

# Unwilling Warriors: An Examination of the Power to Conscript in Peacetime

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¶1 From the militiamen of the eighteenth century to the current Selective Service System, conscription has been one method of ensuring that the federal government has the manpower necessary to respond to a threat to the nation's security. In spite of this history, citizens of the United States have challenged the draft each time it has been invoked. This Comment will put forward a framework for evaluation of the constitutionality of an active military draft under the Thirteenth Amendment. This framework will use the severity of the conflict facing the country to determine when conscription can be constitutionally justified.

¶2 While it has been over thirty years since the last active draft in the United States, there have been calls in recent years to reactivate the draft in light of current military involvement overseas.<sup>1</sup> Although these calls often are made to stoke discussion of American foreign policy,<sup>2</sup> they demonstrate that the implementation of a draft is not outside the realm of possibility, or even probability depending on the outcome of our current military engagements.<sup>3</sup> Despite optimism that the election of Barack Obama would lead to a drawdown of troops stationed overseas, the withdrawal of American forces from Iraq is being offset by a corresponding "surge" of troops in Afghanistan.<sup>4</sup> In addition, tensions with nations such as Iran and North Korea make it likely that the armed forces will continue to play an active role in U.S. foreign policy. If the U.S. military continues to be actively deployed in multiple theaters, there will be pressure to find ways

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\* Juris Doctor, 2009, Northwestern University School of Law. The author would like to thank the editors of the *Northwestern Journal of Law and Social Policy* for their invaluable assistance in preparing this article for publication.

<sup>1</sup> See Charles Babington, *Amid Uproar Over War, Rangel Renews Call for Draft*, WASH. POST, Nov. 20, 2006, at A04.

<sup>2</sup> See Press Release, Office of Charles Rangel, Congressman, 15th Dist., Rangel Reintroduces Draft Bill (Feb. 14, 2006), available at [http://www.house.gov/list/press/ny15\\_rangel/CBRStatementonDraft02142006.html](http://www.house.gov/list/press/ny15_rangel/CBRStatementonDraft02142006.html). For a more in-depth discussion of some of the possible effects of conscription on a democracy's attitudes toward and appetite for war, see Joseph Paul Vasquez III, *Shouldering the Soldiering: Democracy, Conscription, and Military Casualties*, 49 J. CONFLICT RESOL. 849 (2005).

<sup>3</sup> Lt. Gen. Douglas Lute, the so-called "war czar" who serves as deputy national security adviser for Iraq and Afghanistan, has stated that from a military perspective, it makes sense to consider a draft. 'War Czar' Concerned over Stress of War on Troops (NPR radio broadcast Aug. 10, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=12688693>.

<sup>4</sup> See Jim Miklaszewski & Courtney Kube, *Secret Report Recommends Military Shift in Afghanistan*, NBC NEWS, Feb. 4, 2009, <http://deepbackground.msnbc.msn.com/archive/2009/02/04/1780446.aspx>. While a troop drawdown is underway in Iraq, there will still be as many as 120,000 soldiers in Iraq at the end of 2009, and U.S. forces will remain in Iraq until the end of 2011. Jeff Schogol, *Odierno: Troop Levels to Drop to 120,000*, STARS AND STRIPES, July 1, 2009, <http://www.stripes.com/articleprint.asp?section=104&article=63533>.

to increase the size of the armed services. While higher bonuses<sup>5</sup> and lower recruiting standards<sup>6</sup> have alleviated some of this pressure, these measures have their own drawbacks, and alternative methods of recruitment may be sought out.

¶3 One such method is compulsory military service. This method clearly has political consequences, but the full legal ramifications of initiating a draft are not clear. Notably lacking is meaningful discussion by the Supreme Court of the constitutionality of a peacetime draft. Given that at various times in history—including this one—we have committed our armed services to military engagements without a congressional declaration of war,<sup>7</sup> the constitutionality of the draft in the absence of a declared war remains a pressing question. This issue has been raised, most often during the conflict in Vietnam, but it has gone without a satisfactory answer.

¶4 This Comment will apply the oft-neglected Thirteenth Amendment of the Constitution to demonstrate why a peacetime draft may not pass constitutional muster. This Comment focuses on the place of the draft in American history in order to understand the justifications for conscription and the role it plays in the military. Section I details the history of the draft in the United States to illustrate what role it has played and what arguments have been employed in defending its constitutionality. Section II examines the history and application of the Thirteenth Amendment to determine how best to apply that Amendment to the situation of a peacetime draft. Section III illustrates why a draft should be subject to strict scrutiny analysis, requiring the government to show that the draft would be the narrowest way to achieve a compelling state interest. Section IV provides a legal framework that would allow a court to determine when we are at war or at peace for the purposes of the draft. Finally, in Section V, this Comment concludes that the right to be free of involuntary servitude, especially involuntary servitude carrying the high risk of death, is a fundamental freedom enshrined in the Constitution. In a time of peace, the draft infringes on the fundamental freedoms of the conscripted civilians, and would likely fail to pass constitutional muster. More difficult is the question of the draft in wars of limited scope, such as the ones that characterize our current state of military deployment. This Comment proposes that the courts do have a place in determining the constitutionality of such a broad infringement on fundamental freedoms, by examining the severity and necessity of the conflict at hand. This examination serves the important purpose of ensuring that national security does not become an automatic override to the Constitution, while allowing the political branches leeway to raise troops when the nation is truly threatened.

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<sup>5</sup> See Fred Kaplan, *The Bonus Army*, SLATE, Feb. 18, 2008, <http://www.slate.com/id/2184482>.

<sup>6</sup> See Fred Kaplan, *Dumb and Dumber*, SLATE, Jan. 24, 2008, <http://www.slate.com/id/2182752>.

<sup>7</sup> Military operations against Iraq in 2003 and against Afghanistan in 2001 were commenced under the authority of joint resolutions of Congress, not declarations of war. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Perhaps the most notable example of American military forces being engaged in combat in the absence of a declared war is the conflict in Vietnam. Again, a joint resolution of Congress authorized combat involvement. Tonkin Gulf Resolution, Pub. L. No. 88-408, 73 Stat. 384 (1964).

## I. A HISTORY OF THE DRAFT IN THE UNITED STATES

A. *Pre-Civil War*

¶5 While references to the draft often presume that the Framers of the Constitution intended to invest in Congress the power of conscription to raise armies, conscription does not appear to have been in use by the federal government at the time the Constitution was written.<sup>8</sup> The Constitution does confer upon Congress the power to “raise and support armies,”<sup>9</sup> but conscription during the American Revolution was limited to the state militias, which were then called to serve on behalf of the fledgling nation.<sup>10</sup> Even with state-backed conscription, the armies of the Continental Congress consisted almost entirely of volunteers, both in the state militias and in the loosely organized federal Continental Army.<sup>11</sup> Great Britain, which presented the model for the Continental Army, declined to institute conscription for the regular army on several occasions.<sup>12</sup>

¶6 After gaining independence, America relied on a small regular army comprised of volunteers who often signed up for multiple reenlistments.<sup>13</sup> During the War of 1812, this army grew in numbers, based not on drafts, but on volunteers, often enticed by large cash bonuses, when men were needed.<sup>14</sup> While there were calls for drafts between the War of 1812 and the Civil War, none were implemented, based in part on claims that such an action could not be supported under the Constitution.<sup>15</sup> Even the state militias—the only military units that had used conscription in appreciable numbers—had almost completely stopped the practice by the beginning of the Civil War.<sup>16</sup>

B. *Civil War*

¶7 The Civil War, likely the darkest time in our nation’s history, proved to be the first departure from our historical reliance on volunteerism. In March 1863, President Lincoln signed into law a bill stating that all able-bodied men between the ages of twenty and forty-five, with some exceptions, were obligated to perform military service when called upon by the President.<sup>17</sup> The nation was split into districts, roughly following

<sup>8</sup> See JOHN REMINGTON GRAHAM, *THE MILITARY DRAFT: A CONSTITUTIONAL HISTORY OF THE MILITARY DRAFT* 21–22 (1971).

<sup>9</sup> U.S. CONST. art. I, § 8, cl. 12.

<sup>10</sup> GRAHAM, *supra* note 8, at 25–26.

<sup>11</sup> See William G. Carleton, *Raising Armies Before the Civil War*, in *THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION* 67, 68 (Martin Anderson ed., 1982).

<sup>12</sup> These measures were proposed, and defeated, in 1704, 1707, 1756, 1757, 1778, and 1779. Harrop A. Freeman, *The Constitutionality of Peacetime Conscription*, 31 VA. L. REV. 40, 68–69 (1944).

<sup>13</sup> Carleton, *supra* note 11, at 69.

<sup>14</sup> *Id.*

<sup>15</sup> While the Revolutionary War never saw a Continental Army of over 20,000 troops, and the regular army only numbered 34,000 during the War of 1812, President Madison proposed a draft to raise 100,000 men for the army. Public reaction, and the reaction of Congress, was overwhelmingly negative. *Id.* at 69–70. Daniel Webster went as far as to say, “I almost disdain to go to quotations & references to prove that such an abominable doctrine has no foundation in the Constitution of the country.” Daniel Webster, Speech Against the Conscription Bill, House of Representatives, December 9, 1814, in *CONSCIENCE IN AMERICA: A DOCUMENTARY HISTORY OF CONSCIENTIOUS OBJECTION IN AMERICA, 1757–1967*, at 67–68 (Lillian Schlissel ed., 1968).

<sup>16</sup> Margaret Levi, *The Institution of Conscription*, 20 SOC. SCI. HIST. 133, 144 (1996).

<sup>17</sup> Act of March 3, 1863, ch. 75, 12 Stat. 731 (1863).

Congressional districts, each with a Board of Enrollment.<sup>18</sup> These districts were then called upon by the President to offer up a certain number of troops, and the Boards were responsible for holding a draft within their districts to obtain the needed forces.<sup>19</sup> This draft was riddled with exceptions and loopholes. Once a man was called up to serve, he could find a substitute to enlist in his stead, or pay \$300 (an annual wage for most of the country at the time) rather than enlist.<sup>20</sup> Of the people who were subjected to the draft, only five percent were actually conscripted into the army.<sup>21</sup> Evasion was rampant, with over 160,000 draftees failing even to show up for examinations.<sup>22</sup> Despite the presence of the draft, the Union Army still relied overwhelmingly on volunteerism; conscripts made up only about two percent of its total force, and substitutes furnished by men who had been drafted constituted another six percent of the Northern forces.<sup>23</sup>

¶18 Even though only a small proportion of those eligible for the draft were actually conscripted, the draft did not pass quietly; no less an authority than the Chief Justice of the Supreme Court, Roger B. Taney, remarked on the draft being an unconstitutional usurpation of the states' constitutionally protected right to provide for militias.<sup>24</sup> The sheer unpopularity of the draft, even during a civil war, led to riots across the North.<sup>25</sup> The United States Supreme Court did not get a chance to hear a challenge to the legislation, but a number of cases reached state courts. The most high-profile case dealing with the constitutionality of what became known as the Conscription Act came in Pennsylvania.

¶19 In *Kneidler v. Lane*, three men claimed the Act was an unconstitutional abrogation of the states' rights to raise a militia, then seen as a constitutional means of dealing with insurrection.<sup>26</sup> The Pennsylvania Supreme Court held that Congress had exceeded its authority in a 3-2 decision enjoining enforcement of the Act.<sup>27</sup> Chief Justice Lowrey stated in his opinion, among other things, that the Conscription Act provided an "unauthorized substitute for the militia of the states."<sup>28</sup> He also feared that if the draft could be justified under Congress's power to raise and support armies, Congress could exercise its power to compel people to give over their homes, their property, and their services to the government in other matters.<sup>29</sup> Justice Woodward, concurring in the decision, made this clear in even starker terms:

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Levi, *supra* note 16, at 145.

<sup>22</sup> *Id.* at 146.

<sup>23</sup> *Id.* at 145.

<sup>24</sup> Chief Justice Taney noted that under the draft as constructed, the militia power of the states would be essentially worthless. "[S]uch a power over landmen or seamen would have been repugnant to the principles of the government which was then framed and adopted." Roger B. Taney, *Thoughts on the Conscription Law of the United States*, in *THE MILITARY DRAFT*, *supra* note 9, at 214–15. He also noted that the conscription power claimed by Congress and the President "enables the general government to disorganize at its pleasure the government of the States,—by taking forcibly from them the public officers necessary to the execution of its laws." *Id.* at 215.

<sup>25</sup> GRAHAM, *supra* note 8, at 95.

<sup>26</sup> 3 Grant 465, 1863 WL 4874, at \*4 (Pa. 1863).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at \*7.

<sup>29</sup> *Id.* at \*9.

“The framers of the constitution, and the states which adopted it, derived their ideas of government principally from the example of Great Britain . . . but enlarging the basis of popular rights. . . . Assuredly the framers of our constitution did not intend to subject the people of the states to a system of conscription which was applied in the mother country only to paupers and vagabonds.”<sup>30</sup>

Justice Thompson, the last member of the majority, explained the importance of this issue: “[W]e gain but little, if, in our efforts to preserve [the Constitution] when assailed in one quarter, we voluntarily impair other portions of it.”<sup>31</sup>

¶10 These powerful statements would not preserve the conscripts’ victory for long; Chief Justice Lowrie’s commission, and thus the 3-2 majority, expired within months, and a new three judge majority overturned the injunction, based largely on a separation of powers argument.<sup>32</sup> While President Lincoln himself expressed a wish for the Supreme Court to hear this case and make a final decision, it was clear that no one else in the government shared his desire, and the matter went untouched for over fifty years.<sup>33</sup>

### C. World War I and the Interwar Period

¶11 *Kneedler* was the primary authority on the draft for decades, until a new conflict arose. With World War I raging on the other side of the Atlantic, the United States implemented a draft with the goal of enlisting 500,000 new soldiers.<sup>34</sup> No bonuses were paid to bring in new recruits; an enlistee was paid on a scale identical to the rest of the Army,<sup>35</sup> and his only inducement to enlist was that he would not be prosecuted for failure to report.<sup>36</sup> When people protested the draft and urged men not to comply, they were promptly prosecuted under the newly passed Espionage Act of 1917.<sup>37</sup> This period provided the seminal test of the federal powers of conscription in wartime.

¶12 The *Selective Draft Cases* were a consolidation of six cases involving men who refused to report for registration,<sup>38</sup> and in these cases, the Supreme Court ruled that the militia power and the power to raise armies had been effectively delegated to Congress, so there was no conflict between state and federal authority.<sup>39</sup> After dismissing a myriad

<sup>30</sup> *Id.* at \*15.

<sup>31</sup> *Id.* at \*29.

<sup>32</sup> *Kneedler v. Lane*, 3 Grant 523, 1863 WL 5095 (Pa. 1863).

<sup>33</sup> J.L. Bernstein, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.A. J. 708, 712 (1967).

<sup>34</sup> Act of May 18, 1917, Pub. L. No. 12, 40 Stat. 76 (1917).

<sup>35</sup> Act of May 18, 1917 § 10.

<sup>36</sup> Act of May 18, 1917 § 5.

<sup>37</sup> See, e.g., *Debs v. United States*, 249 U.S. 211, 213–14, 216 (1919) (where Debs was prosecuted for making statements that the war was criminal and the men enlisted in the draft were “cannon fodder”); *Schenk v. United States*, 249 U.S. 47, 52 (1919) (introducing the now famous “falsely shouting fire in a theatre” analogy and holding that the First Amendment did not protect the defendants when they passed out leaflets urging citizens to protest the draft as an unconstitutional abrogation of their Thirteenth Amendment rights); *Coldwell v. United States*, 256 F. 805, 809 (1st Cir. 1919) (where the defendant was convicted after, among other things, speaking of three men who were prosecuted for refusing to serve as soldiers in the army, saying they were “victims” of “a damnable system of government” and that “they merely refused to become uniformed murderers”).

<sup>38</sup> *Arver v. United States*, 245 U.S. 366 (1918).

<sup>39</sup> *Id.* at 382–83.

of other challenges to the statute, including claims that it was void for vagueness, an interference with the free practice of religion, and an unlawful delegation of legislative authority to an administrative body operated by the states, the Court turned to a challenge on Thirteenth Amendment grounds.<sup>40</sup> The Court dismissed this challenge in one terse paragraph:

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.<sup>41</sup>

While the language of the Court was extremely confident, some observers took a more skeptical approach to the question of whether compulsory military service violated the Thirteenth Amendment's proscription of involuntary servitude. One commentator perceived the reasoning of the Court to be "arbitrary" and "fallacious."<sup>42</sup> Another more recent examination of the case noted that when the Court discussed the Thirteenth Amendment claim, it did so with "more the tone of the advocate than of the arbitrator . . . appear[ing] to repudiate every guide to legal judgment."<sup>43</sup> Indeed, the confidence of the Court that Congress holds the power of the draft stands in stark contrast to the narrow margins of the *Kneidler* decisions during the Civil War and the history of the draft before World War I. While this confidence seems odd, it may be better understood in the context of the background of the opinion's author. Before the case was heard, and before the United States entered World War I, Justice White had stated that, were he thirty years younger, he would "go to Canada to enlist."<sup>44</sup> While one cannot be certain how much of a role this sentiment played in his approach to this case, it does not take a great deal of imagination to see how Justice White's personal feelings towards the war might have led him to overstate the strength of the government's claims vis-à-vis the Thirteenth Amendment. A wartime draft may well be unassailably constitutional; however, the single dismissive paragraph given to the Thirteenth Amendment argument did not include any legal reasoning beyond contempt towards the very thought of nullifying the draft.

¶13 The assertion that a wartime draft is within the inherent powers of the government was never seriously revisited. In the period between wars, however, Justice Cardozo noted in passing that the Court had not examined the power of the government to exact military service during a time of peace.<sup>45</sup> This question remains unsettled.

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<sup>40</sup> *Id.* at 389–90.

<sup>41</sup> *Id.* at 390.

<sup>42</sup> Forrest Revere Black, *The Selective Draft Cases—A Judicial Milepost on the Road to Absolutism*, 11 B. U. L. REV. 37, 38 (1931).

<sup>43</sup> Bernstein, *supra* note 33, at 709.

<sup>44</sup> *Id.*

<sup>45</sup> *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 265 (1934) (Cardozo, J., concurring). *Hamilton* dealt with a state law requiring university students to study military tactics; however, Justice Cardozo's concurrence suggested that while taking these classes was not burdensome to the petitioners' constitutional

## D. World War II

¶14 In the years before American involvement in World War II, another draft was ordered. As with the previous two series of drafts, legal challenges were filed—with near uniform lack of success. The courts’ decisions generally considered the crisis emerging around the world and argued that the federal government should have the ability to mobilize the citizenry to prepare for war, even if the United States was not actively participating in the war yet.<sup>46</sup> Even if these challenges had been appealed to higher courts or the Supreme Court, the declaration of war in December 1941 would likely have rendered a challenge to peacetime conscription moot before a decision could be reached.

¶15 Once the United States declared war on the Axis powers, more challenges came forward. Perhaps the most notable was *Billings v. Truesdell*, a habeas corpus action by a man who was detained by Army officials after refusing to take the oath of induction after being drafted.<sup>47</sup> The Court ruled that the Articles of War<sup>48</sup> did not govern the treatment of a draftee who had declined to take the oath of induction because the draftee was still under the jurisdiction of the Selective Draft Act—a civilian apparatus.<sup>49</sup> Because Congress attached criminal penalties to violations of this Act, the military could not undermine these penalties and the will of the legislature by taking into custody those draftees who fail to report or take the oath of induction.<sup>50</sup> In recognizing that draftees were not subject to military law and were still afforded the general protections that civilians enjoy, the *Billings* court helped clarify how to examine challenges to the draft.

¶16 The Thirteenth Amendment argument surfaced in this period as well. In *Heflin v. Sanford*, the Fifth Circuit was asked whether compelling a conscientious objector to serve in a civilian capacity would be a violation of the Thirteenth Amendment right to be free of involuntary servitude.<sup>51</sup> The court answered this in the negative, stating that the “Thirteenth Amendment has no application to a call for service made by one’s government according to law to meet a public need, just as a call for money in such a

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rights, requiring the petitioners to enlist may have been a different matter entirely. See *infra* note 62. Bernstein also remarked that “[w]hat Chief Justice White and the other men of the Court at the time might have had to say about sending American conscripts to fight an undeclared war thousands of miles from our shores is purely conjectural.” Bernstein, *supra* note 33, at 709.

<sup>46</sup> See, e.g., *United States v. Herling*, 120 F.2d 236 (2d Cir. 1941) (per curiam) (stating that imposing a distinction between the wartime and peacetime use of the draft created a distinction not in the Constitution itself); *United States v. Lambert*, 123 F.2d 395 (3d Cir. 1941) (stating that Congress was not limited by the Constitution in its power to call a draft, and the *Selective Draft Cases* were found to still be controlling); *United States v. Rappeport*, 36 F. Supp. 915 (S.D.N.Y. 1941) (stating that the power of the federal government to prepare for an emergency or armed conflict could not be questioned, and thus that while actively conscripting in a time of peace would not be reviewed, registration to prepare for wartime conscription was well within the power of Congress); *United States v. Garst*, 39 F. Supp. 367, 368 (E.D. Pa. 1941) (quoting Alexander Hamilton in *The Federalist* No. XXIV that the nation must have the ability to raise an army prior to being attacked); *United States v. Cornell*, 36 F. Supp. 81 (S.D. Id. 1940) (Congress holds unconditional power and discretion in determining how to raise armies); *Stone v. Christensen*, 36 F. Supp. 739, 743 (D. Or. 1940) (finding that emerging circumstances created a situation similar enough to war that the *Selective Draft Cases* would apply, and citing to *Hamilton*, 293 U.S. 245, to state that the issue of peacetime conscription would not be addressed).

<sup>47</sup> 321 U.S. 542 (1944).

<sup>48</sup> 10 U.S.C. § 1473.

<sup>49</sup> *Billings*, 321 U.S. at 551–52.

<sup>50</sup> *Id.* at 557–58.

<sup>51</sup> 142 F.2d 798 (5th Cir. 1944).

case is taxation and not confiscation of property.”<sup>52</sup> The case also cited a previous Thirteenth Amendment case holding certain forms of compulsory civil service constitutional.<sup>53</sup>

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While *Heflin* held that the Thirteenth Amendment was no bar to a wartime draft, the language used by the court highlighted the importance of considering the scope and reach of the conflict to which the government was reacting. The opinion characterized the war confronting the nation as a “total war,” where “every means of destruction will be used, and men, women and children alike killed.”<sup>54</sup> This would require a unique form of dedication: “[T]otal effort may be necessary to resist it, men, women and children all doing what they can.”<sup>55</sup> The clear implication was that in the event of a total war, measures taken by the government to protect the nation would naturally be more likely to fall within its constitutional powers. World War II was one such total war, and the draft was one such measure. While later conflicts did not present the same existential threat to the future of the nation, they would provide plenty of civil unrest and fertile ground for legal challenges to the draft.

### E. The Korean War and Vietnam

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In the period between the Korean War and the Vietnam War, additional challenges were mounted against mandatory registration. Many of the challenges prior to Vietnam were based on religious objections to military training or compulsory registration.<sup>56</sup> Challenges to the draft on Thirteenth Amendment grounds began to surface, particularly in the Ninth Circuit, but were rebuffed as misinterpretations of the freedoms that the Thirteenth Amendment was intended to protect.<sup>57</sup> This trend of vigorous challenges continued through the Vietnam era, leading most notably to Supreme Court clarifications on conscientious objector status.<sup>58</sup> Conscription itself was a volatile topic during Vietnam, leading to civil unrest and demonstrations where protestors burned their draft cards.<sup>59</sup> Media outlets criticized the draft.<sup>60</sup> There were also legal challenges to the draft

<sup>52</sup> *Id.* at 799.

<sup>53</sup> See *infra* note 93 and accompanying text.

<sup>54</sup> *Heflin*, 142 F.2d at 800.

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., *United States v. Henderson*, 180 F.2d 711, 714–15 (7th Cir. 1950) (stating that in an era of “total war[s],” the government had the power to call on everyone in some capacity; and that if overrun, the country could provide no protections for anyone under the First Amendment); *Richter v. United States*, 181 F.2d 591 (9th Cir. 1950) (holding that defendant’s First Amendment rights were not violated when he was compelled to register for Selective Service, as there were exceptions from combat duty should the need ever arise).

<sup>57</sup> See, e.g., *Howze v. United States*, 272 F.2d 146, 148 (9th Cir. 1959) (holding that the compulsory civilian draft was not limited by the Thirteenth Amendment).

<sup>58</sup> See *Gillette v. United States*, 401 U.S. 437 (1971) (holding that a conscientious objector must object to participation in war in any form, and not just to a particular war or war waged for a certain reason); *United States v. Seeger*, 380 U.S. 163 (1965) (holding that a conscientious objector must have a genuine, truly held, religious belief to claim conscientious objector status); see also *United States v. Bortlik*, 122 F. Supp. 225 (M.D. Pa. 1954) (holding that a Jehovah’s Witness who would only fight in a theocratic war ordered by God could claim conscientious objector status, because Congress did not intend “war in any form” to include divine struggle).

<sup>59</sup> These activities eventually came to the Supreme Court’s attention. The Court upheld federal legislation banning the mutilation or destruction of a draft card as an appropriate, narrowly-tailored way of ensuring the continuing availability of draft certificates, notwithstanding First Amendment claims that this burdened symbolic speech. *O’Brien v. United States*, 391 U.S. 367 (1968).

based on racial disparities between members of the local draft boards and the civilian populations that the boards were charged with conscripting.<sup>61</sup> Just as in the period between the World Wars, the issue of a draft in the absence of a declared war was present, and again the Supreme Court declined to hear any cases that would clarify the issue.<sup>62</sup>

¶19 However, the Circuits did weigh in on arguments that peacetime drafts and civilian reassignments were unconstitutional under the Thirteenth Amendment.<sup>63</sup> The Thirteenth Amendment was not a popular avenue through which to try to block the draft, no doubt because of the lack of success it had seen during World War I. Among the cases where plaintiffs tested these waters was *United States v. Fallon*.<sup>64</sup> The Seventh Circuit dealt with this case by referring to the *Selective Draft Cases*, holding that the absence of a draft exception in the Thirteenth Amendment could not be construed to state that the Amendment blocked involuntary servitude in the military when the government conducted a draft.<sup>65</sup> In the absence of Supreme Court intervention, the circuit courts were bound by the *Selective Draft Cases*. The Thirteenth Amendment has not been used to challenge the right of the government to conduct a draft since these Vietnam-era cases.

#### F. Post-Vietnam to Today

¶20 After the Vietnam era, President Ford discontinued draft registration.<sup>66</sup> However, it would resume shortly thereafter when the Soviet invasion of Afghanistan prompted President Carter to reinstate registration to facilitate future conscription.<sup>67</sup> When

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<sup>60</sup> See, e.g., Jack Raymond, *The Draft Is Unfair*, THE N.Y. TIMES MAG., Jan. 2, 1966, at 5. This article catalogued the complaints that often surfaced in connection with the draft during the Vietnam conflict: the administration of the draft was unfair in who it actually sent to fight; the war itself was not, in the minds of many, worth fighting; and the United States historically had an uneasy relationship with the draft as an institution.

<sup>61</sup> See *Clay v. United States*, 397 F.2d 901, 909–13 (5th Cir. 1968) (holding that the failure to have racially proportionate selection for draft boards was not sufficient to overturn Cassius Clay’s conviction for refusing to report for service, and that an argument comparing the composition of a draft board to the constitutional protections of trial by jury was not meritorious); *United States v. Richmond*, 274 F. Supp. 43 (C.D. Cal. 1967) (holding that there was no requirement that board members be selected based on racial patterns).

<sup>62</sup> Justice Stewart wrote in a memorandum attached to a denial of certiorari that he would have heard the issue of whether civilians could be conscripted and compelled to serve in an armed conflict overseas, but the issue was not before the court. Justice Douglas took this a step further in an opinion dissenting from this denial of certiorari, saying that Justice Cardozo’s old question in *Hamilton*, 293 U.S. 245, had never been answered. *Holmes v. United States*, 391 U.S. 936, 936–38 (1968) (Douglas, J., dissenting from denial of certiorari).

<sup>63</sup> See, e.g., *Badger v. United States*, 322 F.2d 902, 908 (9th Cir. 1963) (quoting *Howze v. United States*, 272 F.2d 146, 148 (9th Cir. 1959), that “[c]ompulsory civilian labor does not stand alone, but is the alternative to compulsory military service,” which is understood to be constitutional).

<sup>64</sup> 407 F.2d 621, 624 (7th Cir. 1969), cert. denied, 395 U.S. 908 (1969). See also *United States v. Holmes*, 387 F.2d 781, 784 (7th Cir. 1967) (adopting the rule of the Ninth Circuit as laid out in *Howze*, 272 F.2d 146, to affirm the conviction of a man for failing to report for civilian service in lieu of military conscription).

<sup>65</sup> *Fallon*, 407 F.2d at 624.

<sup>66</sup> Proclamation No. 4360, 3 C.F.R. 462 (1971–1975).

<sup>67</sup> It is interesting to note that when President Carter expressed his interest in reviving draft registration, he actually sought to have both men and women register, but Congress passed the legislation with only men being compelled to register. Earl F. Martin, *Separating United States Service Members From the Bill of Rights*, 54 SYRACUSE L. REV. 599, 636 (2004). See also *Rostker v. Goldberg*, 453 U.S. 57, 69 (1981).

registration resumed in 1980, it was challenged as a violation of due process under the Fifth Amendment because only men were required to register under the Military Selective Service Act.<sup>68</sup> The district court agreed with this challenge and issued a permanent injunction against registration for the draft.<sup>69</sup> The Supreme Court quickly issued a stay of this injunction, since the injunction was more likely to harm the government than the stay was to harm the registrants.<sup>70</sup> After hearing the case, the Supreme Court ruled that men and women were not similarly situated for the purpose of a draft, due to differential treatment in the military's combat regulations—for example, women in the Navy and the Air Force were prohibited by statute from serving on board an aircraft or a warship during a combat mission, and the Marines and Army had similar policies regarding women in combat situations.<sup>71</sup> Based on these practices, the Court concluded that Congress acted well within its authority by authorizing a male-only draft, and the district court's opinion was reversed.<sup>72</sup>

¶21 The *Rostker* opinion continues to resonate, and many have called for its reversal after over twenty years of changes in military regulations permitting greater female exposure to combat situations and altering the due process calculus.<sup>73</sup> However, no challenges based on gender disparities in the draft have reached the Supreme Court since *Rostker*, and its holding continues to stand.

¶22 After *Rostker*, many challenges to the draft have been based on the constitutionality of withholding federal financial aid from male students who fail to register for the draft<sup>74</sup> and on the Department of Justice's passive system of draft enforcement.<sup>75</sup> The Supreme Court has rejected each of these challenges, and draft registration under the Selective Service System continues to this day.

## II. A BRIEF HISTORY OF THE THIRTEENTH AMENDMENT

¶23 The Thirteenth Amendment was ratified on December 13, 1865, shortly after the end of the Civil War.<sup>76</sup> In its entirety, it states:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

<sup>68</sup> *Goldberg v. Rostker*, 509 F. Supp. 586 (E.D. Pa. 1980).

<sup>69</sup> *Id.*

<sup>70</sup> *Rostker v. Goldberg*, 448 U.S. 1306 (1980).

<sup>71</sup> *Rostker*, 453 U.S. at 76–77.

<sup>72</sup> *Id.* at 83.

<sup>73</sup> See, e.g., Dale A. Riedel, *By Way of the Dodo: The Unconstitutionality of the Selective Service Act Male-Only Registration Requirement Under Modern Gender-Based Equal Protection*, 29 U. DAYTON L. REV. 135 (2003); Leslie Ann Rowley, *Gender Discrimination and the Military Selective Service Act: Would the MSSA Pass Constitutional Muster Today?*, 36 DUQ. L. REV. 171, 181–82 (1997).

<sup>74</sup> See, e.g., *Selective Serv. Sys. v. Minn. Pub. Interest Res. Group*, 468 U.S. 841 (1984).

<sup>75</sup> See *Wayte v. United States*, 470 U.S. 598, 603 (1985) (describing the explicit passive enforcement policies).

<sup>76</sup> U.S. CONST. amend. XIII.

Section 2. Congress shall have power to enforce this article by appropriate legislation.<sup>77</sup>

- ¶24 This amendment was passed as a fulfillment of the Emancipation Proclamation.<sup>78</sup> While it was intended primarily to outlaw slavery, the addition of the words “involuntary servitude” broadens the scope of the amendment past the range of slavery, and perhaps into different territory entirely.<sup>79</sup> The language, “shall exist within the United States,” also expands the scope of the Amendment. Unlike many other Amendments, which focus on state action, this language targets a condition without regard for whether the cause of that condition is a state actor or an individual.<sup>80</sup>
- ¶25 While the broadness of its language gives the Amendment theoretical clarity, its interpretation in practice has been anything but clear.<sup>81</sup> This lack of clarity, and a general deference to Congress’ powers under the second section of the Amendment, has traditionally made it difficult for plaintiffs to make a claim based on these Thirteenth Amendment rights.<sup>82</sup> In an effort to limit claimants’ abilities to bring claims based on the expansive and self-executing nature of the first section, courts have created exceptions to this Amendment.<sup>83</sup> One of the more commonly used exceptions is built into the text of the Amendment: “except as a punishment for crime whereof the party shall have been duly convicted.”<sup>84</sup> Prisoners have often attempted to use the Thirteenth Amendment as an avenue to escape forced labor as part of their punishment, only to be rebuked by courts applying the plain text of the Amendment.<sup>85</sup> Notably, no such plain text exists excusing the military draft, despite how recent the memory of Lincoln’s conscription measures would have been in the minds of the Amendment’s framers.
- ¶26 The most formative decision interpreting the Thirteenth Amendment, as well as many other reforms of the era, is the consolidated *Slaughter-House Cases*.<sup>86</sup> The Supreme Court in *Slaughter-House* discussed the Thirteenth Amendment as a part of a package of amendments passed after the Civil War and stated that they were passed with a “unity of purpose.”<sup>87</sup> While the Court acknowledged the term “involuntary servitude” is more expansive than slavery, it found that the term was meant to be a catchall for stealthy forms of African slavery, rather than a new class of freedoms guaranteed to all citizens.<sup>88</sup> In 1883, the Court appeared to backtrack on this restrictive view in the *Civil Rights Cases*, and averred that the Thirteenth Amendment did indeed create positive

<sup>77</sup> *Id.*

<sup>78</sup> Lauren Kares, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 373 (1995).

<sup>79</sup> *Id.* at 374.

<sup>80</sup> Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1644 (2001).

<sup>81</sup> Kares, *supra* note 78, at 375.

<sup>82</sup> *Id.* at 380.

<sup>83</sup> *Id.* at 375.

<sup>84</sup> U.S. CONST. amend. XIII, § 1.

<sup>85</sup> See, e.g., *Ali v. Johnson*, 259 F.3d 317 (5th Cir. 2001); *Tourscher v. McCullough*, 184 F.3d 236 (3d Cir. 1999); *Berry v. Bunnell*, 39 F.3d 1056 (9th Cir. 1994); *Ruark v. Solano*, 928 F.2d 947 (10th Cir. 1991), *overruled on other grounds*, *Lewis v. Casey*, 518 U.S. 343 (1996); *Omasta v. Wainwright*, 696 F.2d 1304 (11th Cir. 1983); *Ray v. Mabry*, 556 F.2d 881 (8th Cir. 1977).

<sup>86</sup> 83 U.S. 36 (1872).

<sup>87</sup> *Id.* at 67.

<sup>88</sup> *Id.* at 69.

freedoms.<sup>89</sup> These freedoms were described as being political, civil, and universal, arguably a construction with reach beyond the pre-Civil War institution of slavery.<sup>90</sup> Most importantly, the Court also stated with no ambiguity that this Amendment, like the Fourteenth, “is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.”<sup>91</sup>

¶27 This expansive reading in the *Civil Rights Cases* has never been understood to indicate universal, limitless freedom, just as the First Amendment is not understood as an unlimited freedom.<sup>92</sup> In *Butler v. Perry*, the Supreme Court refused relief to a habeas corpus petitioner who had been imprisoned after refusing to obey a Florida statute requiring able-bodied men to either work on the highways six days a year, furnish a substitute for the work, or pay three dollars per day of obligated service.<sup>93</sup> The petitioner claimed that this mandatory service violated the Thirteenth Amendment prohibition of involuntary servitude, and was unconstitutional.<sup>94</sup> The Court ruled that the old Roman theory of *trinoda necessitas*, an obligation to maintain thoroughfares on an estate holder’s land, controlled this situation.<sup>95</sup> The Court cited a variety of cases to support its determination that the Thirteenth Amendment was passed to address “liberty under the protection of effective government,” rather than to strip state governments of their traditional powers to impose duties and obligations.<sup>96</sup> Because *Butler* involved such a traditional state power, the Court found that the Thirteenth Amendment did not relieve Butler of his obligation.<sup>97</sup> Much like the compulsory military service exceptions to the Thirteenth Amendment, these traditional state power exceptions are creations of the judiciary, rather than an interpretation derived from the language of the amendment.<sup>98</sup>

¶28 While standing by the ruling in *Butler*, the Court has shown a willingness to expand Thirteenth Amendment rights beyond the traditional realm of slavery into the realm of economic freedom, albeit with a little Congressional prodding. In *Pollock v. Williams*, the Court found that peonage (the practice of forcing a debtor to work for the lender to pay off his or her debt) was unconstitutional under the Thirteenth Amendment.<sup>99</sup> The Court eschewed a restrictive interpretation, and stated that one purpose of the Amendment was to “maintain a system of free and voluntary labor across the United States.”<sup>100</sup>

¶29 In *United States v. Kozminski*, the Supreme Court addressed the scope of the Thirteenth Amendment and illustrated how the Amendment reaches beyond state

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<sup>89</sup> 109 U.S. 3, 20 (1883).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words not protected under the First Amendment); *Miller v. California*, 413 U.S. 15 (1973) (obscenity not protected under the First Amendment).

<sup>93</sup> 240 U.S. 328 (1916).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 331.

<sup>96</sup> *Id.* at 333.

<sup>97</sup> *Id.*

<sup>98</sup> Kares, *supra* note 78, at 392.

<sup>99</sup> 322 U.S. 4, 17 (1944). Rather than arising directly under the Thirteenth Amendment, the case arose under the Antipeonage Act, enacted by Congress under the authority of the Thirteenth Amendment.

<sup>100</sup> *Id.*

action.<sup>101</sup> The decision dealt with a family that owned a Michigan dairy farm and had employed two mentally handicapped men in their sixties to work on the farm.<sup>102</sup> These men, described in the opinion as viewing the world and responding to authority in the same manner that an eight-to-ten-year-old would, were working seven days a week, up to seventeen hours a day on the farm.<sup>103</sup> These men were at first paid fifteen dollars a week, and eventually nothing.<sup>104</sup> When they failed to do the work that they had been ordered to do, the farm's owners berated the men, and the owners instructed their other employees to do the same.<sup>105</sup> The prosecution presented the case not as an example of physical coercion, but of a situation where these men were "psychological hostages" brainwashed into working for free, based on their lack of knowledge of other opportunities open to them.<sup>106</sup> The Sixth Circuit, hearing the case *en banc*, had disagreed with this theory of psychological coercion, finding it too broad an application of the Thirteenth Amendment.<sup>107</sup>

¶30 The Supreme Court held that psychological coercion is included in the Thirteenth Amendment. Finding a circuit split in how involuntary servitude had been defined, the Court established a definition that would be used in the criminal context, stating that the Amendment was violated when services were compelled by the use of physical or psychological coercion.<sup>108</sup> This was narrower than the definition that the prosecution had sought, which would have included compulsion of services by any means that leaves the victim with no tolerable alternative or would deprive the victim of choice.<sup>109</sup>

¶31 Thirteenth Amendment jurisprudence includes a broad right to be free from involuntary servitude. This amendment has been described as a vindication of "fundamental rights" which are essential to citizenship.<sup>110</sup> It is the deprivation of these rights that leads from freedom to the forbidden condition of involuntary servitude.<sup>111</sup>

### III. STRICT SCRUTINY ANALYSIS

¶32 The Supreme Court has explicitly acknowledged the rights guaranteed by the Thirteenth Amendment as fundamental and central to citizenship. When examining the constitutionality of statutes, the Court subjects statutes that putatively infringe on fundamental liberties to strict scrutiny. Areas where the Court has applied this test include the First Amendment rights of religion<sup>112</sup> and free association,<sup>113</sup> the right to vote,<sup>114</sup> the right to travel freely,<sup>115</sup> and the right to bodily integrity.<sup>116</sup>

<sup>101</sup> 487 U.S. 931, 934 (1988).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 935.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *United States v. Kozminski*, 487 U.S. 931, 936 (1988).

<sup>107</sup> *United States v. Kozminski*, 821 F.2d 1186 (6th Cir. 1987) (*en banc*).

<sup>108</sup> *Kozminski*, 487 U.S. at 949.

<sup>109</sup> *Id.*

<sup>110</sup> *The Civil Rights Cases*, 109 U.S. 3, 22 (1883).

<sup>111</sup> *Id.*

<sup>112</sup> *See Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that state unemployment benefit regulation infringed on a Seventh Day Adventist's ability to freely practice her religion in violation of the First Amendment, and that there was no compelling state interest in doing so).

<sup>113</sup> *See NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that state of Alabama could not compel the

¶33 In a military draft, the government calls up a citizen for mandatory induction into the armed forces. This induction is by its very nature involuntary; after all, that is why it is called compulsory military service. Under a *Kozminski* analysis, a draft employs both psychological and physical coercion (by threatening legal consequences for non-compliance) to compel service.<sup>117</sup> As such, it is involuntary servitude for the purposes of the Thirteenth Amendment in both criminal and civil contexts.<sup>118</sup> Based on Thirteenth Amendment jurisprudence, an imposition of involuntary servitude is an infringement on a fundamental right.<sup>119</sup> The right to be free of involuntary servitude is likely to be held equivalent to the freedom of movement and freedom of speech. On one level, each of these freedoms is intertwined with freedom of the person. On another, as a matter of common sense, the rights to free speech, association, and movement are essentially worthless if the state can disregard those rights by inducting people into the military, where speech, association, and movement are all heavily controlled.

#### IV. STATES OF WAR

¶34 Before laying out a framework for judicial treatment of the draft, it is important to examine the external context of draft challenges. This Comment proposes that the threshold issue in examining a challenge to the draft should be the type of conflict (if any) that the nation is dealing with. Carl von Clausewitz, a Prussian soldier and author of the seminal treatise *On War*, is perhaps best known for his statement that “[w]ar is a mere continuation of policy by other means.”<sup>120</sup> However, immediately after this argument, von Clausewitz posited that wars could come in different intensity and forms, stating:

The greater and the more powerful the motives of a War, the more it affects the whole existence of a people. The more violent the excitement which precedes the War, by so much nearer will the War approach to its abstract form, so much the more will it be directed to the destruction of the enemy, so much nearer will the military and political ends coincide, so much the more purely military and less political the War appears to be  
 . . . .<sup>121</sup>

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NAACP to turn over membership records, as this could have a negative impact on the freedom to associate freely, and the state could show no compelling interest sufficient to overcome the negative effects of its statute).

<sup>114</sup> See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (holding that additional requirements on top of age and residency requirements did not sufficiently advance a compelling state interest to justify infringement of the fundamental right to vote in a local election).

<sup>115</sup> See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that fiscal integrity is not a sufficiently compelling interest to allow a state to infringe on the right to travel by instituting a one-year waiting period for new residents before they could access public assistance benefits).

<sup>116</sup> See, e.g., *Bonsol v. Perryman*, 240 F. Supp. 2d 823 (N.D. Ill. 2003) (invalidating legislation denying bail to indefinitely detained aliens).

<sup>117</sup> See *United States v. Kozminsky*, 487 U.S. 931, 949 (1988).

<sup>118</sup> See *id.*

<sup>119</sup> See *The Civil Rights Cases*, 109 U.S. 3, 22 (1883).

<sup>120</sup> CARL VON CLAUSEWITZ, *ON WAR* 119 (Anatol Rapoport, ed., J.J. Graham trans., Penguin Books 1982) (1908).

<sup>121</sup> *Id.* at 119–20.

While von Clausewitz went on to remind his readers that war, regardless of intensity, was political, this insight gives us a new lens through which to view conflicts and the measures taken to prevail in those conflicts, in recognition of the fact that depending on the aims of a war, its intensity may wax or wane in a way that puts the nation in varying degrees of danger.

¶35 At one extreme are times of ongoing peace. During these times, the nation is not facing a military threat to its interests or existence, so maintaining the military is purely a matter of preparedness. Drafts are usually not conducted during times of peace, simply because there is less need for manpower; however, one such draft was conducted in 1940, as World War II raged in the background. As stated above,<sup>122</sup> the bombing of Pearl Harbor and the subsequent declaration of war on the Axis Powers quickly made challenges to this particular draft moot.

¶36 The ensuing involvement in World War II provides an example of the other extreme. The bombing of Pearl Harbor typified a form of danger that had been unknown in previous wars; aircraft carried on naval vessels could fly great distances from their fleet and drop bombs on military or civilian targets with little or no warning.<sup>123</sup> By the end of the war, tens of millions of people, largely civilians, were dead as a result of the conflict.<sup>124</sup> It was with no exaggeration when the court in *Heflin* labeled the conflict “total war.”<sup>125</sup>

¶37 Of course, there is a middle ground between pure peace and total war as exemplified by World War II. There is precedent in labeling the differing degrees of U.S. involvement in wars and assigning these degrees of involvement greater or lesser judicial recognition. The earliest such case dealt with the Quasi-War, a purely naval conflict between the United States and France waged between 1798 and 1800 as a result of the XYZ Affair.<sup>126</sup> In *Bas v. Tingy*, the Supreme Court reviewed a dispute between the owner of a ship which had been seized by the French and the commander of another ship recovering the seized vessel.<sup>127</sup> The dispute centered on the amount of salvage that the owner of the seized vessel owed the salvager, and the relevant question became whether or not the United States was at war with France.<sup>128</sup> While Congress had not declared war, the Court found that “hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more

<sup>122</sup> See *supra* Section I.D.

<sup>123</sup> During the raid on Pearl Harbor, about 350 Japanese aircraft flew 200 miles from their floating bases. During the two-hour attack, 2403 Americans were killed. Pearl Harbor Attack: Index of Action Reports, <http://www.history.navy.mil/faqs/faq66-1.htm> (last visited Sept. 22, 2009). Throughout the war, the power of aerial bombing was graphically illustrated by the British and American air forces. For example, a concerted air attack against Dresden, Germany, by bombers based in England, led to an estimated 135,000 fatalities. Kenneth Hewitt, *Place Annihilation: Area Bombing and the Fate of Urban Places*, 73 in *ANNALS OF THE ASS'N OF AMERICAN GEOGRAPHERS* 257, 263 (1983). In the Pacific Theater, the fire-bombing of Japanese cities left over 425 km<sup>2</sup> of what had been developed urban areas in ruins, and killed upwards of 780,000 civilians. *Id.* at 267. Surveys of cities subjected to this form of bombing often described the remains as “lunar landscapes.” *Id.* at 261.

<sup>124</sup> MSN Encarta, World War II, [http://encarta.msn.com/encyclopedia\\_761563737\\_15/World\\_War\\_II.html](http://encarta.msn.com/encyclopedia_761563737_15/World_War_II.html) (last visited Sept. 22, 2009).

<sup>125</sup> *Heflin v. Sanford*, 142 F.2d 798, 800 (5th Cir. 1944).

<sup>126</sup> For a brief description of the conflict, see Quasi-War With France, 1798–1800, <http://www.state.gov/r/pa/ho/time/nr/16318.htm> (last visited Sept. 22, 2009).

<sup>127</sup> 4 U.S. 37 (1800).

<sup>128</sup> *Id.* at 40 (opinion of Washington, J.).

properly termed *imperfect war*.”<sup>129</sup> Thus, the Court would recognize a milder state of war in the absence of a formal declaration of war by Congress.

¶38 The example of the Quasi-War as a state of undeclared conflict has reappeared, most notably in recent years. The Vietnam War is the most prominent example of undeclared war, which resulted in a number of casualties both for the United States and its enemies in the conflict. Yet, it did not reach the level of “total war” seen in World War II, with cities fire-bombed and civilians targeted widely and indiscriminately.<sup>130</sup> In addition, Vietnam did not pose a direct threat to the existence or immediate physical security of the country; rather, it was an aggressive extension of a policy of containing Communism.<sup>131</sup> In these respects, it is clear that Vietnam is in the gray area that the *Bas* court referred to as “imperfect war.”

¶39 Is there a metric to reliably determine the difference between a “total” and an “imperfect” war? The federal courts have held in the context of the War Clause<sup>132</sup> that they are competent to determine when the nation is at war.<sup>133</sup> Factors that courts have considered include the duration, expense, and American fatalities involved in the conflict in question.<sup>134</sup> However, these inquiries have focused on a question apart from the Thirteenth Amendment: whether conflicts like Vietnam have been sufficiently war-like to require Congressional approval to be constitutional.<sup>135</sup> This is at heart a separation of powers issue. However, under a Thirteenth Amendment analysis, courts are concerned with whether a crisis is sufficiently pressing to justify government action that has the effect of depriving citizens of certain fundamental liberties. While measures like the monetary expense and the duration of a conflict may be sufficient to determine whether a war requires express Congressional approval, they would seem to be insufficient when looking at an actual violation of a citizen’s fundamental rights. Therefore, other factors should be considered in a Thirteenth Amendment challenge to a draft.

¶40 In the heat of an “imperfect war” conflict, courts may be under pressure to grant sweeping authority to the government, including powers that exceed the authority conferred by the Constitution. Though strict scrutiny analysis would require courts to determine whether an interest is compelling, and whether the means of achieving that interest are narrow, there would be great political and social pressure during a time of conflict to allow the draft to pass muster notwithstanding strict scrutiny. Establishing some stable factors that would allow courts to give a discrete basis for its decision, rather than simply rolling over under either internal or external pressure (as the Court arguably did in the *Selective Draft Cases*), is important. Some factors I propose for consideration in a Thirteenth Amendment analysis reviewing a military draft include:

<sup>129</sup> *Id.* (emphasis in original).

<sup>130</sup> While Vietnam did see the use of guerilla fighters that could blend in with the civilian population, and thus did involve a civilian component, the level of destruction did not approach that seen by the German or Japanese homelands.

<sup>131</sup> See Daniele Archibugi, *Can Democracy Be Exported?*, 13 WIDENER L. REV. 283, 285 (2007).

<sup>132</sup> U.S. CONST. art. I, § 8, cl. 11 (leaving to Congress the power “to declare war”).

<sup>133</sup> See *Dellums v. Bush*, 752 F. Supp. 1141, 1145–46 (D.D.C. 1990) (citing *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C. Cir. 1973)).

<sup>134</sup> *Mitchell*, 488 F.2d at 614.

<sup>135</sup> *Id.*; see also *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971). These cases each found that Vietnam was a war within the scope of the War Clause, but that Congress had either tacitly or explicitly approved it through expenditures for the conflict or through actions like the Gulf of Tonkin Resolution.

- (1) The impact of success or failure of the war on national survival. This surpasses a mere involvement in national interests, such as natural resources or an ideological interest in fostering certain forms of government. This should be the most heavily weighted factor; a war that threatens the very survival of a nation can be nothing less than total as far as that nation is concerned.
- (2) The degree of involvement of civilians in the war effort. As the *Heflin* case discussed in regard to World War II, a war in which destruction can be visited upon civilians may require civilians to take extreme measures to resist destruction.<sup>136</sup>
- (3) Party initiating hostilities. While this may be difficult to determine in a timely fashion in many cases (for example, the Gulf of Tonkin Resolution authorizing expanded U.S. military involvement in Vietnam was based on pretenses that later turned out to be dubious at best<sup>137</sup>), in some cases the instigating party can be more quickly identified. In World War II, hostilities were rudely visited upon the United States in the form of Pearl Harbor. In contrast, the invasion of Iraq was not a reaction to military overtures by the Iraqi Army, or any other belligerent action towards the United States or its interests.
- (4) Formal declaration of war. As *Bas* indicated, an “imperfect war” is often unaccompanied by a declaration of war. By formally declaring war, Congress makes an affirmative action that open, acknowledged hostility is called for, moving the conflict from one that is likely to have narrow aims and execution to one that is more open-ended. In the Quasi-War and the ongoing conflict in Afghanistan, the aims of Congress in sanctioning conflict were narrower than they would have been in a full war. In the Quasi-War, the United States followed a policy of purely naval engagement. In the conflict in Afghanistan, we have followed a policy of targeting Taliban militants and Al Qaeda terrorists, rather than the nation of Afghanistan itself.

¶41 This leads to a pressing question for current times. Is the War on Terror a “war” under this analysis? In reviewing whether the “Global War on Terror” is a war, Professor Ackerman answers in the negative: “War is traditionally defined as a state of belligerency between sovereigns.”<sup>138</sup> Although the Global War on Terror is not against a sovereign (any more than the wars on drugs or poverty), the wars in Afghanistan and Iraq were conducted, if in a limited fashion, against a sovereign.<sup>139</sup>

¶42 In draft cases, the existence of a war has been narrowly defined in at least one instance as “a conflict by force between two or more nations; it is a conflict of violence by one politically organized body seeking to overcome or overthrow another political entity.”<sup>140</sup> Involvement in fighting against an inchoate insurgency does not qualify as war under this reasoning; the enemy in the conflict would not be politically organized or

<sup>136</sup> 142 F.2d 798, 800 (5th Cir. 1944).

<sup>137</sup> See John Prados, *Essay: 40th Anniversary of the Gulf of Tonkin Incident*, NAT’L SECURITY ARCHIVE, Aug. 4, 2004, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB132/essay.htm>.

<sup>138</sup> Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1032 (2004).

<sup>139</sup> *Id.*

<sup>140</sup> *United States v. Bortlik*, 122 F. Supp. 225, 227 (M.D. Pa. 1954).

politically recognized, so there would be only one “nation” in the conflict. By limiting the definition of a “war” to conflicts against another sovereign, we can prevent the nation’s leaders from using political and rhetorical devices to seize full war powers whenever convenient to their interests.

## V. ANALYSIS

¶43

The draft cases that have dealt with the Thirteenth Amendment have done so in an enclave carved out by the judiciary, where the courts have decided that the constitutional protections of the Amendment do not apply.<sup>141</sup> These cases have largely avoided direct questions concerning the compelling interests of the government as weighed against the infringement of a fundamental freedom of the citizen. We may chalk this up to a higher level of deference to the state when dealing with the war powers, and the unwillingness of the Court to interpose itself in decisions involving these powers.<sup>142</sup> Given the extent of wartime case law reinforcing the constitutionality of the draft, and the extraordinary leeway granted the legislature in making decisions during times of war, it would be a fool’s errand to argue that wartime conscription (particularly during involvement in an indisputable total war, such as the Civil War or World War II) is unconstitutional. Indeed, there have been analyses showing that the draft cases that have been successful (generally dealing with conscientious objection and other individual exceptions, rather than dealing with the institution as a whole) have succeeded because they dealt with unprofessional conduct on the part of local boards, which fall under a less deferential civilian analysis.<sup>143</sup> Given these examples, an attempt to find the draft unconstitutional will probably have to withstand the strong military deference espoused in cases such as *Korematsu v. United States*.<sup>144</sup> In the cases discussed here, that deference is probably most visible in *Heflin*, with its language regarding the totality of the conflict in World War II, where the consequences to the nation of failing to mobilize would have been

<sup>141</sup> See, e.g., *Arver v. United States*, 245 U.S. 366, 336 (1918).

<sup>142</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that legislation that forced people of Japanese background to report to a specific military holding area was within the war powers of Congress, despite being subject to strict scrutiny).

<sup>143</sup> One story that emerges is that of a divinity student who turned in his draft card to his local board in protest of the Vietnam War. The Board unilaterally revoked the student’s draft exemption, leading to a tongue lashing from Justice Douglas: “It is no different . . . from a case where induction of an ordained minister or clearly exempt person is ordered (a) to retaliate against the person for his religious views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board member might be better served.” Steven Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court’s Tradition of Deference to the Military, 1918–2004*, 65 MD. L. REV. 907, 930 (2006) (quoting *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 237 (1968)).

<sup>144</sup> 323 U.S. 214 (1944). In this case, Toyosaburo Korematsu’s conviction for violating an exclusion order that only operated against people of Japanese descent was upheld by the Court. Despite applying a strict scrutiny analysis, the Court noted that military commanders had decided that the order was important to the war effort, and upheld the order. *Id.* at 223. However, when applying the racial standards commanded by the order, the Court noted that under its strict scrutiny analysis (the same a violation of the Thirteenth Amendment would command), only the perception of a grave, imminent threat to the public could uphold such a suspect law. *Id.* at 218. At the time, the threat was Japanese invasion of the West Coast—a threat of severity not seen since World War II.

dire.<sup>145</sup> However, many of the draft cases, most notably those during the Vietnam War, did not involve total war.

¶44 It is here that a distinction must be made. The Supreme Court has never answered the question of whether a peacetime conscription would be unconstitutional. However, it is unclear from precedent whether there would be a difference between peacetime as peacetime and peacetime during which the United States is engaged in a conflict that may represent an “imperfect war” falling short of a total war.

¶45 Looking at past conscription challenges under the Thirteenth Amendment, we can see two themes emerge:

- The Thirteenth Amendment does not prevent the government from using powers that it has traditionally employed, such as the use of the *trinoda necessitas* doctrine mentioned in *Butler*.<sup>146</sup>
- The Thirteenth Amendment does not take precedence over the nation’s military requirements, and does not excuse nonparticipation in the military once Congress exercises its authority under the Constitution to raise armies through a draft.<sup>147</sup>

¶46 The first line of reasoning is that because the government has historically used the draft, the Thirteenth Amendment does not prevent the government from continuing to do so. However, the historical record does not support this conclusion. If and when the courts recognize that historically the United States has only sparingly used the draft, how will that recognition change the constitutional viability of conscription?

#### *A. Historical Underpinnings of the Draft*

¶47 The first flaw in the analysis used by courts to uphold the draft as constitutional involves the historical use of the draft. In the *Selective Draft Cases*, which through Vietnam proved to be sufficient authority to uphold the constitutionality of the draft, the Court mentions the history of the draft in the United States, treating it as undisputed fact that the government has used the draft if not routinely, then frequently enough to merit serious consideration.<sup>148</sup> In addition, *Butler* seems to open an exception for long-standing government activities to the Thirteenth Amendment, so that traditional tasks of the government cannot be halted by constitutional challenge.<sup>149</sup>

¶48 The problem is that the use of a modern, national draft that does not allow substitutes or buy-outs postdates the passage of the Thirteenth Amendment. Our first national experience with a draft as we currently understand it came during World War I.<sup>150</sup> Before the twentieth century, conscription was either applied only to the destitute portions of a population,<sup>151</sup> conducted on a local level without direct federal

<sup>145</sup> See *Heflin v. Sanford*, 142 F.2d 798 (5th Cir. 1944).

<sup>146</sup> See *Butler v. Perry*, 240 U.S. 328, 331 (1916).

<sup>147</sup> See, e.g., *Arver v. United States*, 245 U.S. 366 (1918).

<sup>148</sup> See *id.* at 386.

<sup>149</sup> See *Butler*, 240 U.S. at 331.

<sup>150</sup> *Levi*, *supra* note 16, at 134.

<sup>151</sup> In the British drafts of the late 18th century, only the “idle and disorderly” were pressed into military service, and this was done as punishment. See *Freeman*, *supra* note 12, at 69. If maintaining this tradition

intervention,<sup>152</sup> or had loopholes that allowed ninety-five percent of those drafted to evade service.<sup>153</sup> Even prior to the Revolution, the British failed a number of times to institute a conscription program that could have served as a model to the new nation.<sup>154</sup> To use the *Butler* rule to argue that the draft was a pre-existing traditional use of government power that the framers of the Thirteenth Amendment did not wish to displace ignores the fact that the Amendment predated the tradition entirely.

### B. Types of War and Strict Scrutiny Challenges

¶49 While the Thirteenth Amendment could not incorporate a tradition that did not yet exist, it could—and did—create new fundamental rights for U.S. citizens. Because a draft infringes on these fundamental rights in violation of the Thirteenth Amendment, a strict scrutiny test should be applied.

¶50 During a time of total war or even a sufficiently pressing national emergency, this analysis is not difficult. Even under strict scrutiny, in the event of total war, curtailing fundamental liberties may be seen as a necessary measure in the face of a compelling government interest—and there is arguably no more compelling interest than the survival of the nation. Abraham Lincoln’s famous quotation rings true under a total war analysis: “[A]re all the laws *but one* to go unexecuted, and the Government itself go to pieces, lest that one be violated?”<sup>155</sup> Under a strict scrutiny analysis of a draft during a total war, the Court could still find the existence of a compelling national interest to deal with war or emergency that precipitated the draft in the first place.<sup>156</sup> For example, while the *Korematsu* decision is often reviled as bad law,<sup>157</sup> it does offer an example of a court applying strict scrutiny and nevertheless upholding the infringement of a fundamental interest. With the compelling interest of national preservation established, the inquiry goes next to whether the means of achieving that interest are narrowly tailored. As pointed out in *Heflin*, however, these kinds of conflicts can require a dedication of the citizenry unparalleled by other challenges.<sup>158</sup>

¶51 A peacetime challenge would proceed very differently. In a time of true peace, it is unlikely that there could be any compelling justification for drafting citizens into the military against their will and in violation of their Thirteenth Amendment rights. Because a draft is intended to help field a military to prevail in a conflict, the government would be hard-pressed during peacetime to argue that a draft is narrowly tailored to meet a compelling government interest. Beyond the mere problem of being too far-reaching a solution to the problems at hand, the institution of the draft has tended to have

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is important, the Thirteenth Amendment does provide for involuntary servitude after conviction for a crime, although I would not recommend a modern military composed in any part of the conscripted idle, disorderly, and criminal.

<sup>152</sup> GRAHAM, *supra* note 8, at 22.

<sup>153</sup> Levi, *supra* note 16, at 145.

<sup>154</sup> Freeman, *supra* note 12, at 68–69.

<sup>155</sup> Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1015 (2003).

<sup>156</sup> This analysis hearkens back to *Heflin v. Sanford*, 142 F.2d 798 (5th Cir. 1944).

<sup>157</sup> Or, as Professor Ackerman puts it, “bad law, very bad law, very, very bad law.” Ackerman, *supra* note 138, at 43.

<sup>158</sup> 142 F.2d 798, 800 (5th Cir. 1944).

widespread social and political consequences.<sup>159</sup> There are very few ways one can argue that a draft is the narrowest way to achieve an increase in troop strength. For example, while financially draining, bonuses offered to encourage volunteer enlistment can be one more narrowly tailored method of increasing recruitment.<sup>160</sup> In addition to the constitutional reasons for adopting this approach, there are arguments that encouraging volunteer enlistment would be less costly financially than compelling military service.<sup>161</sup> While having a draft may provide other benefits, such as lessening the disproportionate representation of minority populations in the armed forces, courts would be unlikely to find the draft a narrowly tailored means of meeting those objectives.

¶52 Perhaps one example of a situation where a peacetime challenge to the draft could have succeeded is the period between 1939 and 1941, when the world was at war, and it appeared inevitable that the United States would be involved. While this was a real concern in 1939, it is not a common situation, and it is one that the courts can deal with under the strict scrutiny standard if such an exceptional situation arises again.

¶53 A draft during an imperfect war would be most likely to create controversy, as the Vietnam War, a conflict likely classified as imperfect war, generated several challenges to the draft based on varying theories. While there would still be military involvement in an imperfect war, reasoning borrowed from *Heflin* would be unlikely to apply. It is worth noting that military conflicts not accompanied by declarations of war tend to be overseas, have had very little impact on the civilians in the territory of the United States, and have not been as critically important to the nation's survival as the total wars in U.S. history.<sup>162</sup> While the judiciary is not eager to involve itself in military decisions, it has been known to check the powers of the other branches during armed conflicts that were not declared wars.<sup>163</sup> This should signal a willingness by the courts to consider challenges to the draft during conflicts that fall short of total war.

### C. *A Framework for Evaluating the Draft During an "Imperfect War"*

¶54 One of the primary difficulties with challenging actions of the political branches during a time of conflict is that they can always cloak their actions in the guise of military necessity. This can be the case even when the conflict is relatively limited and does not threaten the integrity of the nation itself.<sup>164</sup> This is the reason why the courts should have a reliable test for determining the severity of a conflict—that is, whether it is closer to a

<sup>159</sup> *Rangel Seeks to Introduce Bill Reviving Military Draft*, MSNBC ONLINE, Nov. 20, 2006, <http://www.msnbc.msn.com/id/15805957/>. In the article, Representative Charlie Rangel is described as saying that a draft would deter politicians from entering into war.

<sup>160</sup> See, e.g., Sara Wood, *Army Boosts Enlistment Bonuses*, U.S. DEPT. OF DEFENSE, Aug. 2, 2007, <http://www.defenselink.mil/news/newsarticle.aspx?id=46917>.

<sup>161</sup> When Richard Nixon convened the Commission on an All-Volunteer Armed Force, the Commission reported that an all-volunteer army could provide the strength needed to meet goals, especially with increases in enlisted soldiers' pay, a better recruiting network, and improved quality of life for those in the service. Walter Oi, *The Virtue of an All-Volunteer Force*, CATO INSTIT., July 29, 2003, [http://www.cato.org/pub\\_display.php?pub\\_id=3182](http://www.cato.org/pub_display.php?pub_id=3182).

<sup>162</sup> Note again that I would treat the War on Terror as a separate type of conflict that does not justify the use of the draft to counteract.

<sup>163</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that the President was not acting within his constitutional authority when he ordered the Secretary of Commerce to take control of a steel mill that was going to strike, possibly impairing the Korean War effort).

<sup>164</sup> See *id.*

“total war,” or an “imperfect war.” The political branches will nearly always have an incentive to emphasize the importance of a war, both to justify their actions in engaging in the conflict and to protect the scope of their powers. The judiciary, while not having specialized experience in warfare, has typically been in the position of protecting the rights of individuals from encroachment by the other two branches of government. In addition, courts would have the least to lose or gain politically from the classification of a conflict as a total or lesser war, making them more impartial arbiters. These factors leave the judiciary in the best position to determine whether the circumstances of a particular conflict justify the disruptive and otherwise unconstitutional invasion of rights that a draft introduces.

¶155 Just because the judiciary is not caught up in the political motivations for emphasizing the importance of engaging in a certain conflict does not mean that it will automatically rule against implementation of a draft. One should remember that the strict scrutiny test, contrary to its reputation, is not necessarily fatal.<sup>165</sup> Challengers to a draft would still need to show that a fundamental right has been infringed, shifting the burden to the government to demonstrate that a draft is narrowly tailored to achieving a compelling government interest.

¶156 All this should not be read to mean that registration, which is ongoing under the Military Selective Service Act, should be terminated. Registration is not a violation of constitutional rights, at least under the Thirteenth Amendment, and could be an objectively reasonable way for Congress to guarantee that the manpower is accessible in case of an emergency that would require a draft in the future. The only time that Thirteenth Amendment rights would be implicated is during an active call-up period when citizens would be inducted into the armed forces.

¶157 The broadest way to implicate a fundamental right under the Thirteenth Amendment would be to appeal to the reasoning of the *Civil Rights Cases*.<sup>166</sup> This could be done by claiming that the Thirteenth Amendment was meant to be construed broadly, as a means to ensure that the rights incumbent to citizens were protected by making sure that citizens would not be compelled to serve against their will.<sup>167</sup> The problem with this analysis is that a reviewing court may be reluctant to embrace such a broad standard, for fear of establishing such a broad test under the Thirteenth Amendment that it could be used to reach any government restriction on citizens’ freedoms.

¶158 There are, however, other, more limited ways of applying the Thirteenth Amendment to reach an active draft. One way would be to implicate the economic interests implied in *Pollock*.<sup>168</sup> Where the government compels a citizen to leave his or her livelihood and engage in a new profession as soldier, a case could be made that the economic liberties of the citizen are infringed, and that the rights elaborated in *Pollock* are fundamental enough to trigger strict scrutiny.

¶159 Another way to address a peacetime draft would be to use the more formulaic analysis laid out in *Kozminski*.<sup>169</sup> There, the Court stated that conduct that either physically or psychologically compelled someone to serve another against his or her

<sup>165</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: an Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

<sup>166</sup> See 109 U.S. 3, 22 (1883).

<sup>167</sup> *Id.*

<sup>168</sup> 322 U.S. at 17.

<sup>169</sup> 487 U.S. 931.

wishes constituted a violation of the victim's Thirteenth Amendment rights.<sup>170</sup> Indeed, legal coercion, such as the penalties for failure to comply with a draft, is contemplated by the opinion in *Kozminski*.<sup>171</sup> The *Kozminski* approach is more likely to succeed—the opinion is more recent, directly contemplates legal coercion, and gives a definition of involuntary servitude that will be easier for future courts to follow.

¶60 Once this fundamental right is established, a reviewing court would need to determine whether the government's interests in the conflict are sufficient to be compelling. It is for this reason that the factors enumerated at the end of Section IV are important. Von Clausewitz's observation on war as politics is relevant here; while a war fought for the nation's own survival is as compelling as an interest could ever be, a voluntary expedition to change a small nation's government for ideological purposes would be unlikely to present a compelling interest to the courts. By staying within the confines of a predetermined set of factors, a court is less likely to be influenced by the rhetoric that is likely to accompany the political branches' exercise of military power.

¶61 These factors also play a role in determining whether or not a draft is narrowly tailored. As a conflict is graded as more severe, the government's options for successfully achieving its interests narrow. In other words, while a relatively modest conflict such as the invasion of Haiti could be achieved through comparatively modest means,<sup>172</sup> a draft might be the narrowest means of protecting the nation during a World War. Ultimately, it will be up to the courts to determine where to strike the balance between the interests of the government and the interests of the citizens facing conscription. Looking into the future, the most important matter now is to establish that the courts should not merely rubberstamp government action; one of their roles is to help protect individual rights from government encroachment. That role should not be diminished by the political branches' actions, and the courts should not abdicate that role just because it is more difficult in a time of conflict.

## VI. CONCLUSION

¶62 The draft has been a part of the military strategy of the United States for much of its history. However, it seems clear that much of the justification for its use in more recent conflicts is due to a misunderstanding of the role of conscription in past conflicts, and a wildly deferential view of what powers the legislature may exercise in the gray area between total peace and total war. By reexamining the constitutional provisions of the Thirteenth Amendment and applying the appropriate strict scrutiny analysis, courts in the future will be able to see that in most cases, the draft is inefficient at providing manpower in times of peace, and is not worth its corrosive effects on the fundamental liberties of this country's citizens. At the same time, the courts will be able to recognize when it is important to grant sweeping powers to the political branches to successfully execute a war. In the past, the courts have failed to preserve this balance. If, as history indicates is

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<sup>170</sup> *Id.* at 949.

<sup>171</sup> *Id.* at 947.

<sup>172</sup> That conflict required a six month commitment of between 15,000 and 20,000 troops, which the all volunteer force was more than capable of absorbing. Mark Thompson, *Invasion Target: Haiti*, TIME, July 18, 1994, available at <http://www.time.com/time/magazine/article/0,9171,981104,00.html>.

likely, we are involved in a conflict that provokes a draft, the courts should use the test outlined here to regain the balance of military necessity and individual rights.