

## SOME THOUGHTS ON MINIMAL ENTITLEMENTS AND THE THIRTEENTH AMENDMENT

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I am first going to address minimal entitlements and then I am going to move to a related area: child abuse and whether the government is compelled to protect children against abuse—i.e., whether there is a compelling interest that requires affirmative government action.

First, about minimal entitlements to a stake in society. Many sensible constitutional ideas can be triangulated different ways. There are different modes of analysis and ways to get to the same basic idea, although different paths may have slightly different implications at the margin. If you take the basic idea of freedom of speech, for example, we could, even without the First Amendment, think about freedom of speech both as an aspect of individual liberty, implicating personhood and autonomy—expression as part of what it means to be an individual in a free society—and as an essential requirement of democratic or collective self-governance. The latter is the Meiklejohn idea<sup>1</sup> that regardless of whether each individual has an inalienable right to speak in say, a benign monarchy, in a working democracy, the populace must be permitted to exchange views and to criticize officials in government. We take those basic intuitions, which converge to a fair degree but diverge at the margins, and we often talk about these visions by using the rhetoric or the text of the First Amendment. What I suggest is that there is a similar way we could think about minimal entitlements. Indeed, we could root it, I suppose, in a First Amendment ideal, although I am going to suggest some other ways.

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<sup>1</sup> See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

Dean Edelman talks about both a Lockean and a Rousseauian (republican) conception of minimal entitlements.<sup>2</sup> The Lockean conception goes to what it means for an individual to be able to survive in this society—for the individual to have some dignity and a minimal ability to live and perhaps even flourish. But, however true that is generally, I suggest there is another way to think about minimal entitlements. In a democracy, in order for people truly to be citizens in society they have to have some minimal stake in that collective enterprise. They have to be shareholders in U.S.A., Inc. They have to have, almost literally, some ground of their own on which to stand in order to resist government tyranny and to be members of society. Basically, there is a fundamental linkage between property and democracy.

There are two ways to run that linkage. First is the *exclusionary* method: if you do not have property you cannot be in the democratic club. You are excluded because you are not really a full person—maybe because you are an eighteenth century married woman and you cannot even own real property and in legal contemplation you do not have any will of your own; maybe because you are a slave; maybe simply because you do not (even if you are a white male) own real property and therefore do not have a stake in the societal venture. The exclusionary side of the republican vision is poll taxes and the like. That is the original constitutional vision: in order to be a member of the democratic club you have to have some minimal property. Thus, property is prior to democracy in some unfortunate ways.

What I suggest, however, is that there is a different vision that simply reverses that linkage. This second type of linkage puts democracy first, and it says that because people are citizens, and they are going to be voting on issues that are important to us as well as to them, we must guarantee that they have some minimal stake in society. That is, I would suggest, the *inclusionary* vision of republicanism.

Once again, however, I have been talking at a rather high level of generality as I did with individual and collective interests and freedom of speech. But it seems to me that we can give this vision a more precise foundation based upon particular clauses in the Constitution and particular historical events that support it, just as the text of the First Amendment and the historical event of the reaction to the Sedition Act support the First Amendment tradition. Basically, in a word, this inclusionary republican vision, with a capital “R” as well as a

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<sup>2</sup> See Peter B. Edelman, *Mandated Minimum Income, Judge Posner, and the Destruction of the Rule of Law*, 55 ALB. L. REV. 633 (1992).

small “r,” is, in some respects, the vision of Reconstruction. If I were pointing to particular constitutional text, I would point to the second reconstruction in the 1960s, and the Twenty-fourth Amendment, which abolishes poll taxes.

I would also point to the three amendments of the first Reconstruction: the Fifteenth, Fourteenth and Thirteenth, working backwards. When you think about these three amendments together, they are basically about reversing the priority of property and democracy by putting democracy first. The Fifteenth Amendment makes blacks (former slaves) voters. The Fourteenth Amendment makes them citizens. And the Thirteenth makes them free. There is a linkage between these amendments. In order to assure ourselves that former slaves will sensibly exercise their Fifteenth Amendment right, it is important to understand that the Thirteenth Amendment is ultimately about freedom and some minimal stake in society—what I am going to call “forty acres and a mule.” We have to read the Thirteenth Amendment in light of its subsequent history to understand it as part of the opening act of what my colleague Bruce Ackerman calls “a constitutional moment.”

When legal commentators look at this constitutional moment, I think they have a basic intuition that this idea of minimal entitlement is significantly connected to Reconstruction, but different commentators try to locate that vision in the text of different clauses of the Constitution. Many try to make arguments based on due process. For example, Dean Edelman talked a lot about life, liberty, and property, resonating with the Due Process Clause,<sup>3</sup> and some of Professor Grey’s work in response to *Goldberg v. Kelley*<sup>4</sup> has focused on the Due Process Clause as one way to think about minimal entitlements.<sup>5</sup>

I think there are some problems with this and that the Due Process Clause is overworked. Too often we use it when there may be better mechanisms at hand. To begin with, the text speaks of process, not substance, and it is difficult to cram a shadow substantive vision into it, although it can be done. Once you do cram a substantive vision into it, you run the risk that the vision will be unbounded. I think I heard, in Professor Nagel’s remarks at this conference, some concerns about the unboundedness of certain constitutional visions.<sup>6</sup> Furthermore, historically the Due Process Clause goes back to the

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<sup>3</sup> See Edelman, *supra* note 2.

<sup>4</sup> 397 U.S. 254 (1970).

<sup>5</sup> See, e.g., Thomas C. Grey, *Procedural Fairness and Substantive Rights*, 18 NOMOS 182 (1977).

<sup>6</sup> See Robert F. Nagel, *Unfocused Governmental Interests*, 55 ALB. L. REV. 573 (1992).

Fifth Amendment; the clause is not really redistributive, but rather tied with Professor Radin's analysis of its companion clause, the Takings Clause in the Fifth Amendment.<sup>7</sup> Originally, these clauses embodied a kind of "stand-patism": protect what you have, do not change the rules of the game (the existing property rules), and do not redistribute. So I am not sure that the Due Process Clause is the best vehicle to accomplish any kind of redistributive vision that is being proposed.

We could, alternatively, focus upon the Equal Protection Clause of the Fourteenth Amendment. Here, Professor Michelman's work is very suggestive.<sup>8</sup> Once again, however, I think there are some problems with using equal protection as the vehicle for this vision of minimal entitlements. To begin with, the doctrine has developed in a manner such that we really do not take the word "protection" seriously. Instead, we tend to reduce the Equal Protection Clause to equal treatment by government of, for example, criminal defendants. But, it is a little more difficult for us to take seriously the idea that the government might have to affirmatively protect its citizens. Here, we hear again the echoes of the affirmative/negative distinction coming back in. The courts have been hesitant to see that the government may have an affirmative obligation to act (for example, to protect citizens from murder or poverty). It is much easier, for example in *McCleskey v. Kemp*,<sup>9</sup> for the Court to at least look at racial discrimination among criminal defendants than to see racial discrimination among the victims of crime because we have reduced equal protection to equal treatment.

Equal protection was originally supposed to have a much more substantive bite. I think this is simply undeniable for anyone who has read, for example, Professor ten Broek's work on the Equal Protection Clause and its historical roots.<sup>10</sup> Even if we take the word "protection" seriously, however, we still have this word "equal" that, I think, is problematic for a minimal entitlements vision. The language of "equal protection" seems to suggest more the idea of *equal* property allocations, if we are going to apply it to property, rather than some *minimal* stake in society. As a result, I am not sure that it is the best vehicle. If I had to pick words in the Fourteenth Amend-

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<sup>7</sup> See Margaret J. Radin, *Evaluating Government Reasons for Changing Property Regimes*, 55 ALB. L. REV. 597 (1992).

<sup>8</sup> See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

<sup>9</sup> 481 U.S. 279 (1987).

<sup>10</sup> See JACOBUS TEN BROEK, *EQUAL UNDER LAW* (New enl. ed. 1965).

ment to do the work, I would probably select the first sentence about citizenship—that all persons born in the United States are citizens of the United States<sup>11</sup>—and try to take seriously what that means, once they are in the club, and especially once the Fifteenth Amendment and the Twenty-fourth Amendment make them voters.

I want to suggest to you that we have disregarded one of the most radical and/or progressive provisions of the Constitution, the Thirteenth Amendment, which is, of course, about getting rid of slavery. Much more than that, however, it is about empowering people and ensuring freedom. Its text is about substance, not procedure (unlike the Due Process Clause). It has no state action requirement, which is what all of us have been knocking up against in different ways. The amendment is about positive and not just negative liberty, and ultimately about, as I said, forty acres and a mule—which is the vision, when you look beyond its text to the historical context, that is inspiring the Thirteenth Amendment. This idea of forty acres and a mule, of freedom and nonslavery, is an idea that is much more naturally suggestive of *minimal* property shares than *equal* property shares. The idea that we would just have to take all the money in America and divide it up equally is a political nonstarter and enables someone like Judge Posner to talk, perhaps too glibly, about socialism. I think the better way for us to talk and think about the idea of minimal entitlements (and this is my research suggestion for those of you who want to try to develop a progressive agenda for minimal entitlements) is to pay more attention to the Thirteenth Amendment. It is a much richer provision than we have acknowledged. It is also, of course, redistributive. We should be proud of the Thirteenth Amendment. It is a revolutionary provision aimed at transforming society by taking property that happens to be maldistributed (without any compensation for slaveholders because the initial legal property allocations were considered unjust) and redistributing it in pursuit of a more just ideal. It is a modification of the Takings Clause in some important degree, rather than a reaffirmation of its “stand-patism” about existing legal property rights. The argument might of course be, “well, the old rules of legal property were never just in the first place,” but that is indeed the very claim that many contemporary redistributionists are making about the current legal property regime.

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<sup>11</sup> “All persons born or naturalized in the United States are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV.

That is why I think we should pay a lot more attention to the Thirteenth Amendment.

What I would now like to do is take seriously the linkage, which is very clearly in Dean Edelman's paper, between children and poverty.<sup>12</sup> Dean Edelman is talking about poverty, and he reminds us that many of the impoverished are children. You cannot really blame them for their plight, and if we are truly serious about poverty we must be serious about children. What I want to suggest is that the impoverishment of children cannot be understood only in financial terms, but that they are impoverished by violence, which is often visited upon them in the form of child abuse. Once again, affirmative government intervention may be compelled just as affirmative intervention on the property side may be compelled. Not surprisingly, I believe that the Thirteenth Amendment is helpful in at least beginning the conversation.

Indisputedly, the amendment was designed to end American enslavement of children as well as adults. A mulatto slave child sired by a white slave owner was no less entitled to personal freedom under the amendment. Under slavery, in the antebellum South, biology often failed to protect the master's genetic offspring from the harsh conditions of servitude. Many slaves were the biological children of their masters. Nor did the amendment protect only those slaves with some biological roots in Africa, for it also abolished the enslavement of all persons regardless of their race or national origin. Finally, the amendment guaranteed personal freedom in all respects, not only freedom from forced labor. The amendment speaks to the actual enslavement of a person regardless of whether the ultimate motive for such domination is greed, sadism, or power-lust. By its terms, therefore, the Thirteenth Amendment extends its affirmative protection to a slave even if (1) the slave is a child; (2) the slave-child is the offspring of the master; (3) the slave-child has no African roots; and (4) the slave-child is not used to maximize the master's financial profit. One such slave-child, I submit, was Joshua DeShaney.

In *DeShaney v. Winnebago County Department of Social Services*,<sup>13</sup> the Supreme Court held that the State of Wisconsin had no constitutional duty under the Due Process Clause of the Fourteenth Amendment to protect a young child from his father's physical abuse. The facts, of course, are heart-wrenching. During his first four years of life, Joshua DeShaney suffered repeated beatings at the hands of

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<sup>12</sup> See Edelman, *supra* note 2.

<sup>13</sup> 489 U.S. 189 (1989).

his father, resulting in severe brain damage. During these years, Joshua remained in his father's custody even though Wisconsin's Department of Social Services had strong reason to believe that he was being abused.

In January of 1983, Joshua was temporarily removed from his father's custody, but a juvenile court of Wisconsin soon returned him to his father. Caseworkers were involved for a long time; they noted the abuse but did nothing about it. Finally, a few weeks before his fifth birthday in 1984, Joshua suffered a final and savage beating resulting in severe brain damage and leaving him, basically, profoundly retarded. He and his birth mother brought suit against Wisconsin for its failure to remove him from his father's custody.

The Supreme Court denied Joshua's claim, and it did so following very self-consciously, in my view, the lead of the Seventh Circuit opinion below, written by Judge Posner<sup>14</sup>—who, by the way, keeps turning up (like a bad penny) in our discussions here. Chief Justice Rehnquist, writing for the Court, explained that the Department of Social Services has no duty to act because the Due Process Clause does not impose an affirmative obligation on the state to ensure that a person's interest in safety does not get violated through private means. The Court distinguished Joshua's situation from cases like *Youngberg v. Romeo*,<sup>15</sup> which, said the Court, stood

only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . [W]hen the State by the affirmative exercise of its powers so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.<sup>16</sup>

The *DeShaney* Court's narrow application of *Youngberg*, in my mind, reflects obvious concerns about affirmative rights. We see from Dean Edelman's discussion,<sup>17</sup> and we clearly saw in *DeShaney* be-

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<sup>14</sup> See *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989).

<sup>15</sup> See 457 U.S. 307 (1982).

<sup>16</sup> *DeShaney*, 489 U.S. at 199-200 (citations omitted).

<sup>17</sup> Edelman, *supra* note 2 (Dean Edelman discussing Judge Posner's comments regarding judicially mandated minimal entitlements).







