R.E.A.L. J. 11, 20–21 (2001) (explaining the importance of slave breeding to a slaveowner's profit motive and to the national economy); Darcia Green, *Ain't I . . .?: The Dehumanizing Effect of the Regulation of Slave Womanhood and Life*, 25 DUKE J. GENDER L. & POL'Y 191, 211–14 (2018) (explaining the dehumanizing impact forced sales had on Black families).

[172] Davis, *supra* note 60, 92 n.22, 110–11; *see also* Correa, *supra* note 47, at 91–94 (citing studies that detail the negative impact on Black communities that result from discriminatory police practices and mass incarceration).

particular communities.[173] So he interprets the Thirteenth Amendment as a vehicle through which Congress may promote communal self-governance.

Davis's collective self-determination account highlights the importance of local polities in promoting the freedom promised by the Thirteenth Amendment. The freedom Davis posits is a positive freedom, similar to Tsesis's work. But whereas Tsesis emphasizes individual autonomy, albeit against the backdrop of a national polity committed to the common good, Davis emphasizes claims made by members of a particular community to determine the governance practices that most conduce to the well-being of their particular community.

A common good conception of freedom is compatible with Davis's conception of the freedom guaranteed by the Thirteenth Amendment, as both treat the claim to communal well-being as compatible with individual freedom—freedom expressed as solidarity. And, just as with a common good conception of freedom, Davis views local communities as the true locus of power for free people. In Tocqueville's words: "[l]ocal institutions are to liberty what primary schools are to science: they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it."[174]

Thirteenth Amendment jurisprudence as a whole offers a rich description of American freedom that extends beyond negative freedom alone. At its inception, the Thirteenth Amendment initiated a new polity. It sought to free a previously subjugated and culturally displaced people and bring them into the national polity and into state and local polities as well. Its promise of universal freedom was more than simply freedom from arbitrary rule; it included freedom to share in the same social bonds as every other member of the polity, and to forge deep personal ties and cultural commitments with and to others. The "civic-duty exception," then, is best read not as an exception to the Thirteenth Amendment, but as part of the Amendment's complete expression of civil freedom.

IV. FOSTERING TRUST BY PUBLIC WORKS AND PUBLIC SERVICE

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[173] Davis, *supra* note 60, at 110–11 (citing Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990)).

[174] DENEEN, *supra* note 2, at 176.

This article started by taking up Patrick Deneen's challenge to "imagine, and build, liberty after liberalism."[175] The challenge seems daunting, considering the hyper-individualism that informs so much of public life in the United States. How does such a society properly orient itself to prioritize the common good over individual rights? Yet, maybe surprisingly, calls for public service as a means of forging civic trust and spiritedness have a long history in the United States. These calls equally come from the political left and right, and the ideological liberal and non-liberal alike. There seems, in other words, to be some consensus that government needs to make some moves to properly orient citizens' priorities. Government at every level already possesses conscription power to mandate public service from its citizens and residents. A polity-oriented reading of Thirteenth Amendment jurisprudence supports a positive mandate for government to use its power of conscription to forge civic trust, spiritedness, and solidarity among its members.

A. Public Service Promotes Civic Trust and Spiritedness

The idea that public service promotes civic trust and spiritedness is neither new nor controversial. Liberals and non-liberals alike agree that citizens should engage in public service to promote civic responsibility and trust, but they disagree on the means by which to secure public service, and the scope of public service. Here, it is worth considering the shared ideological focus on public service to appreciate its importance in preserving American democracy.

Martha Nussbaum's recent work—*The Monarchy of Fear*—provides a good starting point. Nussbaum describes the current American political crises as an expression of untutored fear.[176] Fear, she argues, causes people to retreat inward, to jettison all concern for others, "returning us to an infantile solipsism."[177] When fear gives rise to anger, one's anger overcorrects an innate desire to regain control over whatever perceived evil gave rise to one's fear in the first place, which causes one to blame and become envious of others, and motivates a desire for retribution against those others.[178] Unchecked or unreflective fear and anger lead to a politics of retribution, inhibiting hope and love, two emotions that promote democratic

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[175] *Id.* at 198.
[176] NUSSBAUM, *supra* note 1, at 1–3.
[177] *Id.* at 28–29.
[178] *Id.* at 63–64, 80–86.

reciprocity by enabling us to connect with and envision a sustainable and meaningful life with others.[179]

The pathways to hope, Nussbaum offers, lie in shared societal and institutional practices that "help people sustain or embrace hope"—such as the arts, education, religion, and protest movements—but she adds that a youth national service program should supplement these shared practices.[180] A national service program, she argues, is imperative to confront two related problems that presently impede civic solidarity. First, Nussbaum states that race and class divisions persist in large part due to lack of regular contact between people of various races and classes.[181] Second, Americans are largely self-centered, lacking a sense of shared purpose with others outside of their immediate family.[182] Nussbaum suggests a three-year mandatory national civil service program for "all young people" that sends them into regions geographically and economically different from where they came from would address both problems by exposing young people to, and thereby helping them appreciate, "the diversity of people" in a shared country.[183]

On the communitarian side, Michael Sandel agrees with Nussbaum's sentiment regarding the need for national civil service. Sandel, like Nussbaum, points to sparse interaction among citizens across racial, ethnic, and class lines as a barrier to a politics centered on the common good.[184] He adds that America's merit-based ideology against the backdrop of liberalism's self-making individual exacerbates the present political divide.[185] People come to believe or "find hard to resist the thought that they deserve their success and that those at the bottom deserve their place as well," even though market forces, like globalization policies advanced by government, determine the winners and losers in society.[186] The result, Sandel states, is a "politics so poisonous and a partisanship so intense that

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[179] *Id.* at 211–21.

[180] *Id.* at 220–21.

[181] *Id.* at 241.

MARTHA C. NUSSBAUM, THE MONARCHY OF FEAR: A PHILOSOPHER LOOKS AT OUR POLITICAL CRISIS 241 (Simon & Schuster 2018).

[183] *Id.* at 242–43. Nussbaum emphasizes that the service program should be civil only, not war-related. She identifies "elder care, child care, infrastructure work" as examples of the kind of civil work "that urgently needs doing all over America." *Id.* at 242.

[184] SANDEL, *supra* note 2, at 226–27; *see also* SANDEL, *supra* note 16, at 266–67.

[185] SANDEL, *supra* note 2, at 34–35, 226.

[186] *Id.* at 22–24, 226.

many now regard marriage across party lines as more troubling than marrying outside the faith."[187]

A just society, according to Sandel, aims to cultivate virtue and open shared spaces to facilitate its members' opportunities to engage in public reasoning about the common good.[188] Central to the aims of justice, then, is a "strong sense of community" shared by citizens.[189] Mandatory national service, he suggests, may fill the civic education function that public schools and military service no longer offer in large scale, considering "public schools are in parlous condition and . . . only a small fraction of American society serves in the military."[190] Sandel points to President Barack Obama's campaign call to public service as a positive example, which translated into legislation that increased monetary incentives—college tuition—in exchange for volunteer service hours in AmeriCorps.[191] But just as Nussbaum was careful to single out civil service over military service, as the former aims to bring people together while the latter is an institution of destruction, Sandel warns of the dangers of "marketizing social practices," which threaten to corrupt the way people come to value public service.[192] A "more ambitious proposal for mandatory national service" would likely better aid citizens in valuing public service for its own sake than would incentive-based calls for citizens to volunteer to perform services that promote the common weal.[193]

Patrick Deneen focuses on cultivating civic virtue at the local level. The Tocquevillian democratic self-rule Deneen invokes looks to local settings, such as the township, where people are near to one another and regularly interact.[194] State and the national government embody larger units, making nearness and regular interaction less likely among people, except maybe bureaucrats.[195] These larger political units "tend[] toward abstraction" not merely because they are more distant than townships and other local settings, but also because these larger units seek to homogenize otherwise distinct and disparate norms and customs into generally applicable laws.[196] Human flourishing, Deneen posits, starts with small units and works

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[187] *Id.* at 226.
[188] SANDEL, *supra* note 16, at 260–61.
[189] *Id.* at 263.
[190] *Id.* at 264.
[191] *Id.*
[192] *Id.* at 265.
[193] *Id.*
[194] DENEEN, *supra* note 2, at 176.
[195] *Id.*
[196] *Id.* at 80.

outward.[197] The larger units flourish in the proper sense only when the smaller, constituent parts flourish.[198]

Calls for public service at the national and local level form a recurrent theme among conservatives and progressives alike in the United States. National service programs, like AmeriCorps, the Public Service Loan Forgiveness Program, and even the United States Military, are incentive-based to secure volunteers.[199] Proposals for mandatory national service, however, draw more ire than support, as "merely mentioning mandatory national service can invoke calls of socialism and slavery."[200] Some mandatory public service programs exist at the state and local level, particularly programs that require high-school students to complete requisite community service hours prior to graduation to earn a diploma.[201] These state and local programs came to fruition only after a felt need and concomitant call for more civic participation among America's youth due to lack of civic engagement by America's adults.[202]

Undoubtedly, there is a need—at least a felt need—for public service at every level of civic membership (local, state, and national). The present and particularly partisan, distrustful, and uncivil epoch of American politics makes urgent, maybe more so than ever before, the need to bring citizens together, to forge civic trust between them, and to instill civic solidarity in them. If Deneen's diagnosis of America's ills is correct, then the present moment demands that citizens who wish to preserve American democracy muster moral and political courage to act, that is, to find ways to foster civic trust, spiritedness, and solidarity; stated another way, it is time for Americans to prioritize the real-life common good over abstract individual rights.

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[197] *Id.*

[198] *Id.*

[199] Andrew M. Pauwels, *Mandatory National Service: Creating Generations of Civic Minded Citizens*, 88 NOTRE DAME L. REV. 2597, 2598 & nn.9–10 (2013). Pauwels details past volunteer programs, such as the Civilian Conservation Corps during World War II, that had great success in the United States. *Id.* at 2602–603.

[200] *Id.* at 2599.

[201] *Id.* at 2608–610. Studies conducted after these programs were initiated show a sharp increase in volunteer work, not counting the mandatory hours, as well as an increase in civic participation among high school students, including a rise in voting among young adults. *Id.* at 2609–610 & nn.103–04.

[202] *Id.*; *see also* Justin Wagner, *"Doing Good" in Schools: A Legal & Policy Perspective on Community Service in Education*, 17 KAN. J.L. & PUB. POL'Y 56, 57 (2007).

B. A Polity-Oriented Reading of Thirteenth Amendment Jurisprudence Supports a Positive Mandate for Government to Promote Civic Spiritedness

A polity-oriented reading of the Thirteenth Amendment accounts for the amendment's "great purpose" and its jurisprudence, while advancing the amendment's role in the unity of purpose underwritten by the reconstruction amendments taken as a whole. Government at every level plays a role in promoting the equal freedom promised by the Thirteenth Amendment. The Thirteenth Amendment under this reading mandates that government not only combat and avoid arbitrary rule over individuals, but also advance modes of self-governance—a capacity that requires cultivation.

Citizenship plays a crucial role in this reading as well. Most citizens in the United States did not initially choose their status as United States citizens, or as citizens of whatever state they happened initially to reside, any more than they chose to whom or where they would be born. Yet, having been born in the United States, they remain citizens of both the national polity and the state polity wherein they reside.[203] An initially unchosen status, then, not only defines one's privileges and immunities and duties and obligations within these polities, but also forges an inseparable bond between each citizen, one that ties them together and makes them individually and collectively responsible for the success or failure of their modes of governance.[204]

As discussed above, there is an inseparable link between freedom and citizenship embodied in the Thirteenth Amendment and Fourteenth Amendment. Reconstruction Congress believed the Thirteenth Amendment sufficient to override the barrier to citizenship imposed by the *Dred Scott* decision, wherein the Court reasoned, in part, that freedom was a necessary condition to citizenship.[205] By making all persons free in the United States

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[203] U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

[204] SANDEL, *supra* note 16, at 84–87; Afroyim v. Rusk, 387 U.S. 253, 268 (1967) ("Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry."); Trop v. Dulles, 356 U.S. 86, 92 (1958) (plurality opinion) ("The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country.").

[205] Scott v. Sanford (*Dred Scott*), 60 U.S. 393 (1857).

via the Thirteenth Amendment, Reconstruction Congress took the next step to bring newly freed slaves into the National and state polities by statutorily conferring citizenship status on all persons born within the United States. However, statutorily conferred citizenship stood on unstable ground, as the Civil Rights Act of 1866 was enacted by legislative override of President Andrew Johnson's veto.[206] A primary objective of the Fourteenth Amendment Citizenship Clause was predominantly to secure Black Americans' citizenship, which the Reconstruction Congress feared could not be achieved by statute alone under its Thirteenth Amendment enforcement power, as a statute lacked the supermajority protection an amendment afforded.[207]

The link between Thirteenth Amendment freedom and Fourteenth Amendment citizenship matters here because it helps define government's role in promoting civic growth and development and helps explain the United States Supreme Court's Thirteenth Amendment jurisprudence, which affirms the national and state governments' power to mandate public service. With respect to civic growth and development, a more fully developed historical and theoretical account of American citizenship that can be offered here would illuminate the scope and contours of citizenship's active components, i.e., the correlative duties and obligations that attend to the passive rights and immunities of citizenship. However, Deneen's account of citizenship, illustrated in Tocqueville's account of democratic citizenship, adequately captures the role citizens play in sustaining and affirming their shared civic identity.

According to Tocqueville, regular and ongoing interactions with other polity members nurtures a preference for the common good and motivates individuals to freely act on behalf of that good.[208] The more regular, close, and immediate citizens interact with one another, the more likely they are "to care and take an active interest not only in their own fates but in the shared fates of their fellow citizens."[209] This, Deneen states, is the true nature of democratic self-governance.[210] Deneen notes that to foster an

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[206] Robert Longely, *The Civil Rights Act Of 1966: History and Impact*, THOUGHTCO. (Mar. 01, 2021), https://www.thoughtco.com/civil-rights-act-of-1866-4164345.

[207] *See* Correa, *supra* note 47, at 139–41, 149.

[208] DENEEN, *supra* note 2, at 174–76.

[209] *Id.* at 176.

[210] *Id.*

environment that cultivates the requisite virtue in polity members requires "the thick presence of virtue-forming and virtue-supporting institutions."[211]

Government is responsible for facilitating and sustaining civic institutions that cultivate the virtues of self-government, a positive expression of freedom, and a necessary feature of citizenship. In a representative government, citizens rule one another and bear the responsibility that inheres in their civic identity as citizens. The United States Supreme Court put the matter as follows: "[c]itizenship in this Nation is part of a cooperative affair. Its citizenry is the country, and the country is its citizenry."[212] Another way of stating the relationship between citizenship and the Nation is that the citizenry and Nation are tied in a shared fate.[213]

The fullest expression of citizenship is promised by the Fourteenth Amendment Citizenship Clause. The Court read the Citizenship Clause to mean that government at any level could not "shift, cancel, or dilute" other citizens' citizenship, unless voluntarily relinquished by the person.[214] The Court reasoned from the cooperative relationship between citizenship and polity in a free nation that "a group of citizens temporarily in office" could not deprive other citizens of the fullest expression of citizenship.[215] It follows that the polity-oriented reading of the Thirteenth Amendment, complimented by the Fourteenth Amendment Citizenship Clause, supports a positive mandate for government to advance modes of self-governance, which includes creating and sustaining civic institutions that cultivate civic trust and solidarity.

The link between Thirteenth Amendment freedom and Fourteenth Amendment citizenship also helps to more fully explain the United States Supreme Court's decisions in the line of cases that developed the "civic-duty exception" to the Thirteenth Amendment. As free members of a polity, each of whom bears responsibility for the success and failure of their modes of governance, public service itself cannot be construed as "involuntary

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[211] *Id.* at xvi. Michael Sandel also notes the importance of civic institutions to democratic citizenship, stating that the "hollowing out of the public realm makes it difficult to cultivate the solidarity and sense of community on which democratic citizenship depends." SANDEL, *supra* note 16, at 267.

[212] Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

[213] In another case, the Court, in explaining Congress' power to exact citizens duties to serve their country in a time of war, reasoned that, "while the Constitution protects against the invasions of individual rights, it is not a suicide pact." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159–60 (1963).

[214] *Afroyim*, 387 U.S. at 262.

[215] *Id.* at 268.

servitude" in any legal sense, as Justice John Marshall Harlan posited in his dissent in *Robertson v. Baldwin*.[216] The performance of public service, when called upon by one's local, state, or national polity, constitutes one's contribution to the general welfare, to the common good, which is her own; it is a performance each member would freely choose if the exercise of freedom and the salience of membership in the polity were properly cultivated. Citizenship obligations form part of one's civic identity and, being part of "citizenship" itself, cannot be diluted but must be promoted by citizens temporarily in office. Public service laws are one means by which citizens give full expression to their membership in their local, state, and national polities.

C. Government Should Use its Conscription Power to Require Citizens Regularly to Perform Public Services to Foster Civic Trust, Solidarity, and an Orientation to the Common Good

This article assumes for the sake of discussion that Deneen's diagnosis is correct, and the United States is headed toward inevitable decline due to its strict adherence to liberalism as a governing ideology. The ills to overcome include incessant distrust among the citizenry, hyper-individuality, and misplaced priorities—prioritizing individual rights over the common good. The question this article addresses is what, if anything, government can do now to forge civic trust and solidarity among the citizenry and cultivate an orientation toward the common good above all else? The answer proposed by this article is that government at every level should use its power of conscription to require citizens regularly to perform public services.

State government's power to compel citizens to perform public services rests on solid ground. The Court in the *Slaughter-House Cases* announced that the state's police power, though difficult to define and limit, is uncontestable.[217] The federal government's power to compel public service rested on the war power in many of the "civic-duty exception" line of cases, with civilian service complementing military morale.[218] Still, this line of cases found the federal government possessed the power to compel civilian public service in lieu of military service during peacetime and absent any

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[216] Robertson v. Baldwin, 165 U.S. 275, 298 (1897) (Harlan, J. dissenting).
[217] *Slaughter-House Cases*, 83 U.S. 36 (1872).
[218] *See* case cited *supra* note 110.

national emergency.[219] While the federal government may seem more constrained in its power to act to promote public morals than the state governments under their police powers, this article reads the Thirteenth Amendment and Fourteenth Amendment Citizenship Clause as broadening the scope of Congress' power to advance modes of self-governance and good citizenship via its Thirteenth Amendment section 2 power and its section 5 Fourteenth Amendment power, a power which would include mandatory public service.

The need for public services in every state and the nation is great. Public schools are short staffed and in disrepair. Basic infrastructure—roads, bridges, highways—are dated and in disrepair. Elderly persons across the nation need care. Urban blight is too common a feature of many cities. At every turn there is an opportunity for citizens to serve each other's needs, to look out for one another, to demonstrate equal concern for one another's fate. Federal and state governments should start the conversation now to consider ways to bring citizens from all walks of life, from every class and background to personally tend to the disrepair in their state and nation of which they are equal members.

When it comes to public services, like building or repairing infrastructure or tending to the nation's elderly population, potential legal challenges may arise. Some lower courts have devised tests to determine whether mandatory public services become so burdensome or brutal that they amount to prohibited "involuntary servitude."[220] Legislators could avoid some potential suits by engaging the public in a discussion about mandatory public service and its purpose and scope. Electoral pathologies may serve as a deterrent against too burdensome public service, as citizens will likely reject such action at the polls. Legislators need to make sure that the burdens fall equally on all citizens, not disproportionately on any group of citizens, so as to comport with the Fourteenth Amendment Equal Protection Clause. And legislators should prepare for First Amendment challenges that argue

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[219] *See id.*

[220] *See, e.g.,* Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 459 (2d Cir. 1996) ("[T]he constitutionality of forced labor turns, in large measure, on the nature and amount of work demanded, and the purpose for which it is required. . . . '[T]here may be some mandatory programs so ruthless in the amount of work demanded, and in the conditions under which the work must be performed, and thus so devoid of therapeutic purpose, that a court justifiably could conclude that the [work constituted] . . . involuntary servitude.'"); Steirer v. Bethleham Area Sch. Dist., 987 F.2d 989 (3d Cir. 1993).

that public service requires a plaintiff to affirm a certain belief or "attitude of mind." [221] Against First Amendment challenges, a "common good constitutionalism" may aid courts in interpreting the Constitution to prioritize the good.[222]

State and federal governments also may consider bolstering mandatory public services that already exist. Jury service provides an example. The United States Supreme Court included jury service among its rote list of public services government could compel citizens to perform.[223] Alexis de Tocqueville observed that jury service served as civic education to citizens:

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all citizens; and this spirit, with its habits which attend it, is the soundest preparation for free institutions. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge toward society; and that part which they take in the Government.[224]

Recent studies confirm Tocqueville's observation.[225] While jury service is sometimes viewed as burdensome, and dreaded even at times,[226] its ability to

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[221] Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996); Steirer v. Bethleham Area Sch. Dist., 987 F.2d 989, 994 (3d Cir. 1993) (holding mandatory high school community service requirement did not carry the same "'affirmation of a belief and an attitude of mind" that is a prerequisite for First Amendment protection).

[222] Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

[223] Butler v. Perry, 240 U.S. 328, 332–33 (1916) (reasoning Thirteenth Amendment "was not intended to interdict enforcement of those duties which individuals owe to this State, such as services in the army, militia, on the jury, etc.").

[224] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 127 (A Mentor Book 1956).

[225] Liana Pennington & Matthew J. Dolliver, *The Effect of Deliberation on Jurors' Attitudes toward Jury Service in Criminal Cases*, 46 LAW & SOC. INQUIRY 391 (2021); Valerie P. Hans, et al., *Deliberative Democracy and the American Civil Jury,* 11 J. EMPIRICAL LEGAL STUD. 697 (2014).

[226] Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1510–152 & n.253 (2014).

enliven civic spiritedness in citizens provides a positive route to inculcate civic trust and engagement in citizens.

One way to bolster jury service is to make the best use of time for citizens called as jurors. Most jurors who are summoned do not make it onto a jury panel for an actual case and are sent home. Rather than sending these jurors home, courts could involve these jurors in some civic training by, for example, providing them with a legal problem to resolve as if they were deciding a real case. The training could cover the span of a few days rather than a few hours. The benefit of such practice and training is not only that it educates the public about how the laws work and the jury's role in the administration of justice, but also allows citizens from different backgrounds to interact within one of the great civic institutions of a free country offers—public courts.

Government at every level must commit itself to fostering civic trust and solidarity among its citizens if this country wishes to survive. If Deneen's diagnosis of American democracy is correct, then the time to act is now. Citizens must now muster the moral courage and fortitude to prioritize the common good over individual rights.

V. CONCLUSION

As Deneen notes, civic spiritedness requires "ongoing interactions with fellow citizens."[227] States and the federal government would do well to utilize their conscription power to bring citizens together to perform public services and to build up their communities. While liberalism may ultimately fail, or if it has already failed as Deneen argues, its failure does not mean the end of American democracy. Deneen challenged his readers to imagine a post-liberal world and to initiate practices geared toward its realization, practices that prioritize the common good and communal well-being. Government at every level should consider mandatory public service as a viable route to preserving American democracy.

[227] DENEEN *Supra* note 2, at 24.